Dedication

I dedicate the book to my wife, Ansie,
our sons, Jacques and Michel, and our
grandchildren, Layla, Aiden, Sienna and Lachlan, and to
the memory of my mother, who encouraged me to read
everything I could lay my hands on and
to teach others what I had learned.

Foreword to revised edition 2003

Although I know the difference between a rave review and a foreword, I simply cannot maintain the requisite degree of dignified restraint here. This book could not have appeared at a better time; nor could its contents have been more appropriate. This I discovered to my delight when I recently used it in preparing a lecture for candidates for Bar pupillage. I was so impressed with the particular section I was studying that I started browsing further and further afield, eventually reading the book from cover to cover.

It is trite that in our system of justice the quality of a court's jurisprudence is directly dependent upon the quality of the practitioners who appear before it — a Bench is as good as its Bar. This the South African Bar (in common with its kindred bodies in England and other similar jurisdictions) has long since known. An increasingly structured system of pupillage has been developed in this country over the past 30 years, concentrating more and more on the ethics and skills of advocacy rather than on theoretical knowledge of the law. Latterly courses have been offered to young advocates already in practice too. The underlying objective is to ensure that attorneys, litigants and the courts can have confidence in the professional skills of members of the Bar.

That objective has been given special impetus over the last decade. The negotiated revolution of 1994 brought about many changes in South Africa. The most important was the transfer of state power from parliament to the Constitution. Adoption of the doctrine of separation of powers with a fully justiciable bill of rights clothed the courts with greatly enhanced power and responsibility. At the same time the courts and their office-bearers had to mutate from an almost exclusively white male preserve to a true reflection of the society they serve. This transformation has increased the need for tailor-made training for all who play a part in the functioning of the courts.

Over many years I have had the privilege of sharing in professional training and can, I think, claim sufficient expertise to express an admissible opinion on the merits or otherwise of forensic training material. *Marnewick on litigation skills* (as I am sure it will soon come to be called familiarly) is a winner. Although the primary target group is young advocates in private practice, everybody involved in litigation who studies what the author has so helpfully systematised will enrich and polish their courtroom knowledge and skills. Here I have in mind not only seasoned advocates, but prosecutors, attorneys and even judicial officers of all ranks.

I have been made to realise, with considerable embarrassment, just how ill-equipped I was for the advocate's profession. I am even more embarrassed at being shown how inadequate my well-meaning but disorganised efforts at training have been. My copy of this book will become dog-eared.

Johann Kriegler
Johannesburg
August 2003

Preface

I want to put as many new ideas into the law as I can, to show how particular solutions involve general theory . . .

Oliver Wendell Holmes, Jr
United States Supreme Court Justice, 1902–1932

The world in which advocates ply their trade has changed considerably since the first edition of *Litigation Skills for South African Lawyers* was published in 2002, necessitating a complete revision of the text in this edition. The most important changes accommodated by this edition are:

- The Legal Practice Act 28 of 2014 (LPA) is now in force. It has reorganised the governance and control of the legal profession by the government in a number of respects. The LPA makes provision for different categories of advocates, including so-called 'trust account advocates', being advocates who practise without the intervention of an attorney.

- A comprehensive code of ethics superseding the respective codes of ethics of the various Bars and Law Societies has been promulgated under the LPA. A code of ethics for prosecutors is now in force and a code of conduct for judges is also in place. The codes concerned are:

  - The Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities published in terms of section 36(1) of the LPA (LPA Code of Conduct).

  - The Code of Conduct for Members of the National Prosecuting Authority under section 22(6) of the National Prosecuting Authority Act 32 of 1998 (NPA Code of Conduct).

  - The Code of Judicial Conduct adopted in terms of section 12 of the Judicial Services Act 9 of 1994 (Judicial Code of Conduct).

- The Supreme Court Act 59 of 1959 has been repealed and replaced by the Superior Courts Act 10 of 2013.

- The test for leave to appeal has been changed – it is now more stringent.

- Criminal practice and procedure may have been neglected somewhat in the previous editions and the changes made for this edition reflect a fresh look at, in particular, ethics for prosecutors.

- Mediation has become an increasingly attractive alternative to litigation and a pilot programme introducing court-supervised mediation has been introduced in certain Magistrates' Courts. While that programme has lapsed, it is anticipated that mediation will soon be provided as an additional service available to litigants, at least in the Magistrates' Courts.

- Shortcomings in the LLB curriculum have been identified and at least one university (Unisa) has introduced a new subject using the third edition of this book as the prescribed textbook. The book is also the prescribed textbook for the Bar's pupillage programme and the training of attorneys and prosecutors.

- Research methodology has changed considerably with most legal materials necessary for a standard litigation practice available in digital form, some by subscription and a good deal in open sources. Smart phones, the internet and social media have become indispensible tools of the advocate's trade.

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There is a drive towards a 'paperless' or environmentally sustainable society with the result that briefs and case materials are now also available in digital form. The storage of clients' files is likely to be digitised with the result that bulky case files stored in boxes and expensive storage facilities may soon be things of the past. I anticipate that filings at court and the service of documents and pleadings will soon be required to be in digital form – with a hard copy (paper) only required or accepted in exceptional circumstances in line with the statement by the Minister of Justice that

> '[w]e cannot, in this time and age, spend millions of rands, if not billions, to pay physical storage for records on paper when . . . modern jurisdictions are digitising their records; buy paper books when court judgments and publications can be accessed quickly and easily through technology, and send police and sheriffs to effect physical delivery of court processes when such can be efficiently done through the use of information communication technology'. (*Legalbrief* 4 July 2019)

Therefore, two main changes in this edition relate to the use of digital resources for legal research, and the place and importance of ethics in the litigation process, in particular, ethics for prosecutors. The former has become necessary due to the increasing availability and use of digital materials and the latter due to the neglect of the subject in the previous editions of this book and the increasing number of serious breaches of ethics in trials of national and even international interest, which reflects poorly on the image and reputation of the administration of justice in South Africa. Legal research retains its place but the chapter is considerably expanded. Please note that the references to paragraphs of the LPA Code of Conduct in the text are for illustrative purposes only. The full text of the LPA Code of Conduct must be consulted.

In the Preface of the first edition of *Litigation Skills for South African Lawyers* I explained the purpose of the book as follows:

> 'The book is not about the theoretical aspects of advocacy. It is about practical skills and tips for everyday use in practice. Its aim is to teach the "how" rather than the "what". Conventional legal education teaches the law student what the law is, the "this" and the "that", the substantive and procedural rules of the law. Universities teach textbook law. Textbook knowledge tends to be superficial. It is acquired by studying. It is passive, existing in the mind. It is also random in that it depends on some arbitrary syllabus, and in general, giving the student no clear reason why a particular piece of knowledge is necessary. On the other hand, a skill, or "know-how", is far more deep-seated knowledge, and, once acquired, tends to remain. It is acquired by "doing", by practising the technique of the skill over and over. It is also active knowledge, demonstrated by action. With skills the emphasis is always on "doing". If you can't do it, you don't have the skill; if you can do it, you have the skill. And the only way to demonstrate that you have mastered a particular skill is to do it, like riding a bicycle!
>
> When I started this book, it was intended for use as a litigation skills guide for the practical training of aspirant advocates and attorneys at the law schools of the universities, the Practical Training Schools of the Association of Law Societies and the Advocacy Programmes of the Bar. However, as the book developed during the research and writing processes, it dawned upon me that junior practitioners also need a book that they can carry to court with them, to serve as a first or basic guide for all the steps and procedures which constitute the litigation process. I know of no other book that covers the whole process from beginning to end. I couldn't even find a book to help me with the chapter on appellate advocacy, and as for fact analysis, the subject seems to have been largely ignored in South African legal education programmes.'

And that remains the purpose of this book: It is a skills and techniques manual, not a legal textbook. For this reason, as I explained in that first Preface:

> 'Footnotes and references to cases, statutes, rules and textbooks are avoided as far as possible. Valuable time should not be spent looking up the Rules of Court, or having to find principles, statutes and cases in the *Law Reports*. Nevertheless, because the book is also intended to cover the syllabus for the Bar Examinations in Legal Writing, parts of the syllabus for Civil Procedure and parts of the Attorney's Admission Examinations, reference is made to the High Court Rules from time to time. The rules referred to in the text should be studied as part of the process of learning how to apply them. The reader will need to have access to the Uniform Rules of the High Court (referred to in the text as "the rules"), a commentary on the rules, *Amler's Precedents of Pleadings* (LexisNexis – latest edition)) and a good textbook on the law of evidence.'

The complete lawyer* – no matter what field of law they practise in – must have:

o

sound academic knowledge of the theory and content of the law

o

the skills and techniques involved in the legal processes peculiar to his or her practice or occupation

o

the values commonly known as the ethics of the legal profession.

* *A word or two about terminology*.

The title of the book is remaining – *Litigation Skills for South African Lawyers* – although the LPA and the LPA Code of Conduct have introduced the term 'legal practitioner'. The OED defines 'lawyer' as 'one versed in law, a member of the legal profession'. Well, that definition is so wide that it includes judges, magistrates, law lecturers and legal advisors, among others. I have been a lawyer under many different appellations: prosecutor, magistrate, articled clerk, attorney, pupil advocate, advocate, senior counsel, acting judge, arbitrator, solicitor and barrister (in New Zealand), legal practitioner (in New South Wales), litigation skills instructor (New Zealand) and law lecturer (South Africa). The skills and techniques covered in this book are practised not only by advocates and attorneys in private practice – the legal practitioners envisaged by the LPA and LPA Code of Conduct – but by many other lawyers, especially prosecutors, whether admitted as an advocate or not. So the book's original title stays.

The focus of the book is on 'litigation skills' and the new term – legal practitioner – will be used where appropriate. Occasionally terms such as 'prosecutor', 'attorney', 'advocate', 'senior counsel', and yes, 'lawyer', will likewise be employed where deemed necessary.

Ultimately the book is aimed at those lawyers who think of themselves as 'litigators' or 'advocates'; that is to say, lawyers who represent a client for the purpose of assisting the client to resolve a dispute with another party by means of a recognised form of dispute resolution. It is my sincere hope that this book will be of assistance to that kind of lawyer.

Chris Marnewick SC

Auckland, New Zealand
September 2019

Precedents, examples and strategies
Litigation procedures

PRECEDENTS

EXAMPLES OF WHAT TO SAY IN COURT

STRATEGIES FOR DIFFERENT LITIGATION PROCESSES

Chapter 1
Interviewing clients and witnesses

[A]ll practitioners . . . act on instructions. In order to obtain instructions a practitioner must be able to conduct an interview. Having conducted an interview, the practitioner will know how to give advice, how to conduct negotiations, write letters, draft documents and present argument in court. These are skills that are required in legal practice.

RJ Scragg, Sydney, 1996

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1.1 Introduction

The litigation process starts long before the well-known processes we readily associate with it, such as the issue of a summons, the exchange of pleadings, making an opening statement, examination-in-chief, cross-examination and closing argument. The litigation process starts at the first meeting with the client and there are special structures, skills and techniques involved in interviewing a client or a witness.

For starters, one needs a good structure for the interviewing process. That structure has to be sufficient to enable you to elicit all the relevant information from your client and from potential

witnesses. Your plan has to allow you to fill the gaps in the information you have. Your plan has to include processes to help you evaluate the information you have obtained in order to determine whether your client has a valid claim or defence. There has to be some place or stage within your grand plan for the consideration of the admissibility, reliability and sufficiency of the information you have gathered. This process starts with that first interview.

Interviewing is one of the most fundamental skills required by a legal practitioner; we elicit the facts by asking questions. It is the way we conduct our daily business in our offices or chambers and the way we present evidence in court; we ask questions for the clients or witnesses to answer. And we know how difficult that process can be in court. So why should it be any easier when we are taking instructions from a client or interviewing a witness? It isn't. The good news is that the necessary skills and technique can be acquired with a bit of study, a bit of practice and a bit of common sense.

We call a discussion between a legal practitioner and a client, or a potential witness, an 'interview'. An interview does not necessarily take place in a formal setting; it may be conducted telephonically and it may be conducted away from the legal practitioner's office. It may even be conducted by means of Skype, FaceTime or a similar app. Some legal practitioners may call it a 'consultation' or a 'conference'. Attorneys and advocates may also have slightly different ways for conducting interviews.

[Page 4]

Let us start with a common scenario and a client we can serve through the various stages of the litigation process covered in this book. A potential client arrives at a legal practitioner's office. She is on crutches and her leg is in a plaster cast. Her husband has been killed in a motor collision. Her leg was broken in the same accident. Her children were so seriously injured that they are still in hospital. Her car has been damaged. There are problems with her husband's life insurance. She has no income and her husband's estate will take months, if not years, to wind up. What can she do? Where do we start an interview with this client, or, for that matter, with any client? Do we simply follow our instincts? Surely not! There must be some scientific way to elicit all the relevant information from the client, to explain the alternatives available to her, to guide her to the right decision and to obtain and preserve all the available evidence. You do not have to be a juggler to be able to achieve all these aims. All you need is a proper structure for the interview and sound technique.

The way we conduct the interview will depend on the purpose of the interview. An interview with a client seeking advice will be conducted according to certain accepted protocols and techniques. An interview with a potential witness will be conducted differently, with other protocols and techniques coming into play. An advocate will also conduct an interview in a slightly different way because the client will already have seen an attorney and will often have received some preliminary advice, even if the advice was merely to the effect that an advocate needed to be consulted about the matter.

Whatever the exact nature or purpose of the interview, there are some basic techniques that will be applied in any interview conducted by a legal practitioner. Implicit in these techniques are well-thought-out principles which determine the structure of the interview and the style and content of the questions. Our hypothetical client is a new client; we have not done any work for her before. So we need to rely on a general scheme for interviews that will serve us well, not only for this client, but for other clients as well.

Our objectives are to:

- elicit the relevant facts.
- clarify the client's objectives.
- explain the law and procedure to the client.
- advise the client on the available options.
- counsel the client.

- take instructions on the future conduct of the matter.

1.2 The structure of an interview with a new client

We want to elicit information which is relevant, complete and chronological. Where should we start? And what processes should be complete before the interview is concluded? Consider a general scheme with the following stages:

Stage 1: Initial meeting and exchange of pleasantries

Stage 2: Initial problem and goal identification

Stage 3: Dealing with preliminary matters

Stage 4: Establishing the facts in chronological order

Stage 5: Developing a preliminary theory of the case

Stage 6: Giving preliminary advice

Stage 7: Concluding the interview.

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1.2.1 Stage 1: Meeting the client and exchanging pleasantries

Now let's get back to the client who is waiting in our reception room. She has arrived in some distress. There are other clients present. Where do you think the client would prefer to be? What do you think good manners and sound business practice dictate? First impressions are usually lasting ones.

Meet the client in the reception area and do so promptly. Do not keep her waiting. Do not wait behind your desk for your secretary to bring her to you. Show that you care by going to the reception area and meeting her there. Introduce yourself by telling the client your first name and surname. Do not use titles, such as 'Mister', 'Ms' or 'Advocate'. Learn and remember the client's name. So she is Mrs Anne Smith? Call her Mrs Smith. Then personally escort her to your office. At this stage you will be strangers to each other, so the walk to your office could be useful to break the ice. Make small-talk, ask about the weather, how she found parking in town, ask whether she needs help or can make it on her own with her crutches. In short, strike up a conversation with the client at the earliest opportunity and maintain that until you are both seated comfortably in your office.

So we have got from the reception to your office. What do we find there?

While one cannot be dogmatic on the style in which individual legal practitioners should furnish and decorate their offices, one could perhaps suggest that a legal practitioner's office must be comfortable and comforting *to the client*. Make sure your client has a comfortable chair. Are the surroundings comforting? Or is your office full of bookcases and modern art? What would help an anxious client relax? Muted colours perhaps, a plant or two, a few photographs of your family? It is important that the client is able to relate to you and see you as more than just a legal practitioner.

Let's return to our client, Mrs Smith. Seat her at your desk. Make sure she does not have to squint against harsh light from the windows. Make sure your desk is clear of other work. You want the client to know that she has your undivided attention. Smile. Show concern. Offer tea, coffee or a soft drink; never alcohol.

Try to find a natural way from the small-talk to the client's problem or concerns. Perhaps, '*Well, now that we are comfortable and know each other a little better, perhaps you can start by telling me how I can be of help*', will do. This request takes us to the next stage of the process.

1.2.2

Stage 2: Initial problem and goal identification

If you had advance notice of the client's appointment, you may have received some information to help you identify the areas of law that may be relevant. Legal practitioners do this automatically, drawing on their academic legal knowledge and their practical experience. This initial identification of a relevant area of law has to be flexible; you have not yet heard what the client has to say. But it helps to have an initial view of the law involved because it helps you to elicit the information the client may have and enables you to focus your questions during the interview on information that is relevant to a potential solution provided by that branch of the law.

A client's problems and goals cannot always be identified with certainty at the beginning of an interview. The most you can hope for is that you may get a good idea of how the client sees the problem and what outcome the client would like to achieve. Suppose the client says:

> 'I don't know what to do. My husband was killed in a collision. My children and I have been injured. They are still in hospital. The bills are mounting up. The hospital wants more [Page 6] money now and I just don't have any left. My brother-in-law is the executor of my husband's estate. He says he cannot let me have any money from my husband's life policy until the estate has been finalised, even though the policy belongs to me. I just don't know where to turn. I need money urgently.'

It is obvious that our client needs advice urgently. The interview must therefore be conducted with the aim of gathering enough information to enable you to give her some preliminary advice before the interview is concluded. There are quite a few problems apparent at first blush. When the client is in distress you may ask if she would prefer to have a support person – a friend or relative – to sit in during the interview. Your secretary may fulfil that role if the client so wishes. For each legal problem you are required to establish the legal principles involved, as well as the relevant facts, before you can give the client sensible advice. You may even wish to refer some questions to an advocate for advice or to a partner in your firm who specialises in a different branch of the law. So what problems do we see here? Consider the following:

- There may be a loss of support claim against the Road Accident Fund Act 56 of 1996 (RAF Act) for the widow and her children arising from the death of their husband and father. There may be personal injury claims against the RAF for damages in favour of the client and her children.

- There may be a claim against the other driver for the damage to the car. Negligence becomes an issue here.

- There may be insurance policies covering some of the expenses now being incurred by the client in respect of the funeral, medical treatment and repairs to the car.

- The deceased's policies may have been ceded to our client. Does that mean she can have the proceeds paid to her without delay?

This is enough for now, but rest assured that there are other problems. However, these are the potential problems as a legal practitioner, not the client, may see them. The client's main concern may be quite different; she is short of money and urgently needs some immediately. It is all too tempting for a legal practitioner to rush into a scholarly exposition of the law and to discuss various theoretical options at this stage. That is exactly the wrong way to go. At this stage of the interview the client expects three things: empathy, an indication of competence and some assurance that help is forthcoming. The time is not yet ripe to advise the client, nor is it appropriate to give the client an exposition of the law of damages, or for you to work away with your nose in a file while taking notes. The client needs to be assured, not worried by being given the impression that her problem is bigger than she thought. A sincere statement demonstrating empathy, competence and helpfulness will do at this stage:

> 'I am sorry to hear of your husband's death. I fully understand your concern for your children's well-being and that you are experiencing financial difficulties at this stage. I would like to help you solve these problems quickly. You have already given me some very helpful information but I'm afraid I am going to need more information so that you and I may work together to find a solution quickly.'

The client usually responds positively to this approach, but there is the possibility that the client may become tearful; so keep a box of tissues handy in your desk drawer. The time may now be ripe for you to explain where you intend going with the rest of the interview. You should proceed with caution, however. Remember that the client probably has no idea what to expect and may even feel quite uncomfortable talking to you about money so soon after her husband's death.

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1.2.3 Stage 3: Dealing with preliminary matters

There are a few preliminary matters that you need to discuss with the client before entering into a detailed fact investigation. The most important ones, from an ethics point of view, are a potential conflict of interest among clients of the firm or some other situation where the legal practitioner's objectivity may be compromised. Paragraphs 58.1, 58.9 and 59.1 of The Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (LPA Code of Conduct) should be heeded and, if necessary, explained to the client:

> 58.
> Conflicts of interests involving legal practitioners
>
> 58.1
> A legal practitioner shall guard against becoming personally, as distinct from professionally, associated with the interests of the client.
>
> . . .
>
> 58.9
> A legal practitioner shall not accept a brief if he or she has any form of relationship, including a family relationship, with the client or an opposing party which compromises, or which might reasonably be expected to compromise, the legal practitioner's independence.
>
> . . .
>
> 59.
> Conflicts of interest among clients of legal practitioners
>
> 59.1
> A legal practitioner shall, when acting for two or more clients, be aware of the risk of a conflict of interests existing or arising in the course of the proceedings, whether criminal or civil, and once the legal practitioner is alerted to the existence of a conflict he or she shall withdraw from acting for one or all clients in those proceedings as soon as possible, and in particular –
>
> 59.1.1
> if the legal practitioner has become aware of privileged or confidential information of any one client relevant to the proceedings that could be used to the prejudice of any other client, the legal practitioner may not act in any proceedings in which the prejudiced client is a party;
>
> 59.1.2
>
> if the legal practitioner learns of a conflict of interest among clients at a time and under circumstances where the legal practitioner is not made aware of any privileged information, the legal practitioner may continue to act for one or other client as nominated by the instructing attorney (where one is appointed).

Other preliminary matters include fees, confidentiality, taking possession of the client's documents and even taking notes during the interview. With this particular client, you can start with the legal fees as she is plainly concerned about her current inability to pay her accounts. You could also explain to her that, in terms of the Law Society's practice, the initial consultation, and the advice given during it, is free. (If the consultation is with counsel, different considerations may apply as the attorney ought to have explained the fee structure to the client.) It is suggested that you assure her

that she does not have to concern herself with fees at this stage and that you will advise her later in the interview about the various alternatives as far as fees are concerned.

Other assurances given to the client include that whatever she tells you, will be in confidence and be protected by the legal-professional privilege. You may tell her that you need to take notes, that you will need to obtain important documents relating to the matter from her, and that a detailed factual history will have to be obtained in order to determine what options are available to her. You will consider possible conflicts of interest and inform the client accordingly.

Up to this point, the discussion with the client is general and non-specific. You will have an idea of what the case is about and what the client wants to achieve, initially at any rate. The client will now know more or less where the interview is heading. It is a good idea to tell the client that she must feel free to mention any other matters of [Page 8] concern to her as the interview progresses. Often clients don't tell you of all their concerns or even their true concerns at the beginning of the interview. They wait for some rapport to be established before they bare their souls.

1.2.4 Stage 4: Establishing the facts in chronological order

Cases are decided on the facts. Even if a point of law is important, it has to be decided against the background of the facts of the case. The most important function of a legal practitioner engaged to conduct litigation is therefore to find and present the facts that are favourable to the client. In order to perform this function properly, a legal practitioner needs to be a relentless bloodhound, ever seeking the facts. The facts are required in the context of the client's problems and their possible solutions. It is therefore necessary to explain to the client that it is essential to have the full history of the matter for a complete understanding of her rights and possible options. Some of the important facts or events are:

- the details of her marriage to the deceased, with the marriage certificate to be supplied to you.
- the full names and dates of birth of the client and the children, with their birth certificates to be supplied.
- the deceased's date of birth, with his birth and death certificates to be supplied.
- the deceased's employment details, with documentation such as pay slips, balance sheets and tax returns to be supplied if available.
- details of all insurance policies taken out by the deceased and the client, with the policies and any cession documents to be supplied.
- a full description, including the date and place, of the events which led to the collision and the death of the deceased, with some emphasis on causation and negligence, if they are legal elements of any proposed claim.
- details of potential witnesses.
- details of the family car and the estimated repair cost.
- details of the other driver.
- details of the police station which carries the inquest or criminal docket and the name of the investigating officer, if known.

- details of the executor of the deceased estate.
- any subsequent events and correspondence pertaining to the insurance policies.
- details of the hospital and medical doctors who have provided services or treatment, with the accounts received by the client for the funeral, medical and hospital services to be given to you.

The process of establishing the relevant facts may be time consuming and tiring, for both legal practitioner and client. Make sure the client remains comfortable at all times, take a break if necessary, serve more tea, engage in more small-talk while you have documents copied, ask the client if she has a problem with parking (and if she has, take care of it). Explain, if necessary, why particular information is required. Keep the client informed of progress. In general, make sure that while the fact investigation proceeds in a logical manner, it does not become an unpleasant experience for the client.

Naturally the facts that you seek to establish are the facts that are relevant to the preliminary identification you have made of the possible problems, including the client's [Page 9] own problem identification. You will already know or have a good idea of the legal requirements for the various possible claims against the RAF and any insurer. The facts are sought in order to establish whether these potential causes of action are tenable on the evidence or whether further investigations are necessary.

How you establish the relevant facts, is a question of individual technique but most experienced legal practitioners follow the same general pattern. They prepare a chronological arrangement of the facts. They take possession of relevant documents and use them to complete the facts. They use a technique in questioning which is designed to get the maximum information from the client.

Maintaining a chronological account of the facts is important for a variety of reasons (Binder, Bergman and Price *Lawyers as Counselors: A Client-Centered Approach* (1991) at 112–124):

- It gives a courtroom perspective to the matter. That is how evidence is given in court; you start at the beginning and you move through the relevant events in time sequence.
- It is easier for witnesses to recount events in time sequence. This is in fact a common style of telling a story.
- It leads to completeness and promotes accuracy.
- It aids understanding as one event leads logically to another.
- It broadens one's understanding as the importance of individual events in the bigger scheme of things becomes clearer.
- It may open up additional legal theories that were not apparent in the beginning. Often a compelling theory of the case emerges from the facts when they are seen in their chronological setting.
- It is the most efficient way to organise facts, as the facts and documents would in any event have to be arranged in chronological order for purposes such as preparing a discovery affidavit or a witness's statement or affidavit.

Whether the facts are established in an interview in the legal practitioner's office or by leading a witness in court, they are established by way of an interrogative discussion. The legal practitioner asks questions and the client or witness answers them. The purpose of each question is to determine a fact or a set of facts. While the questions come from the legal practitioner, the facts can only come

from the client or the witness. It is therefore extremely important that the legal practitioner does not jump to conclusions but allows the client or witness to tell his or her story as fully as possible. Naturally the legal practitioner has to help by asking the right questions, or, put differently, by asking the questions in a manner most likely to elicit all the important facts.

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There are three basic types of question we can use in an interview.

Table 1.1 Open, closed and leading questions

Type of question	Examples
The open question: It is called an open question because it allows the client or witness to answer in any way he or she thinks appropriate. The witness can decide what subject to tell you about and also how much or how little information to provide. Open questions of this nature elicit general rather than specific information. Open questions do not give the client much guidance as to precisely what information is required. An open question is always inquisitive (asking for information) rather than suggestive (giving information).	'*How can I help you*?' '*What happened on the day of the accident?*' '*What happened next?*'
The closed question: This type of question is put in such a way that it directs the client or witness to the specific information required. Closed questions seek specific information and are usually preceded by interrogative words (words we expect to be followed by a question mark when we write) like 'when', 'where', 'who', 'what', 'how' and 'why'. Closed questions starting with 'when', 'where', 'who', what', 'how' and 'why' do not usually suggest the answer and are therefore not leading questions. A technique employed to ensure that a closed question is not leading is to graft the question onto a prior answer given by the client or witness. This is called piggy-backing.	Say the client says: '*The other car then came over to our side of the road.*' A closed question employing the piggy-back technique would be: '*How did you react when the other car came over to your side of the road?*' Asking, '*What happened next?*' is an open question and does not indicate to the client precisely what information you require.
The leading question: This type of question is also a closed question but it suggests the answer. It is the kind of question you will predominantly ask in cross-examination. (Leading questions are generally not allowed in examination-in-chief, but more about that later.) It is not sensible to ask leading questions in the initial stages of fact investigation because clients often bow to the suggestion and give the answers they think they are expected to give rather than their own, uncontaminated version of the events.	'*So when the other car came over to your side of the road you applied the brakes, didn't you?*' This question suggests a fact to the witness, namely that she had applied the brakes before the collision.

In an interview with a client, open questions are used to direct the client to a general topic while closed, non-leading questions are used to gather, or clarify, specific information. A technique called 'funnelling' is used to move from general to specific topics. It works as follows: The legal practitioner asks an open question directing the client or witness to a broad or general topic. When the witness answers, the legal practitioner employs closed questions to direct the witness down an ever narrower funnel, hence the [Page 11] word 'funnelling'. The idea is to control the flow of information so that the important facts are flushed out. This technique, using Mrs Smith's case, could be used as follows:

Table 1.2 Funnelling technique

What to do	How to do it
The legal practitioner starts with some general questions to direct the client to the topic to be discussed. The general topic here is the collision.	Q. You said earlier that you were driving the car when the collision occurred. Please tell me everything you remember of the collision. A. . . . Q. What else do you remember of the collision? A.

	. . .
At this point the legal practitioner's questions will become more specific and turn from open to closed questions. This is done in order to flush out all the specific information on the topics chosen by the legal practitioner. The specific topics explored here are speed, weather conditions and relative positions.	Q. At what speed were you travelling immediately before the collision? A. . . . Q. What were the weather conditions at the time? A. . . . Q. Where was the other car when you first became aware of it? A. . . .
The questions will then continue in this fashion until the general topic has been exhausted. A new topic will then be introduced by open questions and clarified by closed questions. (Binder, Bergman and Price (1991) at 171–185.)	

Legal practitioners also use other techniques to recover all the facts from a client or a witness, for example, by referring a witness to documents that can assist in refreshing his or her memory. They employ a technique called active-listening, which sounds like a contradiction, but means that the listener (legal practitioner) actively encourages the client or witness by appropriate comments, even sounds, like '*Yes, I see*', or '*Uhuh*', or '*Go on*'. They try to synchronise the witness's recollection of events with the documents and the evidence of other witnesses. They also go over the witness's statement carefully to ensure that all the direct, circumstantial and reliability evidence has been gathered. (*Direct evidence* is what witnesses saw or heard of the event in issue, mostly eye-witness evidence. *Circumstantial evidence* is evidence of circumstances surrounding the event in issue, which suggests that the event occurred in a particular way, as where debris on the road surface tends to prove the point of impact in a collision case. *Reliability evidence* is evidence of facts that will strengthen or weaken the evidence of a witness, for example, evidence of fading light where the issue is the identity of an offender, evidence of bias or evidence of a prior inconsistent version of the events.)

There may be cases where it is necessary to conduct the interview at the scene where the events in question occurred.

1.2.5 Stage 5: Initial fact analysis and developing a preliminary theory of the case

Litigation is usually conducted according to a general plan or strategy that legal practitioners call the 'theory of the case'. There is no ready definition of the term; it is easier to describe what it does. Your theory of the case answers questions, such as: What is the central question to be answered? What is my position on the central issue before the [Page 12] court? How can I justify or explain my position on the issue? What evidence do I need? Who am I going to call as witnesses to prove my case? How am I going to approach my opponent's witnesses? What argument am I going to advance at the trial?

While the theory of the case is discussed in detail in chapter 13 in relation to preparation for trial, it is important to know how a theory is developed in the early stages and how that theory, once arrived at, influences subsequent stages of the process. Before you decide on the advice to give to the client or any further steps to take in pursuit of her instructions, consider the following important principles:

Firstly, the theory of the case cannot be too specific in the beginning. It will at first be broad, even vague, but will eventually be refined to become more specific as you gather and analyse the relevant facts, the documents and the law. Your theory will also be general because it has to take account of all the facts and circumstances, including those facts which are against your client. In fact, the theory you arrive at has to accommodate or explain the adverse facts or documents.

Secondly, your theory of the case can never be static. It has to be dynamic. It has to change, however slightly, when new facts or documents come to light.

Thirdly, because your theory of the case has to deal with the case as a whole, it has to be coherent and comprehensive. It has to accommodate or explain all the known facts of the case and be convincing. It has to provide an acceptable answer to the central question the court has to answer.

Let us revert at this stage to our client. Where can we start developing a theory of the case for her particular problems? In fact, we have already done so, although we did not announce that we were doing so. Note our response when our client told us what her problems and concerns were, in Stage 2. As the client was telling us of her concerns and problems, we subconsciously identified possible causes of action she might have, did we not? We were subconsciously developing a preliminary theory of the case.

What we now have to do, still as preliminary steps, is to determine the facts that are relevant to those potential claims. For this we need a legal framework. The problem is this: In order to know what facts to look for, we need to know more or less what legal provisions are applicable. However, in order to know what legal provisions are applicable, we need to know the facts. This may sound, at first, as if we are involved in an exercise akin to a dog chasing its own tail. Nevertheless, there is a way to resolve this conundrum. Usually the client's own way of expressing her problem would give us a fairly good idea what sort of case we are dealing with. We are therefore able to determine the broad area of law involved; in this case, the law of delict. In particular, we have potential claims for damages for personal injuries and loss of support arising from a motor collision. These, we know, are statutory claims under the legislation dealing with injuries or death arising from road accidents. We are able to make this assessment quickly because it is such a common scenario. There is also a potential claim for the damage to the car. This one, we know, is based on the common-law *actio legis Aquiliae*. It is also a rather common type of claim and we come to this conclusion quite quickly. We might think that our client may also have claims based on insurance policies but we might not be too certain as we may not have encountered a similar case previously. That is not a problem; what is important is that we have noticed that we need to investigate a potential claim which falls under the principles of insurance law. The thought might have crossed your mind that our client may claim maintenance from the deceased estate for the children, perhaps even for herself. This type of claim will take us into the world of family law and the law of succession.

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What we have been doing thus far is to engage in a process of fact analysis. The model used throughout this book is called the proof-making model of fact analysis. The aim of the proof-making model is to identify the facts and evidence to be presented to the court in order to prove the client's case, hence the term, 'proof-making'.

The proof-making model has five analytical stages and three tactical stages. The analytical stages deal with fact analysis. The tactical stages deal with trial tactics and are covered in more detail in chapter 13. The analytical stages can be presented as follows:

Stage 1 Branch or area of law	**Stage 2 Cause of action or defence**	**Stage 3 Elements of the cause of action or defence**	**Stage 4 The facts**	**Stage 5 Evidence**
Identifies the area of law involved, e.g., contract, delict, family etc.	Identifies the cause of action or defence within the relevant area of law	Identifies the legal elements or requirements of the cause of action or defence	Identifies the facts available to prove each legal element	Identifies the items of evidence available to prove each fact to be relied on

We have already identified the branches of law which could be relevant to Mrs Smith's claims. We have also in the broad sense identified the potential causes of action available to her. Thus:

Stage 1 Branch or area of law	**Stage 2 Cause of action or defence**	**Stage 3 Elements of the cause of action or defence**	**Stage 4 The facts**	**Stage 5 Evidence**
1 RAF Act 2 Delict	1 Claim for loss of support and personal injuries 2			

3 Insurance 4 Family	Claim for damage to car 3 Claim on policy 4 Claim for maintenance			

It doesn't really matter that we are still uncertain about the merits of the potential claims we have tentatively identified. What is important is that we now have a good starting point. First we need to do an analysis of the facts that are relevant to each potential claim. Once that has been done, we can formulate an initial theory of the case. We could use one of our client's potential claims, the claim for loss of support for herself, as an example. We know from our experience and a little research that it is a delictual claim now regulated by statute, the RAF Act. This Act is amended almost every other year and some of the amendments have been so drastic that their validity has had to be considered by the Constitutional Court. Where does that leave us as the legal practitioner at the first interview with the client? We have to undertake legal research which cannot be done immediately while the client is present. That will have to be put on hold. We then proceed as follows:

We first determine the legal elements (the so-called '*facta probanda*' or 'material facts') of such a claim.

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Stage 1 Area of law	**Stage 2 Cause of action**	**Stage 3 Legal elements**
1 RAF Act	1 Claim for loss of support	o The deceased owed our client a duty of support o the death of the deceased has been caused by or arose out of the driving of a motor vehicle o the insured driver has been negligent (**Note for research**: Is negligence still an element?) o our client suffered damages in the form of loss of support o the amount of the loss o there has been compliance with the RAF Act relating to service of a claim and time periods.

After identifying the legal elements, we still have to determine the legal content or meaning of each legal requirement. What is meant by 'negligence', for example? Is it still required? And what sort of losses or damages can be recovered? These questions are answered by legal research. For the purposes of an initial interview with the client, a basic reference work like Harms *Amler's Precedents of Pleadings* 9th edn LexisNexis will probably be sufficient to identify the legal elements and their meaning. (Always use the latest edition.)

At Stage 4 we determine what the facts are which would establish each of the legal elements. For example, the first legal element is that the deceased owed our client a duty of support. What facts have to be present for such a duty to arise? This is a matter where the common law provides the answer. We find that a duty of support arises if we can prove three facts, namely that (1) the deceased and our client were married to each other; (2) our client needed support; and (3) the deceased was able to provide such support. The duty of support can arise in other circumstances too, for example, between parent and child, or even by agreement. But we are not concerned with those; we have to confine our analysis to the facts of our client's case. We call these facts 'propositions of fact' to remind us that they are not facts in the true sense until they have been proved by acceptable evidence to the satisfaction of the court.

At Stage 5 we determine what evidence is available to prove the propositions of fact that we have ascertained are essential to prove the first legal requirement of the claim. Our client has told us that she was legally married to her late husband, the deceased. The marriage certificate will help prove that fact. For the other two facts we have to prove, we require evidence that our client needed

support and that her late husband provided that. The evidence must be somewhat detailed with regard to the history of this family's financial arrangements, the deceased's employment and income and the monthly expenses of the household. This evidence must be given by way of oral evidence by witnesses, supported by exhibits, including documentary evidence such as bank statements, monthly accounts and statements relating to the purchases made for the support of the family, and salary and employment records. The bulk of our initial investigation will be devoted to this part of the exercise.

As a separate process we must make sure that the evidence we have is admissible, reliable and sufficient. Is the evidence potentially inadmissible for any reason? If so, can that be cured? Does one witness perhaps contradict another? Is what the witness says consistent with the documents in the case? Do we have enough evidence to satisfy the [Page 15] burden of proof resting on the plaintiff? (Or, if we are acting for the defendant, do we have enough reliable and admissible evidence to cast sufficient doubt on the plaintiff's version?) This is Stage 6, the first of the tactical stages. It is a bridge between the analytical and the tactical stage.

As an administrative measure, we must also ensure that we have the details of the witnesses to give the necessary oral evidence and to prove the relevant exhibits. They have to be available. How can we prove our case without them?

Note that this process closely resembles the processes counsel employ in the course of preparing for trial. See chapter 13 in this regard.

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Table 1.3 Initial-fact analysis

Stage 3 **Legal element** **Material fact (to be pleaded)**	**Stage 4** **Proposition of fact (to be proved by evidence)**	**Stage 5** **Evidence (oral or by exhibits)**	**Stage 6** **Admissible?** **Reliable?** **Sufficient?**	**Source** *Admin*
The deceased owed a duty of support to the plaintiff.	The deceased and plaintiff were married to each other.	*Oral*: '*We were married on . . . at . . .*' *Exhibit*: Marriage certificate	Yes Yes	Plaintiff Plaintiff
	The plaintiff needed support.	*Oral*: '*I did not work as I have had to look after our children and the household. I do not have any skills to enable me to find work anyway. And even if I were to have got a job, my salary would have been consumed by what we would have had to pay others to care for our children during the day*.'	Yes	Plaintiff
	The deceased was able to provide such support.	*Oral*: '*My husband earned good money in a stable job. He was paid R . . . per month, plus an annual bonus equal to a month's salary, and his employer also contributed to a pension scheme and medical aid fund. He supported me and our children. We had no other means of support*.' *Exhibits*: The deceased's salary slips and tax returns.	Yes Yes	Plaintiff Plaintiff or executor

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The process is repeated for each legal requirement of the claim. This will take some time and may have to be done after the interview has ended. It may even take more than one interview to gather all the necessary information.

The next step is to work out which of the legal requirements (also referred to as legal elements) we have identified, is or are the likely one or ones to be in dispute *and* to determine what our case is on that aspect. Once this process has been completed, we can develop a preliminary theory of the case which must take into account the law and the onus and standard of proof, the strengths and weaknesses of the evidence and the alternatives available to our client. Only then can we advise our client about what she can and should do. But it is far too early to do that yet. During the first

interview we are more likely going to spend our time making preliminary assessments of the claims our client may have, what their legal requirements may be, what evidence is immediately available to support them and what further steps we need to take to obtain full instructions.

However, we can frame a preliminary theory of the case in respect of each potential claim by finding answers to the following questions:

- What is the main issue likely to be?
- What is our submission on that issue?
- What are the best points we can make in support of our submission?
- What is the opposition likely to submit on the main issue?
- What are our best points against the opposition's argument?

Don't be too concerned if you can't find clear answers to these questions at the first interview. The answers will become clearer as you receive more information from the client or the witnesses, or even from the other side's pleadings, from the discovered documents, and from your research. Remember the following:

- Start early with a preliminary theory of the case.
- Develop and refine that theory as further information becomes available.
- Do not cling to a hopeless theory of the case; refine it or find another one.

Do not miss this step. Without a preliminary theory of the case you will be unable to advise the client on the further conduct of the matter. The theory of the case acts as a compass through every step you will take until the litigation has been completed.

1.2.6 Stage 6: Giving preliminary advice

Assuming that our client has been able to give us a useful amount of material, we ought to be in a position to give her some preliminary advice. However, we are not ready to give the client any final or comprehensive advice because we are not in possession of all the facts and documents yet. At this stage, the client is entitled to and will want some preliminary advice. What advice can we be expected to give with the information that we have so far? Our client probably wants to know the following:

- What claims does she have?
- How long will it take to finalise them?
- How much will it cost her?
- Is there anything that can be done to speed up payment of the proceeds of the insurance policies or the medical and hospital accounts?
- How strong is her case?

- What should she do?

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We should be cautious. It is all too tempting to go into the merits of the potential claims but the information we have been given is incomplete and we have hardly had an adequate opportunity to investigate the facts. How the advice to the client on the merits of her potential claims can be structured, is discussed in chapter 2. What is important at this stage of the interview, is that the client must be told what we intend to do in order to gather all the facts and the role she can or has to play in that process. She also needs to be re-assured that the matter will be dealt with expeditiously.

1.2.7 Stage 7: Concluding the interview

The interview should not be terminated before all of the client's concerns have been fully explored and a clear understanding about the further conduct of the matter has been reached. Assume that we have ascertained from our client that her husband's life policy has been handed over to the executor of the deceased estate and that the executor is prepared to discuss whether our client is entitled to the proceeds of the policy. It would be appropriate to explain to her that we need to interview the executor and study the policy and any cession documents before we can advise her on her prospect of receiving early payment.

Other matters to be clarified before the client leaves, include:

- your authority to act for the client in the further conduct of the matter (with a power of attorney to be executed in appropriate cases).
- the extent of your authority (with a signed consent to have access to the whole family's medical and hospital records, if you need to pursue that aspect before the next meeting with the client).
- any arrangement with regard to fees.
- when the client will receive feedback from you with regard to further steps you will take in the matter.
- when, where and how the client may contact you when she has further information or wants something from you.

If the interview has been successful the following things will have been achieved:

- A rapport will have been struck with the client. She will feel that this is not just another case for you. She will also have experienced an empathetic and non-judg-mental attitude to her problems.
- A professional relationship will have been established between you and the client. She will be re-assured that her matter will be dealt with confidentially, that she will be involved in all the important decisions to be made and that she can trust you to deal with her problems and concerns competently.
- The main questions the client had when she came to see you ('*What can I do*?' and '*What should I do?*') will have been answered to her satisfaction.

When these objectives have been achieved, the interview should end as it started, with the legal practitioner accompanying the client to the reception area of the office, and even to the lifts. A

handshake is expected in most cultures. When the client leaves, she must know precisely what is going to happen next and when she can expect to hear from you again. After the interview you must write a letter to the client and record what was discussed and agreed, particularly in the case of an interview with a new client. There should be a letter to the client after every meeting or discussion when advice is given.

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The whole process can be converted to a general scheme we can use for all new clients:

Table 1.4 General scheme for interviewing clients

What to do	How to do it	General advice
Meeting the client and exchanging pleasantries. (*Meet*, *greet* and *seat* the client.)	1 Meet the client at your reception. 2 Introduce yourself. 3 Give the client a comfortable seat. 4 Engage in some small-talk until you can steer the conversation to the purpose of the interview.	1 Don't keep the client waiting. 2 Don't offer alcohol. 3 Don't rush into premature advice.
Initial problem and goal identification.	1 Invite the client to tell you how he or she sees the problem and what his or her goals are. 2 Form your own views of the problem and the client's goal *in your mind*. 3 If necessary, help the client by gently prodding to state the problem and goals. 4 Confirm that you understand what the problem is and what the client's goals are.	1 Don't volunteer your own view of what the problem is or what the client wants or needs. 2 Don't take notes yet; maintain eye-contact instead.
Dealing with preliminary matters.	1 Explain your fee structure. 2 Mention the confidentiality of the discussions. 3 Consider if there may be a conflict of interest. 4 Explain the need to take notes.	Don't assume the client is aware of these matters.
Establishing the facts in chronological order.	1 Explain the importance of the facts and the need to obtain the exhibits. 2 Lead the client gently through the history of the matter. 3 Ensure the client tells the story in his or her own words. 4 Make notes. 5 Use open and non-leading questions.	1 Proceed slowly. The facts are important. 2 Don't suggest facts or solutions. 3 Concentrate on the details when the client's memory is still fresh.

Initial-fact analysis and developing a preliminary theory of the case.	1 Think of the possible causes of action or defences available to the client. 2 Gently question the client to elicit the relevant facts for the claim or defence you have identified. 3 Consider what evidence is available to prove the facts supporting the claim or defence.	1 Don't come to firm conclusions too soon. 2 Reserve your final opinion until you have all the facts and have had time to think about the case. 3 Resist the temptation to give unqualified advice.

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What to do	How to do it	General advice
Giving preliminary advice.	1 Deal with each problem in turn. 2 Tell the client what his or her options are in respect of each problem. 3 Tell the client what you suggest he or she should do. 4 Ensure that the client understands that the advice is provisional and subject to a full investigation of the facts. 5 When in doubt, tell the client that you would like to consider the matter further, consult counsel or do legal research before giving further advice.	1 Avoid overly optimistic opinions or forecasts on the outcome of the matter; they may come back to haunt you. 2 Be conservative in the advice you give. 3 Don't over-emphasise potential problems, but ensure the client knows what they are.
Concluding the interview.	1 Ensure all the client's concerns have been dealt with. 2 Tell the client what you will be doing about the case after the interview. 3 Ensure that the client knows what he or she is expected to do after the interview. 4 Accompany the client to the exit from your office or chambers. 5 Confirm your instructions and advice in a letter.	

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1.2.8 After the interview

When the client has left your office or chambers, you have to start working on the case. However, before you can do that, take a moment to write up our interview notes and to create some sort of plan of action. Consider the following scheme:

- Formulate a preliminary theory of the case.
- Analyse the available information to ascertain whether you can formulate a claim or defence consistent with that theory in respect of each potential claim.

- Go over the evidence carefully to ensure that there are no gaps. If there are, devise a scheme to obtain the missing information.

- Think about possible answers to the claim or defence you have formulated and devise a scheme to gather the evidence you will need to meet those answers.

- Play games with the case. Argue it behalf of the other side. Take points and answer them. Let your imagination run away with the case. Use any new insights which come to you to shape and refine your theory of the case.

- List the specific matters on which you have received instructions from the client and start working on them.

1.3 Interviewing witnesses

There are several differences between the way a legal practitioner may conduct an interview with a client for a conveyancing transaction and the way a legal practitioner (whether an attorney or an advocate) must conduct an interview with a client or prospective witness for a litigation matter. In most cases the client is likely to be a witness at the trial. You are also going to have to call other witnesses, some as lay witnesses and some as expert witnesses. An interview with a potential witness is conducted according to the general scheme we have devised but with some differences. It is extremely important that the evidence given in court by your witnesses is uncontaminated, meaning that their evidence must be free from external influencing. The persons most likely to be able to influence the evidence of a witness are the client and the legal practitioner. Legal practitioners can contaminate the evidence of a witness by suggesting facts or answers, by creating false claims or defences and even by employing inappropriate interviewing techniques. Such practices are dishonest, unethical, dangerous and subversive of the justice process. In a criminal case the contamination of the evidence may occur at the stage when the police are investigating the matter and taking statements from witnesses. It may also occur when a prosecutor interviews the witness. It is important for justice to prevail that care must be taken by everyone concerned to ensure that the evidence presented to the court or other fact-finding tribunal is pure and free from outside influences.

Part VI of the LPA Code of Conduct has several provisions that are relevant to the way an interview with a witness must be conducted by a legal practitioner – meaning an advocate or attorney admitted and enrolled in terms of sections 24 and 30 respectively of the LPA.

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55.
Interviewing of Witnesses

General

55.1
A legal practitioner shall ordinarily interview clients and witnesses in the presence of the instructing attorney or other representative of the instructing attorney (where an instructing attorney has been appointed).

55.2
A legal practitioner who is an advocate as contemplated in section 34(2)(a)(i) of the Act may interview a witness in the absence of the instructing attorney or other representative of the instructing attorney in the following instances:

55.2.1

when the matter is undertaken on brief from Legal Aid South Africa or a law clinic;

55.2.2
when there is a need to interview a witness and the instructing attorney cannot reasonably attend;

55.2.3
when the legal practitioner is at court or before the tribunal with the client and the instructing attorney is absent;

55.2.4
when the instructing attorney gives permission.

55.3
A legal practitioner shall ordinarily interview witnesses whose credibility might be in issue separately from other witnesses.

55.4
Unless a legal practitioner intends to present evidence by way of affidavit to a court or a tribunal, the written statements made by witnesses in an interview with the legal practitioner or written statements made by witnesses that are given to the legal practitioner by the instructing attorney (where applicable) may not be obtained on affidavit.

55.5

Once a legal practitioner has called a witness to testify, the legal practitioner shall not again interview that witness until after cross examination and re-examination, if any, have been completed, unless circumstances arise that make such an interview necessary. When a proper case for such a necessary interview exists, the legal practitioner shall prior to any interview inform the opposing legal practitioner of such need and unless the opposing legal practitioner consents, no such interview shall be held unless the court or tribunal grants permission to do so.

The rules are clear enough and reflect existing practice.

Expert witnesses often claim that they are too busy to come to an interview at an attorney's office or counsel's chambers. You must then go to their rooms or laboratories or offices instead of insisting that they should come to you. You might be surprised by how much you can learn of their science or art while in their workplaces. However, such an out-of-chambers interview must be conducted in strict observance of paragraphs 55.1–55.5 of the LPA Code of Conduct.

There are special rules with regard to interviews with an opponent's witness in civil cases.

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Interviewing of witnesses of the opposing party in civil proceedings

55.6
A legal practitioner shall not be prevented from interviewing any person, at any time before or during any trial, from whom it is believed useful information may be obtained, and in particular, it shall not be a reason to prevent such an interview that the opposing party has –

55.6.1
subpoenaed or contemplates subpoenaing that person;

55.6.2
already interviewed or has arranged to interview that person.

55.7
Whenever, after the commencement of a case, a legal practitioner has reason to suspect that a person with whom an interview is then sought may have been in touch with the opposing party with a view to testifying, the legal practitioner shall, either before or at the outset of an interview, or if the suspicion arises only during the interview, once the

suspicion arises, ascertain if that person has been in touch with the opposing party and whether such person has been subpoenaed or is likely to be subpoenaed by the opposing party or has already been interviewed or an interview has been arranged with the opposing party, and if informed that any of these steps have been taken by the opposing party, the legal practitioner shall at once notify the opposing party of the intention to interview that person, and shall not commence or continue with an interview until such notification has been received by the opposing party, and thereafter the interview may take place in the absence of any representative of the opposing party.

55.8

Whenever a legal practitioner arranges to interview a person who has already testified for the opposing party, before such interview may be conducted, the legal practitioner must invite the opposing party to attend the interview, on reasonable notice. However, regardless of the presence or absence of the opposing party, the interview may be conducted as arranged in the notification.

1.4 Consultations and conferences with counsel

Attorneys often consult an advocate (also referred to as 'counsel') and in some cases take their clients to an advocate for a conference. (Advocates use the word 'consultation' when they see the attorney alone and 'conference' when they see the attorney and client together.) Strictly speaking the attorney is the client. Advocates use the term 'professional client' for the attorney and 'lay client' for the member of the public seeking assistance. The lay client, the attorney and the advocate will usually all be present during the interview. While the general structure of the interview will be more or less the same as that for new clients or witnesses, there are bound to be some differences in approach.

The few deviations from the usual interviewing techniques and procedures are necessitated by the unusual nature of the advocate's relationship with the lay client. The lay client is and always remains the client of the attorney. In terms of the rules and protocols of both the Bar and the Law Society, an advocate should not deal with a member of the public directly. The LPA Code of Conduct recognises that principle but makes an exception for advocates conducting a trust account practice (as defined in paragraph 1.28 of the LPA Code of Conduct). The Bar is a referral profession; clients have to be referred to an advocate by an attorney. The result is that the client will already have been through an interview with an attorney before arriving at an advocate's chambers and will have had some experience of an interview with a legal practitioner. The attorney will also have made a preliminary assessment of the problem and may even have given some preliminary advice. The client will therefore be better prepared for the interview. The advocate will probably also have been briefed well in advance with a full set of instructions, including the client's statement, relevant documents and correspondence, and written instructions explaining precisely what counsel is required to do. Thus counsel is also better [Page 24] prepared for the interview. Since all three parties (the client, the attorney and the advocate) are prepared for an interview on a specific topic, the interview will move quickly to the relevant facts and counsel may be able to give advice at the interview.

Advocates must keep the following in mind when they interview professional and lay clients and witnesses:

- The basic principles and techniques of interviewing still apply, although there ought to be no need for the advocate to explain every step of the process to the professional client in a consultation. However, if the lay client is present, counsel must explain fully where the conference is heading so that the lay client knows precisely what is happening at all times.

- The professional client must be treated with the utmost respect. It is a good idea to ask his or her opinion from time to time. Not only is this sound business practice, but it is a fact that

advocates often receive invaluable assistance from their instructing attorney when they pore over the brief together. The client must be left in no doubt that his or her problem is being dealt with by the attorney and the advocate as a team.

- It is all too easy for advocates to forget the lay client and to proceed with the conference as if he or she is not there. Not only is this demeaning, it is patently poor technique. The lay client needs to be involved in the process. The advice sought at the conference must be delivered to the lay client and he or she be given an opportunity to ask questions and to raise any matter that may arise from it. For this to be done sensibly, the client needs to understand the advice. Keep it simple and explain the ramifications of the proposed course of action fully.

- Address the clients formally as Mr, Mrs, Miss or Ms, according to their preference – initially at any rate. This approach may change after counsel and the lay client have become better acquainted with each other.

1.5 Interviewing in criminal practice

1.5.1 Introduction

While the general skills and techniques discussed thus far are also applicable to criminal practice, the unique nature of criminal litigation requires a different approach or special caution when interviewing someone in connection with a criminal case. This is so for both the prosecution and the defence. Neither the LPA Code of Conduct nor The Code of Conduct for Members of the National Prosecuting Authority (NPA Code of Conduct) provides special rules for the conduct of an interview with a witness in criminal proceedings by a prosecutor. Perhaps the best advice to a prosecutor would be to conduct interviews with witnesses as far as possible in accordance with the general principles laid down in paragraph 55 of the LPA Code of Conduct, and, as a matter of practice, to insist that the investigating officer be present at such an interview.

1.5.2 Interviewing for prosecutors

1.5.2.1 General

In the hurly-burly of a prosecutor's office in a small town there is unlikely to be time to interview witnesses before the court has to start at 09:00. There are usually dockets to be read, charge sheets to prepare, police officers wanting to discuss some matter or other [Page 25] and office administration to get out of the way before the prosecutor can step into court. This is undesirable, of course, but it is a fact of life in practice. It is different in specialist courts and in the High Court. There the prosecutor generally has an opportunity to interview the investigating officer and the main witnesses and experts well before the trial date.

Ordinarily prosecutors are not involved in the investigation of the case (although they may be in special cases). The initial-fact analysis and the development of a theory of the case would have been done by the investigating officer – with or without guidance from a prosecutor – before the accused is charged. The docket usually reflects the charge the police have in mind and the prosecutor's fact analysis proceeds from there. The prosecutor may then decide to prosecute on a different charge or add additional charges, or even to withdraw charges, depending on the charges the evidence will in his or her view sustain.

Some fact analysis is therefore necessary, whether the prosecutor has an opportunity to interview the witnesses or not. That process is explained in detail in chapter 13 and involves several stages. When the prosecutor sits down to interview the prosecution witnesses, he or she must know precisely

where the evidence of the particular witness assists to prove the guilt of the accused. Where the witness to be interviewed fits into the process is best demonstrated as follows:

Stage 1:
Identify the branch of law (criminal law).

Stage 2:
Identify the charge (murder, for example).

Stage 3:
Identify the legal elements of the charge (*actus reus*, unlawfulness, *mens rea* etc.).

Stage 4:
Identify the facts supporting each element.

Stage 5:
Identify the evidence to prove each fact.

It is at this last stage where the witness is involved. A witness must have something to contribute towards proving the facts which are necessary to establish the legal elements of the charge. Therefore, in order to conduct a meaningful interview with a potential witness, the prosecutor must know what fact or facts can be proved by the evidence of the witness. The interview with the witness will then be conducted with the view to identify and organise the evidence of the witness to facilitate a logical and coherent presentation of the evidence by way of the examination-in-chief.

See paragraph 17.3 for a simple structure that can be used for the interview.

1.5.2.2
Complainant

The complainant is almost invariably the victim of the crime concerned and must for that reason be treated with the utmost professional courtesy and empathy. That does not mean that the prosecutor must *believe* the complainant. It is not the prosecutor's function to *believe* or *judge* but to present the case competently and objectively.

It is generally undesirable for the prosecutor to interview the complainant without the investigating officer being present. If the investigating officer is also a witness in the case, someone else must be found to stand in for him or her.

- Introduce yourself to the complainant.
- Explain briefly the procedure involved in giving evidence (where to go when called, taking the oath, responding to questions, handling exhibits etc.) (see paragraph 17.5).
- If at all feasible, tell the complainant when the case will be called.

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If there is time for a full interview, follow the scheme in paragraph 17.3. You may adapt the protocols for interviews with victims of sex crimes to suit the circumstances and apply them to interviews with other complainants. (See paragraph 1.5.2.4 below.)

1.5.2.3
Other witnesses (police, supporting witnesses, expert witnesses)

The police and expert witnesses are usually experienced in the court process and less time is needed to brief them before they give evidence. An interview with an expert witness is usually required not because the witness needs it but because the prosecutor needs to be educated in the science concerned. The more intricate the science concerned, the more time and effort will be required for the prosecutor to master the subject-matter.

The prosecutor's office is not always the best place for an interview with an expert witness and some experts may have to be interviewed at their laboratory or other workplace where they can better demonstrate the principles involved.

Witnesses other than the complainant, the police and experts must be assessed in terms of the materiality of their evidence and the interview must be structured to be appropriate to the situation.

Every witness, the complainant included, must be shown their police statement and questioned with a view to determine whether additional evidence is available, whether there are discrepancies, and, if there are, whether there is an explanation for them.

1.5.2.4

Sex crimes

A special approach is needed in cases involving sex crimes. In the first place, the victims are almost invariable female and in many cases minors, while the prosecutor to whom the case has been allocated may be male. There are gender sensitivities involved which go beyond the scope of this book. Suffice to mention that many female victims of sexual offending at the hands of a male accused prefer to have a male prosecutor. Whether the prosecutor in a particular case is to be a male or a female is a matter to be resolved before the trial preparation and interviewing of the witnesses commence. The decision will presumably be made by the senior prosecutor acting on the advice of the investigating officer and the representations of the complainant or her support person. Once a prosecutor has been appointed for the case, additional protocols need to be in place to ensure that there is compliance with section 227(2)–(6) of the Criminal Procedure Act 51 of 1977 (CPA).

Section 227(2) renders evidence of the complainant's prior sexual experience or conduct inadmissible unless the court grants leave for it to be introduced or the prosecution has adduced such evidence. Section 227(4) and (6) are to the effect that the court may not grant such leave unless the proposed evidence is relevant and must exclude it if the purpose of the evidence is to prove that the complainant was more likely to have consented to the relevant *actus reus* or was less worthy of belief. In determining whether the proposed evidence is relevant, the court must take into account the matters listed in section 227(5). They are whether the evidence (or questioning):

- is in the interests of justice, having regard to the accused's right to a fair trial.
- is in the interests of society in encouraging the reporting of sexual offences.
- relates to a specific instance of sexual activity relevant to a fact in issue.
- is likely to rebut evidence previously adduced by the prosecution.

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- is fundamental to the accused's defence.
- is not substantially outweighed in its potential prejudice to the complainant's personal dignity and right to privacy.
- is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue.

In practice the application for leave to adduce evidence of the complainant's prior sexual experience or sexual conduct is invariably brought by the defence and it may be brought at any stage during the proceedings. The prosecutor must therefore be prepared to deal with the issues listed in section 227(5). This will require that the complainant be interviewed about his or her prior sexual experience or conduct as well as the matters mentioned in the subsection. It is that type of interview which requires that special protocols must be followed. If there is an in-house protocol available, use it. Otherwise consult the internet or use the following model, adapted to the circumstances of the case:

- Ensure that the setting is appropriate to ensure privacy and that the complainant's support person is present.
- Maintain appropriate physical proximity to be reassuring without being too close.
- Explain the purpose and structure of the interview clearly.
- Use appropriate terminology. Medical terms may work in one setting while street terms may be required in another.
- Be patient and empathetic but neutral while remembering that sexual assault is often a life-changing event.
- Fight the urge to get involved to help the victim cope. That is the job of social services.
- Avoid offering unsolicited advice. Advise only on the legal process.
- Use active-listening skills and ask open questions. (See paragraph 1.2.4 Stage 4 above.) Provide a neutral reaction to the complainant's disclosures.
- Avoid making value, moral or ethical judgments. Don't be judgmental towards the complainant or the accused.
- Invite the complainant to ask questions and answer them.

1.5.2.5 Minors

Minors must be interviewed only when their guardian or another suitable relative or adult is present. The offences committed against minors often fall within the sexual-crimes category and the processes and protocols described in paragraph 1.5.2.4 should be adapted to suit and be used.

The prosecutor must assess whether *it would expose the witness under the biological or mental age of 18 years to undue mental stress or suffering if he or she testifies* at the hearing and should the prosecutor come to that conclusion he or she must prepare an application for the evidence to be given through an intermediary under the provisions of section 170A of the CPA.

1.5.3 Interviewing for defence legal practitioners

1.5.3.1 General

The basic skills and techniques described earlier in this chapter apply also to interviews in criminal cases. Those techniques and principles must be applied when interviewing [Page 28] witnesses (other than the accused) and experts. Interviews with the accused and with prosecution witnesses must be conducted in accordance with the principles explained below.

1.5.3.2 Accused

The accused is the client to whom the legal practitioner renders the services and owes a duty of care even though someone else may be paying for those services. Take care to ensure that the accused knows that. The confidential nature of the attorney-client relationship requires interviews with the

accused to be conducted in private and in the absence of the person funding the litigation. Exceptions may only be made with the informed consent of the accused.

The principles and techniques discussed in paragraphs 1.2 and 1.3 above apply save that greater care than usual must be taken when interviewing the accused to ensure that the legal practitioner does not suggest facts or answers to the accused.

Most offences in respect of which an accused would instruct a legal practitioner are serious enough to warrant imprisonment without a fine. Many offences are so serious that prescribed sentences of 15 years imprisonment or more are compulsory in the absence of special circumstances. In many cases the interview with the accused client must be conducted at the police station or prison or in the cells at court. There may be very little time before the matter is due to be called in court. These circumstances may combine to make the setting and tone of the interview extremely uncomfortable for the accused and for the legal practitioner. Extra care is therefore required when interviewing the accused.

The protocol suggested for interviewing complainants in sex crimes in paragraph 1.5.2.4 above may be adopted, adapted as appropriate. Remember that an accused in criminal proceedings may be under as severe, if not more severe, stress as a complainant against whom a serious sex crime has been committed. The risk of losing his or her freedom for an extended period must be a heavy burden to bear and an accused facing that prospect must be treated with the empathy the situation demands.

Clients in criminal cases often blame their legal practitioners for failures in the litigation and it is advisable that legal practitioners minimise the risk of that happening. The steps they can take include the following:

- Act with the utmost professionalism when interviewing the accused.
- If at all possible, conduct the interview in the presence of the instructing attorney or, if he or she is unavailable, a third person such as a clerk or secretary (after obtaining the accused's informed consent).
- Record all advice given to the accused in writing and require the accused to acknowledge in writing receipt of that advice. List the options available to the accused and explain clearly what you advise he or she should do.
- Insist that all instructions the accused gives with regard to the conduct of the proceedings be recorded in writing and signed by the accused.

1.5.3.3 Prosecution witnesses

There are constraints with regard to interviews with witnesses identified as prosecution witnesses. Paragraphs 55.9–55.11 of the LPA Code of Conduct in general terms follow the principles previously laid down by rule 4.3.2 of the Uniform Rules of Professional Ethics of the GCB.

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Interviewing of prosecution witnesses by defence legal practitioner

55.9
A legal practitioner shall, except as provided hereafter, when conducting criminal defences, take reasonable steps to prevent inadvertent contact with any person who is, or is likely to be, a state witness, for as long as that person is or is likely to be a state witness, and whenever the legal practitioner proposes to interview any person he or she shall ascertain whether such person is a state witness before conducting the interview.

55.10

A legal practitioner may interview a state witness if the prosecution consents, or, failing such consent, if a court grants permission to do so, and if permission is subject to conditions, in strict accordance with those conditions.

55.11

For the purposes of these rules of conduct, a state witness in relation to a particular charge includes anyone from whom a statement has been taken by the South African Police Service about a crime or alleged crime, regardless of whether the prosecution is committed to calling such person or not, and anyone who has already testified for the state.

The following additional comments may be made with regard to interviews with a potential prosecution witness:

- The prohibition operates from the time the accused is arrested or charged until he or she is either convicted or acquitted.

- If the prosecutor refuses to grant permission for the interview or imposes untenable conditions, the defence legal practitioner may interview the witness concerned after obtaining leave of the court. If leave is granted, the legal practitioner must comply with any conditions the court has imposed.

- There is a positive duty on the defence legal practitioner to ascertain whether a person they wish to interview is in fact a likely prosecution witness when the circumstances suggest that he or she may be. The emphasis is on 'likely' which requires positive action on the part of the defence legal practitioner; that is to say, a realistic and reasonable attempt to ascertain whether the witness concerned is likely to be a prosecution witness.

There are obvious risks in interviewing a prosecution witness. Special care must be taken to avoid disclosing the defence tactics to the witness or to suggest facts or answers to the witness. Remember, the witness is going to give evidence for the other side.

The purpose of the interview must be to ascertain whether the witness may be able to contribute evidence that may be helpful to the defence. The interview should be limited to that purpose.

A careful note must be taken during the interview and read back to the witness for confirmation that it is a correct record and, if it is, the witness must be asked to sign it. A copy of the note will probably have to be provided to the prosecutor because it is unlikely that the prosecutor or the court will grant permission for the interview without imposing that condition.

1.5.4 Interviewing through an interpreter

Interpreters provide essential services in the legal process yet they are seldom recognised for their worth. When an interview has to be conducted through an interpreter special care must be taken to ensure that the interpretation is accurate. An interpreter is not a translator who translates the text literally and word-perfect without regard to context. He or she is an *interpreter*, meaning that they have to convey the meaning of the question or [Page 30] answer rather than the meaning of the words that were used. Interpreters rely on tone, tenor, hand gestures and body language just like everyone else does in order to ascertain or convey the true meaning of the question or the answer.

In order to perform at the best of their ability, interpreters need to be briefed in advance on the subject-matter of the interview. For example: They should be given a list of technical terms to allow them to consult a dictionary before the interview commences.

The interpreter must be introduced to the witness at the commencement of the interview and his or her role explained carefully. During the interview the following additional matters must be kept in mind:

- Treat the interpreter with professional courtesy. He or she is your friend, not your enemy.

- Ask the interpreter to tell you if there are matters arising from the answer or answers the witness has given that need to be cleared up.

- Ask the witness, through the interpreter, to speak up when he or she does not understand the question.

- Refrain from interrupting the interpreter. Give the interpreter the time and space to *communicate* with the witness and with you.

- Watch the interpreter. Body language and gestures are important communicators of meaning.

- Ask short questions using short words and sentences.

- Avoid long and convoluted compound questions.

- When the witness gives an answer that does not address the question properly, don't blame the interpreter by saying, '*That's not my question, Mr Interpreter*.'

If the matter should proceed to a trial, the same protocols may be used in relation to the court interpreter.

1.6

Protocol

There are some basic courtesies to observe when you interview clients or witnesses, namely:

- be punctual, courteous and professional.

- don't waste time as the client eventually has to pay for it.

- don't be condescending – treat clients and witnesses as individuals with their inherent worth as human beings.

- deal only with the client's matter during the interview – do not allow any interruptions of the interview by other clients, your partners or clerks, and, especially, your spouse or children.

- explain every step of the interviewing process in advance.

- do not suggest facts or answers.

- do not denigrate the legal system, the court, any judge or any other legal practitioner.

- be sympathetic but remain objective.

- be on your best behaviour at all times .

o

be absolutely sure that you have dealt with all the client's concerns and that the client knows exactly what to expect next, including whether you will communicate with the client about any outstanding matters and when you will do so.

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1.7

Ethics: Concluding remarks

The most important rule of ethics that applies to every stage of the litigation process is the principle set out in paragraph 57.1 of the LPA Code of Conduct:

> 57.
> Disclosures and non-disclosures by legal practitioner
>
> 57.1
>
> A legal practitioner shall take all reasonable steps to avoid, directly or indirectly, misleading a court or a tribunal on any matter of fact or question of law. In particular, a legal practitioner shall not mislead a court or a tribunal in respect of what is in papers before the court or tribunal, including any transcript of evidence.

Since the process of misleading the court may start at the consultation with the client or witness if the legal practitioner were to suggest a fact or evidence to the witness, care must be taken to ensure that the legal practitioner does not influence the evidence to be given by the witness. Also, a legal practitioner may not lead evidence at the trial from the witness concerned that the legal practitioner knows to be false, having traversed the evidence during the consultation with that witness.

Some witnesses may be able to contribute facts that are favourable to the client's case while some aspects of the evidence of that witness may be adverse to the client's case. This aspect is discussed more fully in chapter 17. While it is, from an ethical point of view, in order for the legal practitioner not to call that witness, it will not be in order to attempt to persuade the witness to change his or her version.

A difficulty may arise if a client charged with a criminal offence confesses his or her guilt to the legal practitioner instructed to represent him or her. Paragraph 9.5 of the LPA Code of Conduct codifies the principles that have always been recognised and prescribed by the advocates' and attorneys' respective professions.

> 9.
> Integrity in performance of professional services
>
> . . .
>
> 9.5
> Whenever a client charged with an offence confesses at any time to a legal practitioner that the client is guilty of the offence, the legal practitioner must at once explain to that client that the future conduct of the matter shall be subject to these strictures:
>
> 9.5.1
> the legal practitioner shall not assert or imply any fact, or permit the assertion or implication of any fact, which he or she knows to be untrue, nor shall he or she connive to substantiate a falsehood;
>
> 9.5.2
> the legal practitioner shall not put forward any affirmative case inconsistent with the confession of the client;

9.5.3
the legal practitioner may argue that the evidence adduced to support the charge is insufficient to justify a conviction;

9.5.4
the legal practitioner may invoke or assert any point of law that might be of advantage to a resistance to a conviction;

9.5.5
the client may choose to retain the legal practitioner on the basis set out or choose to relieve the legal practitioner of the brief.

The only provision that may require some elaboration is the imprimatur that the legal practitioner concerned must 'at once' explain the principles laid down in paragraphs 9.5.1–9.5.5 to the client; in context this means as soon as it becomes apparent that what the client has told the legal practitioner amounts, or may amount, to a confession. A confession, of course, is an unequivocal admission of every legal element of the offence concerned. Care must be taken not to rely on the client's mere say-so: '*I am* [Page 32] *guilty as charged*.' Clients have been known to make false confessions in order to protect a third party, or after having been coerced into pleading guilty. Some are mistaken about the elements of the offence, mistakenly believing they are guilty when they have a good defence. The 'confession' must therefore be apparent from the underlying evidence the client provides. For example, a client who confesses his guilt to a charge of murder after shooting an intruder may have thought his life was in danger and that he was entitled to shoot and kill that person. In such a case the element of knowledge of unlawfulness may be absent, and the legal practitioner will be remiss in their professional duty if they were not to explore that as a viable defence. Still, that exploration must be preceded by the steps envisaged by paragraphs 9.5.1–9.5.5 of the LPA Code of Conduct.

To this may be added that it would be unprofessional and unethical for counsel to suggest to the client that he or she should tell a false but exculpatory story to another legal practitioner who may then construct a defence on a concocted version of events.

Paragraph 3.5 of the LPA Code of Conduct protects the common-law confidentiality relating to the client's affairs and the legal professional privilege attaching to communications between the client and his or her legal practitioner, candidate legal practitioners and juristic entities (as defined):

Code of Conduct: general provisions

3.
Legal practitioners, candidate legal practitioners and juristic entities shall –

. . .

3.6

maintain legal professional privilege and confidentiality regarding the affairs of present or former clients or employers, according to law . . .

These protections apply to what occurs during interviews with the client, but extends far wider than the mere interview. It applies to all communications between the legal representative and the client, no matter how or where those communications take place, subject only to the common-law exceptions where the protection is lost. One of those exceptions is where the client expresses an intention to commit a crime. That communication is not protected. (For a proper understanding of this aspect, consult a textbook on the law of evidence such as Zeffertt and Paizes *The South African Law of Evidence* 3rd edn LexisNexis, which is available online and in print. (Always use the latest edition.))

Interviews can now be conducted by means of Skype, FaceTime or similar apps and in those circumstances the interviewer must ensure that the witness is able to talk freely and is not subject to intimidation or undue influence by a person not in picture.

Chapter 2
Advising and counselling clients

CONTENTS

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2.1 Introduction

Clients approach legal practitioners for advice and counselling so that they can make informed decisions about their future conduct. The client wants to know, '*What can I do?*' and '*What should I do?*' In the case of a prosecutor's office, the 'client' is the complainant even though in practice the litigation is usually driven by the police and the prosecution is conducted in the name of the state. The question, '*What can I do?*' requires the legal practitioner to identify and evaluate the available options and the consequences of adopting each of them. It is the legal practitioner's duty to advise the client of the pros and cons of each option and which option, in the legal practitioner's view, is the best option. The question, '*What should I do?*' on the other hand, requires the legal practitioner to help the client to make the right decision, having regard to those options and consequences. Counselling therefore goes beyond the mere giving of advice. It is the process by means of which the legal practitioner helps the client to decide what to do. Having received advice and counselling, the client has the responsibility of making the final decision.

Advising and counselling are complementary, but different, skills. The legal practitioner acts as an objective investigator during the advice stage but takes on the role of a personal advisor during the counselling stage. Advising and counselling occur in virtually every branch of a legal practice:

from property transactions to litigation, from the collection of small debts to the conclusion of international shipping or licensing contracts. Whatever the nature of a lawyer's practice, advising and counselling are part of it. Attorneys may advise and counsel differently from advocates as they have a more direct, and usually a more enduring, relationship with their clients. Advocates are also usually required to advise or counsel in a far more formal setting.

Advising and counselling are also part of litigation. Indeed, advising and counselling continue through every stage of the litigation process. It can start at the first interview and can continue even after a final appeal has been decided. Nevertheless, the underlying processes and skills to be employed are the same for both branches of the profession and for all types of legal work, including the work of a prosecutor.

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2.2 Advising and counselling generally

2.2.1 Advising the client

Before you can advise a client, you must form an opinion or view on the facts and the law. This may only be possible after an exhaustive fact investigation or extensive legal research. Sometimes legal practitioners are able to deal with the problem fairly promptly because they have encountered it before or because it falls within their special field of expertise.

Where the problem needs to be investigated before an opinion can be formed or the problem can be solved, you will rely on your skills in legal research and fact analysis, which are dealt with in chapters 12 and 13. After identifying possible solutions by using those skills, you must tell the client what the options are and what you think the best option is.

You could do this according to the scheme below.

Table 2.1 Scheme for advising a client

Stage	Ask yourself . . .
1. Identify the problem and the client's objectives.	What is the problem? What does the client want to achieve?
2. Investigate the facts to ensure you can identify the available options.	Against what factual background does this problem exist?
3. Identify the legal issues and consider their application to the facts.	What legal principles apply to the facts? What is the effect of those legal principles on the problem and on the client's objectives?
4. Identify the consequences of each option by considering the likely legal and non-legal consequences of each option.	What are the options? What are the likely consequences of each of them? Which is the best option? Why do I think so?
5. Discuss the options and their consequences fully with the client.	What can the client do? What are the advantages and disadvantages of each option?
6. Tell the client which option you regard as the best option and why you think so.	What should the client do?

The counselling phase is not entirely separated from this process and is prominent during the next stage when the client, after having received your advice, has to make a decision. The different stages of the process should also not be applied in too strict a sequence as it may become necessary to return to prior stages before the whole process is finally completed. For example: When you have identified the legal principles and have considered their effect, it may become necessary to re-

investigate the facts or even to reconsider the true nature of the problem. A confident legal practitioner will move between the different stages effortlessly while the solution to the client's problem becomes ever clearer. Like most processes used for solving legal problems, advising and counselling cannot be confined to a straitjacket. Each stage constitutes an essential step towards the finalisation of the process.

2.2.2 Counselling the client

The purpose of the counselling process is to empower the client to make an informed and correct decision. This is far easier said than done.

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What the counselling process involves can best be explained by an analogy. When a patient who is suffering from a life-threatening disease consults a specialist physician, the physician will conduct various tests and examinations to determine precisely what the problem is and what different treatments are available for the condition diagnosed. These will all be explained very carefully to the patient so that the patient will know what the options are. The physician will go further than that. It is not enough that the patient knows what different options are available – the physician also has the duty to help the patient to make the right decision. The patient may not know or understand enough to make a correct decision on his or her own. Thus, while the physician has to explain what he or she thinks the appropriate treatment is, the advice to the patient must be given in such a way that the patient is empowered to make the right decision. Legal practitioners have the same duty.

The process of counselling is both *personal* and *dynamic*. It is personal because the style of counselling depends on the individual personalities of the legal practitioner and the client. It is dynamic because its course depends on what happens during the counselling process itself. Some clients need more help than others before they are ready to make a decision. Some clients make the right decision; others make the wrong decision and the process then may have to continue for a while longer. Sometimes a decision can be made quickly, while in other cases it may take time. For these reasons one cannot be too dogmatic about the exact process or style to adopt. Vary your style and the procedures you adopt within the counselling process according to the demands of each individual case.

Generally you have to ensure that

- the client has sufficient opportunity to evaluate the advice
- the particular client, having regard to his or her individual make-up, is given sufficient help to make the right decision
- all the client's questions are answered
- you intervene when the client makes a mistake or is about to make the wrong decision.

Clients often make mistakes even after receiving the best advice because they don't judge the likely consequences of a proposed decision correctly or choose the option that accords with what they *want to do* rather than with what they *should do*. Their decisions are often based on the wrong 'facts' or values. Sometimes their decisions can simply not be reconciled with an understanding of the risks involved or may result in a clash with the ethics of the legal profession. While clients should be allowed to make their own decisions, this cannot be taken too far. In some cases the assistance and support of a family member or an elder in the client's community or a shop-steward may be necessary.

2.3

Oral advice and counselling in litigation

Oral advice can be given during a formal interview, over the telephone or even at court during a trial. There are so many different circumstances under which a legal practitioner would give advice in a face-to-face situation that it is difficult to lay down any specific procedures for doing it. Nevertheless, there are some pitfalls to avoid.

Legal practitioners are often in a situation where they are expected to give oral advice in circumstances of varying degrees of urgency. Sometimes they don't have all the facts [Page 36] on which sound advice would ordinarily depend. Furthermore, they may not be given the opportunity to research the facts or the law before they have to advise on the question posed. This is not a healthy situation. On the contrary, it is fraught with danger for both the client and the legal practitioner as the advice may be based on insufficient or incorrect information or on an incorrect interpretation of the facts or the law. The advice may also be misinterpreted by the client or even be forgotten and a dispute may later arise about what the advice had been.

It is therefore important to remember that it is risky to give oral advice. Take steps to eliminate the dangers that may be present in a particular situation. Advise the client that it is undesirable to make decisions on the strength of advice given as a matter of urgency as the advice may be based on insufficient or incorrect information or an incorrect inter-pretation of the facts and the law. If the client wishes to proceed, the advice must be qualified and both the advice and the facts on which it is based clearly recorded. Don't be rushed into giving advice you have any doubts about.

If pressed to continue, you would be entitled to require the client to sign a disclaimer absolving you from liability for incorrect or negligent advice.

If advice has to be given under circumstances where it is not feasible to record the facts and your advice, confirm the advice and the facts on which it was based in writing at the first opportunity.

Advising the client at court under the stress of the trial or hearing must be done with a special degree of circumspection. A common complaint by clients about the litigation process is that they were *forced into a settlement*. Care must be taken that the client does not feel pressured into making any decisions during the hearings. Ask the judge for time. It will be given if there is a reasonable prospect of a settlement. Go back to the office or counsel's chambers, if necessary. Consider the pros and cons carefully and give the client objective advice on the options. Then make your recommendation. If the client is still uncertain about what he or she should do, start all over again. Make a note of the advice you have given. Advocates often record any advice they give on the brief and ask the client to sign it. It is a practice worth adopting.

There are a few other matters to keep in mind:

- You must make a concerted effort to maintain your neutrality. Counselling is not advocacy. Here the client is entitled to objective advice. The process must therefore have as its aim that the client, after receiving objective advice, is able to make the decision. Nevertheless, there is an element of persuasion involved because the legal practitioner has the duty to help the client arrive at the correct decision. That may, in certain cases, require a degree of *persuasion*. The facts, options and consequences may have to be presented in such a way that the client is led to the right decision. However, this approach cannot be taken too far. The client has the ultimate right to make his or her own decision.

- If the client makes the wrong decision, but still a decision which could reasonably be made on the facts, by all means point out the consequences of that decision as you see them. You may go as far as advising the client again of the other options and how they compare to the one chosen by the client. Once the client has made a decision, after receiving all the help you can give, accept the decision and implement it. Don't undermine the client's confidence by telling him or her that the decision is wrong. You've done your duty when you advised the client of the consequences and how the decision compared to the other options, provided, of course, that you have made sure that the client has been empowered to make the decision.

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Don't rush the client, especially at court when things may not have gone according to plan. The client is probably under severe stress already and needs more assistance, not more stress.

- Keep in mind that the client is an individual, with his or her own levels of intelligence, experience, sophistication, emotional involvement, and support (or lack of it) from family and friends. The problem may range from the simple to the extremely difficult. Adopt an approach to counselling that takes account of these factors.

Let us now revert to our client from chapter 1, Mrs Smith. During the initial interview we can give Mrs Smith the following advice:

- There are several potential claims. She and her children may have personal injury and loss of support claims against the RAF. There may be a claim for the damage to the car, depending on proof of negligence but only if the car belonged to our client. There may also be claims for the proceeds of insurance policies, depending on who the owner and beneficiaries of the policies are.

- The personal injury and loss of support claims may take between 18 months and three years to resolve if they are disputed. The claim for the damage to the car could be resolved in the Magistrates' Court in under a year if the claim is within the limits of its jurisdiction. It is not possible to say how long the insurance-policy claims will take to resolve but it could be a relatively short period if the insurers concerned accept the claims and the policies fall outside the deceased estate.

- It may be possible to make claims for her and the children's maintenance against the deceased estate. This must be investigated immediately. In the meantime, she should provide a list of her weekly or monthly expenses together with copies of supporting documents and vouchers as soon as possible.

- It may be possible to negotiate an agreement with the hospital to the effect that they would wait for the finalisation of any action against the RAF before they demand payment. The RAF may be persuaded to make interim payments with regard to medical and hospital expenses, funeral expenses, and loss of support, depending on whether liability is accepted.

- It is not possible to advise on the strength of the claims before the facts have been fully investigated.

- So far as fees are concerned, there are various options available. These include an application for legal aid, an agreement that the case be undertaken on a contingency basis, and an agreement by the firm to carry all disbursements and to defer payment until the RAF claim has been finalised. It may be too soon to make decisions in this regard but the matter can be discussed and a decision taken at the next interview.

- Give the client an undertaking to supply her with more detailed advice in a letter within a week after you have done some initial research and investigations. (The promise has to be kept!) Advise her not to act until she has had an opportunity to consider the advice you give in the letter and has had a follow-up meeting with you.

2.4 Advising by letter

Attorneys often advise their clients by letter. Even when they have given oral advice, they confirm that advice in a letter. Sometimes the letter confirming the oral advice goes further than the original oral advice, which may have been given in circumstances of some urgency or without an adequate opportunity to gather additional information or to [Page 38] undertake the necessary legal research. In cases where attorneys have briefed counsel for a written opinion, they frequently convey the substance of counsel's opinion to the client by way of a letter which explains what counsel's opinion is and what the ramifications of the opinion are for the client. In short, they advise the client what he or she can and should do, having regard to counsel's opinion.

However, it is rather unusual for an advocate to give advice by letter. The usual form of counsel's advice, when it is not given face to face during a conference, is by way of a memorandum or a written opinion. Legal advisors employed by concerns such as municipalities, insurers or other companies also give advice to their councils or directors by way of a letter or a memorandum.

Prosecutors don't offer advice by letter to the public in the ordinary course of their work but they do give advice to other public officials. In such a case the advice is either given in the form of a memorandum or by way of a minute.

Advice given by letter differs from advice by way of a memorandum or written opinion in one crucial aspect: While memoranda and written opinions are usually aimed at another legal practitioner or more astute clients, the advice given by way of a letter is aimed at the lay client. It is therefore important that the letter be written in such a way (in both style and content) that the lay client is given a clear understanding of his or her options and position. The format of a letter, as well as a memorandum, should allow for the subject-matter to be broken down into paragraphs, each dealing with a distinct aspect:

Table 2.2 Format for a letter (or memorandum) of advice

Subject-matter	Content
Executive summary	This is the initial part of the letter where the client's instructions, the answer to the question or problem and your recommendations are summarised.
Body	The main part of the letter discusses the question or problem in more detail, outlines the conclusion reached and makes a recommendation with regard to further action.
Reasoning or argument	The argument sets out the reasons for the conclusion with reference to the facts and the law applicable to those facts.
Conclusion and practical advice	In the concluding part of the letter the recommendations and advice are repeated and the client is advised with regard to the practical implementation of the recommendation. This includes what further evidence or information may be needed before proceeding any further.

Many lay clients are only interested in the first and last stages. They want to know what they can do and what their legal practitioner suggests they should do. Some clients may also want to know how their legal practitioner has arrived at the conclusion and on what grounds the recommendation is based. The result is that even the *technical* part of the letter (where the facts and legal principles are analysed and applied) should be in plain language. That means that jargon, stale Latin phrases and long quotations from textbooks and cases should be avoided.

It is difficult to counsel a lay client effectively in a letter or even in a memorandum. The counselling process is too personal, too important and too dynamic for that type of approach, but advising and counselling by letter cannot be ruled out altogether in every case. One of the advantages of advising by letter is that the client has the opportunity to read and re-read the letter and to reflect on it, even to take further advice, before finally [Page 39] making a decision. The main disadvantage is that there is no opportunity for the client to ask questions or for the legal practitioner to determine whether the client understands the advice so as not to make a mistake.

Nowadays advice is often given in an email and in some cases even by text message. When you use that form of communication, you should adopt the same approach as for advice by way of a letter, subject to some additional precautions to ensure that confidential communication between your office and the client does not fall into the wrong hands. If documents are to be attached, they must be in a format that does not allow amendments or additions to be made to the attachments.

2.5 Advice per memorandum

Advising by memorandum is more formal than a letter but less formal than a written opinion by counsel. (The same applies to the counselling process.) A memorandum usually involves some counselling that is more formal and subtle than counselling by way of a letter of advice.

Attorneys usually adopt memoranda as the means to advise corporate or institutional clients like government departments or bodies, municipalities, insurers and public companies. These clients often have internal legal departments staffed by trained legal practitioners to advise them on legal matters, including interpreting and explaining advice received from the client's attorneys and counsel. This enables clients to understand legal advice better than a member of public. They often have problems of the same nature and file the written memoranda and opinions they receive for use in similar cases they encounter.

Advocates also adopt memoranda as a means of giving advice. They usually resort to this method when they deal with matters of procedure, when they record advice given orally in consultation, or when they engage in the counselling process itself. (It is a natural consequence of the divided profession that advocates are somewhat removed from the counselling process and that attorneys usually fulfil that function, even when counsel has been briefed.)

Since advising by way of a memorandum is in some aspects the same as advising by letter and the formal advice of a written opinion, the structure is similar. Advice by memorandum can be given in the following way:

- Start, as in a letter of advice, by summarising what the issue is, what your answer is and what you recommend with regard to future steps.
- Proceed by setting out the facts in more detail, explaining how the problem arose having regard to those facts, and then deal with the legal principles which can be brought to bear on the problem.
- Then analyse the facts and the law in some detail, as in a formal opinion. Ultimately this analysis should lead to a conclusion or an opinion that answers the two basic questions at the heart of most cases, namely 'What *can* the client do?' and 'What *should* the client do?'
- The memorandum must conclude with a firm recommendation with regard to what the client is advised he or she should do, including the ramifications of any decision that may be made, whether it is to act on the advice or to go against it. The memorandum should contain practical advice about the way forward.

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2.6 Written opinions

While there is no impediment, legal or practical, to attorneys giving advice by way of formal, written opinions, a written opinion is the traditional way in which an advocate gives advice. Some of the most important sources of the Roman-Dutch law as applied in South Africa are collections of opinions by famous advocates like De Groot. Often a written opinion is in itself a document of such complexity that it needs to be explained to the lay client by another legal practitioner, usually the attorney who briefed counsel in the first place.

An opinion differs from advocacy. When conducting a trial or any other form of litigation, the advocate makes submissions subjectively, meaning that the submissions which may advance the client's case are put before the court whether the advocate *believes* in them or not. The judge then makes the decision. When giving an opinion, the advocate follows an objective approach, telling the client what he or she (counsel) really thinks of the facts and the law. What the client receives in litigation is advocacy. What the client receives in an opinion is objective advice.

Opinions:

- are advisory in character, answering some legal or factual question.
- are not academic even though they may contain an apparently academic discussion of a point of law.
- deal with real cases, which means that the opinion is *case specific* and is shaped by the facts of the case.
- require a consideration of the legal principles which are applicable to the facts of the case.
- are objective to the point of being dispassionate.
- are not designed for the process of counselling the client, although the conclusions reached may well be essential considerations in that process.

If the facts change, the answer may change. Counsel must state the true position as they see it. Clients must know exactly where they stand. The counselling should be left to the attorney. If required, an advocate may assist, but this should be done with both the client and the attorney present.

Advocates usually write opinions under circumstances where the investigation of the facts has been undertaken by the attorney. The advocate might ask for clarification of the facts or for additional information to be obtained. Ultimately the opinion has to be given on the facts and instructions given by the attorney. Advocates often expressly record the facts on which the opinion is based, either by referring to their written instructions or a set of documents or statements, or by listing the facts in the opinion.

In some instances counsel may be required to make an assessment of the available evidence and base the opinion on his or her own view of the facts. In some cases counsel may even be requested to advise what the court is likely to find with regard to the facts. In such cases, he or she needs a sound method for fact analysis, a process described in detail later.

The Inns of Court School of Law suggests the following practical steps as a recipe for a good opinion:

- Read and digest the instructions.
- Determine what the question is which needs to be answered.
- Absorb and organise the facts.

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- Construct a legal framework.
- Look at the case as a whole.

- Answer all the questions.
- Consider the advice you have given.

The writing process follows on the preparatory stage and may overlap to some extent. A written opinion by an advocate usually has a framework, for example:

- introduction.
- discussion of the facts.
- analysis of the legal principles involved.
- conclusion or opinion.

2.6.1 *Introduction*

An opinion is always required on some aspect of the facts or the law. Take care to make the opinion understandable to the reader, who may not be familiar with the facts and the question to be discussed. For example: The opinion can be started as follows:

- *I have been asked to advise on the quantum of the consultant's damages in an RAF action.*
- *I have been asked to advise on the consultant's prospects of success on appeal against the judgment of Mr Justice Wilson, delivered on 1 April [year].*
- *The consultant seeks an opinion on the proper method of valuation to be adopted with regard to the compensation to be paid to the consultant for the expropriation of his farms.*

The introduction will also serve as a reminder of the question to be answered in the final conclusion or opinion section of the opinion. The introduction does not recite the facts but introduces the question to be answered. In some cases the question is put against such a simple set of facts that the question will inevitably refer to some of the facts.

2.6.2 *Discussion*

Since the question to be answered is not raised in a vacuum but in relation to a particular set of facts and circumstances, it is necessary to describe those facts and circumstances. Advocates usually set out the facts in the second part of the opinion. In some cases the pertinent facts and circumstances have to be *found* by evaluating the statements, documents and exhibits provided before arriving at an opinion with regard to the likely findings of fact the court would make. This part of the opinion does not consist of a mere recital of the facts and circumstances but includes an analysis of the evidence to prove them. A detailed fact analysis in the style described in chapter 13 may be necessary.

A number of questions will have to be answered in the process of weighing up the facts and considering their significance. What are the basic facts? What is the significance of each individual fact? Are the inferences to be drawn from the evidence or the facts sound? Are there facts about which you have some doubts or reservations? Is there more information available? Are all the facts accounted for or are there facts running counter to the general picture painted by the other facts? Can the crucial facts be proved? What would the position be if the facts were different? Does the other side have facts you don't have? What can be done to obtain any missing information?

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In litigious matters you may have to consider the burden of proof in relation to the facts. To what standard do the important facts have to be proved? Who bears the onus of proof? (Remember that in civil cases the onus of proof determines who loses when there is no balance of probability either way on the disputed facts.) Above all, is the available evidence admissible, reliable and sufficient?

The discussion and analytical parts of the opinion often flow into each other so that there is no distinct separation between them.

2.6.3 Analysis

The particular facts and circumstances of the case have to be considered in the context of the legal principles applying to those facts. This may also include the contractual provisions between the parties.

It is important to point out at this stage of the opinion what the pertinent legal principles are and how they apply to the particular facts and circumstances of the case. This analysis is an essential component of the argument or process of reasoning which is followed from the introduction of the question to the final conclusion. The client doesn't merely want to know what conclusion the legal practitioner has reached but also how that conclusion has been arrived at. The opinion has to be *persuasive* in the sense that it has to be convincing in the way it answers the main questions put to counsel and must also accord with the known or assumed facts, the law and the principles of logic.

The starting point will thus be the question: What is the law on the point? This is not always an easy question to answer. The law is not always clear, in fact, the law may even be difficult to find. If the law is found in a statutory provision, you will have to interpret the section. If the section has been considered in prior cases, the law reports may give some assistance. The common law is found in textbooks, new and old, and in case law. In some instances you may have to go to original texts in Latin or High Dutch to find the answer.

Although you start with the law, you end with the facts. The purpose of finding the law is to ensure you apply the correct legal principles to the facts of the case. This is probably the most important part of the opinion. It is here where you have to demonstrate how you came to your conclusion or opinion. The facts and the law are merged in this exercise. The only tools available to you are your legal knowledge, research skills, words and logic. The reader has to be persuaded by what you have written. In demonstrating how you arrived at your opinion, you will rely on analogy, examples, precedents in case law, hypotheses, the probabilities as you see them, presumptions, and even your experience of human behaviour and judicial attitudes. This will assist you in arriving at an answer and will be used to justify the opinion you give the client.

It is not suggested that this process is easy. In fact, it can be very difficult. You may lie awake many a night wrestling with the facts and the law before you find the answer. You may struggle to find a way to express your opinion so that the client can follow your reasoning. The good news, however, is that it gets easier with practice. You will soon develop a style that works for you. There is often more than one way to arrive at a conclusion. Even if it takes time, all problems can eventually be solved. Sometimes the best thing to do is to write the opinion and then to let it sit on your desk for a while. Let it stew in the subconscious of your mind. It is surprising how often fresh insights into the problem break through while you are engaged on something totally different. When that happens, you can rewrite the opinion to the extent necessary. You don't have to send the opinion out while you are still uncertain about its correctness.

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2.6.4 Conclusion

The process by which one arrives at the answer cannot be defined nor can it be restricted to a particular model. There are so many different ways to arrive at an opinion after stating the question, setting out the facts and the law, and applying logic and experience to the facts of the case and the law in order to *justify* the answer. However, the client asked for an opinion and you have to express an opinion one way or the other. It does not mean that a legal practitioner is always obliged to have a firm opinion on every question. It may well be that you conclude, for example, that the outcome

of an appeal cannot be predicted. If that is your conclusion, you are entitled to say so but you still have to justify your view like any other (by reference to the facts and the law).

An opinion starts and proceeds almost like an argument. (An argument is a connected series of statements or postulates supporting a particular conclusion or submission.) Therefore, once you have completed the opinion, re-read the document in order to determine whether you have covered all the facts and circumstances and have discussed all the legal principles leading to your conclusion or opinion.

2.6.5 *General comments*

William M Rose *Pleadings without Tears: A Guide to Drafting under the Civil Procedure Rules* 7th edn Oxford University Press (2007) gives some sound tips for opinion writing. It is worth repeating some of them here.

Before you can hope to write a good opinion, you will have to master the skills of legal research (chapter 12) and fact analysis (chapter 13). It is not enough to state the facts: you must *analyse* them. The weight and significance of individual facts must be considered (and explained) very carefully. You must consider (and explain) how the law impacts on the facts and how a different conclusion may be arrived at if the facts are not as you have them.

Although your instructions may ask for an opinion on a narrow or specific question, you should give the client practical advice where it appears appropriate. You can't always do this, for example, where you have been asked to advise on the meaning of a word in a statute. Practical advice supported by good reasons will help the client to decide what to do. Keep in mind that the client wants to know what he or she *can* do and *should* do.

If the facts you have been given are incomplete, insufficient or doubtful, express your view on a hypothetical basis, assuming that different factual findings could be made. Explain how the conclusion may change as different facts are assumed. This should, however, be done as a last resort. Ask for more information or clarification of the facts first. Qualify your opinion, if you have to, but try not to avoid the issue.

Consider the main argument that could be raised against your views and then deal with it. Explain why you think that argument will not prevail over yours. This exercise will not only sharpen your views, it will also expose glaring errors in your opinion or reasoning. It may also come in handy later when the case has gone to a hearing on the subject-matter of your opinion and you have to defend the views you have expressed. You will by then have considered the opposite view and, presumably, found some answers to questions you had regarding it. It is good to do this at a stage when your client still has the opportunity to follow a different course.

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Use headings and subheadings where you can to help separate (and clarify) your discussion of various points, for example:

A.
Introduction – the question

B.
The facts

1.
The background

2.
The disputed facts

3.
The probabilities

C.
The law

1.

The first point – Prescription

2. The second point – Estoppel

D. Conclusion

1. The answer

2. The argument against it

E. The way forward – some practical advice.

Be careful not to express your views in absolute or arrogant terms. You may have some difficulty explaining to an irate client, who has just lost the case, what you meant when you said the defence had *no merit whatsoever*! It is far better to express your views with some circumspection, for example: *On these facts I am of the view that the court will probably reject that defence*.

When relying on authority for a point you make in the opinion, give the full citation of the case, statute or book, but don't burden the opinion with long quotations from it. Paraphrase, if necessary. Use foot- or endnotes as the repository for citations and even quotations from authorities. Ideally you should tell the client what you think in your own words and only refer to authority when necessary. However, sometimes a point is made so well or so succinctly in a book or judgment that it bears repeating in the exact words of the author. Don't quote reams of authority for obvious or trite points, though. Always acknowledge your sources.

You may test your own opinion by applying the theory of the case methodology advanced in chapter 1 to it. Ask and answer the following questions:

- What is the issue or question?
- What is the conclusion I have reached on that issue or question?
- What are the strongest points leading to that conclusion?
- What is the counter-argument?
- What are the strongest points against the counter-argument?

2.7 Advice by a prosecutor

Prosecutors give advice in the course of their daily duties as much as legal practitioners do in private practice. The circumstances may differ but the basic skills, techniques and protocols are the same.

2.7.1 Written opinion

Prosecutors are not called on to provide written opinions. That function is performed by the State Attorney, or counsel briefed by the State Attorney, or by someone employed at a higher office, for example, the National Prosecuting Authority.

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2.7.2 *Memorandum and minute*

From time to time prosecutors have to provide advice in the form of a memorandum or a minute. A minute is a letter addressed to another public official and it has a special format that is discussed below. A memorandum prepared by a prosecutor will also be directed to another public official. Memoranda of this kind and minutes resemble the memoranda and letters respectively that legal practitioners in private practice would write and for that reason the principles discussed earlier in this chapter apply with equal force to them.

However, the differences between memoranda and minutes written by prosecutors and those written by legal practitioners need to be emphasised here.

The first difference relates to the *filing system*. There are literally thousands of different topics with which public officials have to deal. A four-digit reference system is used to distinguish between various departments, offices and subjects to ensure that all official documents are filed in a logical place and can, when required, be found again. (For example: The file number for correspondence dealing with statutory offences is 1/4/3/1 and the file for common-law offences is 1/4/3/2.) Every minute must therefore have a reference number.

The general reference number of the file is not enough. There may be hundreds or even thousands of items under the particular file number and a means must be used to facilitate the identification of a particular case. This can be achieved by including the following details, or as many of the details as is feasible: The name of the accused, the name of the police station, the RCI (register of criminal investigations) or other appropriate number, the case number, and the charge against the accused.

Thus, whether the advice is given in a memorandum or a minute, it must include all the necessary details for filing and archiving purposes.

The second important difference is that memoranda and minutes are *working documents*. They are usually part of a dynamic process. This requires that copies must be at hand when required, for example in police dockets, case records and the like.

The third difference is that there may be local, provincial or national *directives or guidelines* with regard to the style and content of a prosecutor's memoranda and minutes. Where there are, they must be applied with great care for professional and personal reasons. (Prosecutors are subject to merit checks and the trail left behind in the form of memoranda and minutes may well be useful to justify a good score and even promotion out of turn. Where the circumstances allow it, copies of documents may be kept for submission to the merit committee.)

In the absence of applicable directives or guidelines, you may adopt the following approach:

- Use the correct letterhead. Since the communication emanates from the prosecutor's office, the letterhead applicable to the magistrates' office or the office of the National Prosecuting Authority should not be used.
- Use the correct postal address (including the postal code) of the intended recipient.
- Name the recipient correctly, and include their title where appropriate.
- Provide the correct reference number and details.
- Provide the name (initials and surname), email address (if in use) and telephone number of the official to whom enquiries should be directed.

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When using the format of a minute, omit the usual 'Dear Sir/Madam' and 'Yours faithfully' one would find in a business letter.

- The heading must include (where they are available) the case number and police station and RCI number.

- Neither a minute nor a memorandum uses the style in business letters by alluding to the subject-matter in a line commencing with the word 're'.

- The heading or the first paragraph should refer to the reference number and date of the most recent correspondence of the addressee (where those details are available).

- If the memorandum or minute consists of more than one paragraph, the paragraphs should be numbered.

- Deal with the subject-matter in a logical manner, using short words, short sentences and short paragraphs.

- Use the formal tone of official communications. Don't include extraneous matters or homilies (such as wishing the addressee a Merry Christmas or to 'have a good day').

- Introduce the subject-matter, discuss the problem and reach a conclusion. Justify the conclusion, decision or recommendation you have made or suggest should be made. Be brief.

- Where the memorandum or minute envisages that a decision needs to be made by another official, for example the senior prosecutor, the minute should be accompanied by a draft decision.

2.7.3 Entry in investigation diary

Prosecutors are often required to give advice to the police during the course of the investigation of the charge and do so either by a minute or by an entry in the investigation diary. A minute should be used where the advice is complex or detailed; otherwise an entry in the investigation diary will suffice.

Entries in the investigation diary must be dated, addressed to the investigating officer, and signed by the prosecutor who makes the entry. The prosecutor concerned must provide full details of his or her office and contact details to enable the investigating officer to communicate with them if necessary.

The focus of an entry in the investigation diary will often be to strengthen the case in respect of one or more of the legal elements of the offence to be proved. In such an instance the entry has a similar role as an advice on evidence (see chapter 11). In other cases the purpose of the entry might be administrative, for example, giving directions with regard to the attendance of witnesses at the trial and the preparation or production of exhibits.

The tone of entries in the investigation diary must be professional. Avoid emotional outbursts, recrimination, abuse and insults. The purpose of entries in the investigation diary is to advance the investigation, not to discipline officials in another state department.

2.7.4 Oral advice to the complainant

The situation may arise for the prosecutor to have to advise the complainant about the further conduct of the proceedings, for example, when the prosecutor contemplates withdrawing the charge or accepting a plea to a lesser charge, or agreeing to a plea [Page 47] agreement in terms of section

105A of the Criminal Procedure Act 51 of 1977 (CPA). Complainants are entitled to be involved in decisions of that nature as also where the offender has caused loss or damage; the court may be asked to make a compensatory order in terms of section 300 of the CPA. (These are examples and there may be many other circumstances warranting that the complainant be involved in the decision-making process.)

There are many risks attached to giving oral advice (see paragraph 2.3 above) and those risks are far greater in a criminal case than any other case, yet the circumstances prevailing in our criminal courts are such that prosecutors generally don't have the luxury of time to counsel the complainant in the comfort of their office. So, such advice as must be given is usually given in an abbreviated process during the interview with the complainant or during a short break during the trial.

The process described in Table 2.1 above is indispensable in circumstances with this qualification: The complainant must understand that certain decisions are not his or hers to make but yours as the prosecutor. Prosecutors have a duty to the administration of justice which transcends their duty to the complainant.

Prosecutors must take the utmost care when they are required to advise in cases involving sex crimes or crimes against children. The complainant's support person must be involved, if the complainant so wishes. In the absence of a family member or friend acting as support person, the assistance of the investigating officer – who might well be a sex-crimes specialist – or a suitably qualified person from social services may be called for. There are many organisations providing specialised services in spousal-abuse and child-abuse matters and a suitable support person will usually be available from their ranks.

The advice given to the complainant ought to be recorded in detail in the investigation diary of the police docket or in a minute to be filed under the appropriate reference number. The note or minute must record who the support person was and whether the investigating officer was present.

2.8

Protocol

- Guard against the subconscious desire to provide the client with the advice he or she would like to hear.
- Be very careful to express your views confidently and precisely. Do not be vague or ambivalent.
- Be sensitive to the client's feelings. Be diplomatic when you have to break bad news. Do not be judgmental. The client wants your opinion, not your judgment.
- Get a second opinion if you have doubts, or advise the client to obtain a second opinion.
- When counselling the client, be careful to allow the client to make the decision. It is the client's right and duty to make the decision.
- Once the client has made a decision, respect that decision and implement it. If the decision is one which cannot reasonably be made on the facts and the advice you have given, explain the ramifications of the client's decision to him or her and explain why the option you prefer, is better. Then allow the client to decide.
- Do not contradict or devalue the decision made by the client by your words or conduct, even if you disagree with it.

2.9 Ethics

It is unethical and it may constitute a criminal offence to encourage or facilitate a crime or dishonest conduct. Paragraphs 9.2 and 9.3 of the LPA Code of Conduct apply as follows:

> 9.
> Integrity in performance of professional services
>
> . . .
>
> 9.2
> A legal practitioner shall not, in giving advice to a client, advise conduct that would contravene any law; more particularly, a legal practitioner shall not devise any scheme which involves the commission of any offence.
>
> 9.3
>
> A legal practitioner may give advice about whether any act, omission or course of conduct may contravene any law.

A legal practitioner's primary duty to the client is to give honest, objective advice taking into account only the client's best interests. When advising on the prospects of success in any matter, paragraph 9.9 of the LPA Code of Conduct must be complied with:

> 9.9
>
> A legal practitioner shall, in giving any advice about the prospects of success in any matter, give a true account of his or her opinion and shall not pander to a client's whims or desires. However, in any matter in which the legal practitioner's opinion is adverse to the prospects of success, the legal practitioner may upon client's insistence place before a court the client's case for the adjudicating officer to decide the matter and the legal practitioner shall advance that case as best as . . . [**Author's note**: There appears to be a misprint or omission in this paragraph so that it has been left incomplete. What is probably contemplated is that the client's case must be advanced to the best of the legal representative's ability, within reason.]

It happens frequently that an attorney is asked to help a couple to settle their divorce action. While it is advisable in all cases that each adversary should be represented by his or her own attorney, paragraph 59.2 of the LPA Code of Conduct appears to give its blessing to an attorney acting for both parties in drafting a settlement agreement.

> 59.2
>
> A legal practitioner may act for two or more adversaries in drawing a settlement agreement to capture their agreement, but must advise the parties of their rights to independent legal advice. Moreover, in any matter involving a settlement of a matrimonial dispute or a matter involving the regulation of care and residence of children, the legal practitioner shall take active steps to ensure that all aspects of any contemplated settlement is equitable to all parties and in the best interests of the children.

Chapter 3
Alternatives to litigation

Clash and conflict are present in every community. We have the rule of law, including a few of the procedures . . . for resolving disputes, including conciliation and mediation, arbitration, . . . settlement, and judicial determination. The rule of law is versatile and creative.

Justice William O'Douglas, Santa Barbara, 1961

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3.1 Introduction

Litigation is not always the best way to resolve a dispute. It is the legal profession's equivalent of surgery, to be used as a last resort when all other means of resolving the problem are inadequate or have failed. Litigation (like surgery) is by its nature risky, intrusive, painful and expensive. It can only be applied to a narrow range of problems in its field. It cannot guarantee a favourable outcome as it can so easily depend on the skills, or lack of skills, of a single person, namely counsel. It is therefore not surprising that litigation is unpopular with the public. Fortunately, the law is versatile

enough, and legal practitioners creative enough, to include alternative methods of dispute resolution in the array of tools employed to solve legal problems.

It is the professional duty of every legal practitioner to advise clients on the most suitable method for the resolution of their disputes. This can only be done after weighing up the advantages and disadvantages of the alternatives and having regard to the particular facts of the case. In some cases that will mean that the case is removed from the control of legal practitioners altogether. That may not seem like a good outcome for the legal practitioner, but whether a particular outcome is satisfactory or not, has to be judged from the client's perspective, not the legal practitioner's.

There are four main reasons why alternative dispute resolution (known as ADR) should be considered:

- The majority of clients prefer not to go to court. They will tell you so if you ask them. Litigation has many disadvantages that are obvious to ordinary people but which legal practitioners appear to have forgotten. The litigation process is slow, expensive, uncertain and detrimental to the emotional well-being of its participants.

- The litigation process does not always deliver a satisfactory result, partly for the reasons already mentioned. The court lists are also clogged up with too many undeserving cases (for example, hopeless summary judgment applications and divorce [Page 50] cases which could be resolved by mediation), resulting in long delays before a trial can be heard. If these lists could be shortened, the workload would be lighter and judges would be able to deliver judgments quickly.

- ADR broadens the range of services a legal practitioner can deliver with the result that legal practitioners may meet a wider range of clients' needs. With the exception of a few cases, legal practitioners still participate in the resolution of the dispute, but in more innovative ways. In the process a legal practitioner can play an important role in gaining access to justice for more people and thus in improving the quality of justice.

- There are now cases where it is compulsory to use ADR, for example, where a contract between the parties contains an arbitration or mediation clause, or where the parties stand in a special relationship, such as occurs in an employer-employee relationship.

Methods of ADR that are available are:

- arbitration.

- determination by an independent third party or expert.

- mediation.

- negotiation.

- doing nothing.

What the first four methods have in common is that they rely either on litigation skills or on negotiation skills. For example, arbitration and determination by an independent third party or expert are similar to litigation and are conducted in an adversarial fashion. Mediation, on the other hand, has more in common with negotiation. It appears therefore that in order to develop a complete range of skills for all forms of dispute resolution, a legal practitioner would only have to master the skills required for the litigation process and those required for the negotiation process.

If any method of ADR were to be unsuitable or unsuccessful in a particular case, another form of ADR may be adopted, with the proviso that litigation always remains as the last resort.

3.2 Arbitration

Arbitration is a procedure by which a dispute may be determined by means of a litigious contest without recourse to the courts. In some cases arbitration is compulsory, but it is mainly used as a result of a provision in the contract between the parties to the dispute. The contract may provide who the arbitrator will be or how he or she is to be appointed, whether legal representation will be allowed and what procedures are to apply. In the absence of such contractual terms, the provisions of the Arbitration Act 42 of 1965 apply. If a party who has previously agreed to arbitration, institutes an action nonetheless, the other party may apply to the court for a stay of the action until the arbitration has been completed.

The jurisdiction of the arbitrator is limited by the terms of the arbitration agreement and his or her award, as an arbitrator's decision is called, final and not subject to appeal. That does not exclude a review based on an irregularity, but it is usually not easy to upset an arbitrator's award as the grounds of review are limited. The award may be made an order of court for the purpose of enforcement.

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There may be pleadings in an arbitration, depending on the terms of the arbitration agreement, any further agreement between the parties and any directions given by the arbitrator. The degree of formality varies. It may range from a quick, informal arbitration with no pleadings and unsworn or written evidence, and submissions to procedures which are almost the same as those of a trial in the High Court.

The advantages of arbitration are numerous. Arbitration can be quick. It is usually less expensive than litigation. An attorney who does not hold a certificate allowing him or her to appear in the High Court, may conduct an arbitration. An arbitrator with special knowledge of the subject-matter of the dispute may be appointed, as happens for example in most maritime disputes on charter-parties and bills of lading. The arbitrator's award gives finality as there is no appeal except in special cases. The award can be enforced after being made an order of the court. The arbitration could be conducted in an atmosphere that is less hostile than litigation, allowing the parties to continue an existing relationship, such as that between a contractor and owner in a building or construction project. Because the arbitration can also be conducted in secret, parties are able to resolve disputes involving confidential matters or evidence they would prefer not to become known to the public or even to the courts.

Disadvantages of arbitration include the following: Once the arbitration process has started, the parties no longer control the proceedings, the arbitrator does. Further, if an arbitration is conducted like ordinary litigation, it may be more expensive than litigation because the parties also have to pay for hiring the venue, the costs of recording and transcribing the evidence, and the arbitrator's fees. There is no right of appeal, so an incorrect decision is not open to correction through the means of an appeal, except where the arbitration agreement provides for an appeal to an arbitration appeal panel, or, in some rare cases, to the court. Therefore, for the full benefits of arbitration to be realised, it usually has to be conducted differently from litigation.

Arbitration is most suitable and in some relationships such as labour relations compulsory, and equally so for commercial disputes such as building or construction contracts and maritime claims. In these fields expert arbitrators are generally available. However, it is not limited to these types of disputes. In fact, most ordinary disputes before the courts can be resolved by arbitration, including claims for compensation for personal injuries or damage to property. Cases that cannot be resolved by arbitration include matters involving the status of a person or company, such as an action for a decree of divorce, paternity suits, sequestration and liquidation applications and applications for rehabilitation.

Typically the arbitration process would go through the following stages:

o

The parties meet or correspond to agree on the appointment of an arbitrator and on procedural matters.

- The parties approach the nominated arbitrator for his or her consent to act.

- The parties submit their arbitration agreement to the arbitrator and arrange a meeting to discuss preliminary matters such as the procedure to be adopted, the venue, the arbitrator's fees and other relevant questions.

- A pre-arbitration meeting takes place. The arbitrator's jurisdiction is defined by reference to the questions or issues submitted to him or her for determination. This may include the power to make an award with regard to the costs of the arbitration. The arbitrator gives directions, if required, with regard to the exchange of pleadings, discovery and witness statements. This includes whether the evidence will be agreed [Page 52] in advance, submitted by affidavit rather than given orally, and cross-examination be curtailed.

- Pleadings, documents, expert reports and statements are exchanged.

- The hearing takes place.

- The arbitrator makes his or her award in writing.

- If the unsuccessful party does not perform, the other party may approach the court on application for an order that the award be made an order of the court.

- The award is then enforced as if it were a judgment of the court.

After arranging for arbitration as the method for resolving the dispute between their clients, the legal practitioners concerned prepare for the arbitration as if it were a trial before a judge. Most of the drafting, preparation and advocacy skills and techniques discussed later in this book are equally applicable to arbitration. While the hearing may be conducted with less formality than a trial, that does not mean that there is any less skill involved in presenting and arguing the client's case. On the contrary, if the arbitrator is not a trained lawyer, there is an additional burden and duty on the legal practitioners to ensure that the arbitrator has a firm understanding of the procedures and legal principles involved. Because the arbitration is in essence a trial, the protocols and ethics that apply to trials also apply to arbitrations.

3.3 Determination by an independent third party or expert

Another way of resolving an issue between parties to a dispute is to submit it for determination to an independent third party or expert. Such an adjudicator may be from almost any discipline and does not have to be a lawyer. He or she may even be an official such as the Master of the High Court or the Registrar of the High Court. For example: The Registrar is frequently called on to make binding rulings with regard to the amount to be given as security for costs under Rule 47. A question of law may be submitted to counsel for an opinion under the provisions of the Arbitration Act 42 of 1965 or independently of the Act. As in the case of arbitration, the person whose determination is sought, has no jurisdiction beyond answering the question put to him or her.

There are two ways of submitting a dispute to an expert for determination. The expert may be allowed to gather the facts and material on which the issue between the parties is to be resolved independently of the parties. For example: The valuation of a property or a business can be

submitted to an expert valuer who is allowed to gather the relevant information and material independently of the parties to the dispute and then gives a binding valuation. The procedures adopted are flexible and the parties can agree to place facts and arguments before the expert. The expert may also be restricted to the information placed before him or her by the parties, for example where the expert makes an evaluation based on the material provided to him or her. This often arises when the dispute involves a purely legal question that can be submitted to counsel for a binding opinion.

There are many advantages to submitting a dispute to an expert for a binding determination. The procedure is usually quick and inexpensive, especially when compared to litigation and even arbitration. It has none of the trauma of a trial with witnesses. Confidentiality can be maintained. The dispute can also be submitted to a person with special knowledge and experience in the field concerned. Thus the parties can choose an adjudicator with the qualifications for their particular type of dispute.

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Submission to an expert is well suited to cases where the disputes are narrow, the facts are not in dispute and the parties seek an answer from an authoritative source acceptable to both parties. This method of ADR is also frequently used to resolve a narrow issue within a larger dispute which, perhaps, has to go to litigation or arbitration. For example: An arbitrator may submit a question of law to the court or to counsel for an opinion while retaining the arbitrator's own jurisdiction to determine the main issues. Even a lay person can be appointed in certain cases, for example, in family disputes.

The disadvantages of this form of ADR are similar to the advantages of arbitration. The determination or ruling is not subject to appeal but may be taken on review on limited grounds. If a party wishes to enforce any adjudication in his or her favour, he or she must apply to the court (on notice of motion or by way of an action) for appropriate relief, which can include an order for specific performance or payment of money.

The cases that can be resolved by submission to an expert for an independent determination are almost without limit. Typical cases include the following:

- Disputes on a question of law, or fact and law, can be submitted to a legal practitioner, usually an advocate of senior status, but any other lawyer, for example, a law lecturer or retired judge, may be appointed.
- Valuation disputes can be referred to a sworn valuer for a binding valuation.
- Disputes relating to the administration of insolvent or deceased estates can be submitted to the Master of the High Court for a binding ruling.
- Tax issues can be referred to an official in the South African Revenue Services (SARS) for rulings which bind the taxpayer and SARS.
- Building or construction disputes between the builder and the owner can be referred to the architect appointed under their contract for his or her ruling, which is usually binding on both parties.

The procedures involved are flexible and can be devised by the parties themselves, with the assistance of their legal practitioners. The parties have to meet or correspond to identify and define the issue to be resolved. They need to agree on the material to be placed before the chosen expert. It is wise to have a written agreement identifying the issues and specifying the procedures to be adopted. The parties may agree that the determination will be binding and final. If they don't, the expert's determination is advisory only. A brief has to be prepared for the expert, whose consent to act must naturally be required in advance. The expert follows the agreed procedure and makes the determination, usually in writing. Where the expert is allowed or expected to determine the facts by his or her own independent investigation, he or she will make the appropriate enquiries. Where

restricted to the facts or material placed before him or her, the determination will be made on the agreed material.

The legal practitioners for the parties have the following functions: They have to arrange an agreement between their clients for the dispute to be submitted to the expert for his or her determination; they have to settle the terms of the submission. They have to agree on precisely what information will be put before the expert and what independent knowledge or facts the expert may gather or rely on in reaching a conclusion. They have to put the relevant facts and documents before the expert in an appropriate brief and they have to pay his or her fees.

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3.4 Mediation

'Mediation is no more than assisted negotiation', Roger Chapman wrote in *NZLawyer* 13 July 2012 Issue 188. Mediation is therefore similar to negotiation but it takes place under the supervision or guidance of the mediator. Its purpose is also to seek agreement on a possible solution for the problem. The word mediation is derived from the Latin word '*mediare*', which means to be in the middle. That describes the position of the mediator quite accurately. He or she is a neutral person who assists the parties to find mutually acceptable solutions to end their dispute. The mediator does not make decisions or give rulings. The role of the mediator is rather that of a facilitator, a go-between, who structures the discussion, clarifies the viewpoints of the parties, encourages the parties to explore alternatives, and guides them to a mutually acceptable solution. The mediator's function is similar to that of a catalyst in a chemical reaction; the catalyst instigates or facilitates the reaction between the ingredient chemicals, but does not become part of the new chemical produced by the reaction.

Mediation has many advantages. The parties participate directly in the process and the final decision rests with them. The remedies are not limited to those a court can order or prescribe. Legal and non-legal disputes can be resolved by mediation. It can be quick, comparatively inexpensive, flexible and informal. Privacy and confidentiality can be maintained and relationships preserved. Above all, the parties have the benefit of an independent third party who can help them find a solution.

The disadvantages of mediation are relatively few: It needs the co-operation of both parties; it is not available in disputes involving status, such as proceedings for divorce, sequestration, liquidation or rehabilitation orders; and the outcome of the mediation, if an agreement has been reached, can only be enforced through court proceedings.

Mediation is particularly suited to disputes between parties who are in continuing or long-term relationships such as husband and wife, employer and employee, and landlord and tenant. Many countries provide for compulsory or court-supervised mediation for disputes falling within those categories. Mediation is also suitable for the resolution of disputes such as those arising between partners or joint owners of property. What most of these types of matters have in common is something deserving of preservation in the interests of both parties, for example, a marriage or the welfare of children, the employee's job or services, the tenancy, and so on. Litigation tends to destroy relationships and legal practitioners would be well-advised to consider mediation as a less destructive way to resolve disputes in those areas of legal practice.

Mediation is not suitable for the resolution of certain types of disputes, for example, disputes involving purely legal questions or complicated questions of fact or credibility, cases where one of the parties may have an ulterior motive (to agree to mediation) and where one party is at a disadvantage. Mediation is also not suitable where one party is, for emotional or psychological reasons, vulnerable, for example, in a family dispute where there are allegations of abuse. Mediation is also inappropriate in cases where there is a dispute based on fundamental religious or ethical beliefs.

According to Chapman, the following questions may affect the client's decision when faced with the choice between litigation and mediation:

- Can I afford the cost – financial and otherwise – of litigating the dispute?
- Do I have the resources to meet an adverse result?
- Can my family and I cope with the stress of the continued conflict and the trial?
- How would a settlement sit with my sense of justice?

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- What might I achieve by settling that I cannot achieve at a hearing?
- How could the publicity of trial affect my reputation?
- What moral obligation do I have to resolve the dispute?
- How afraid am I of losing control of the outcome?
- What could be the flow-on effects of this case?
- Do I just want to get rid of this problem?

If the client after considering these matters and your advice should agree to mediation, your role as legal practitioner is not over yet. Your client will need advice and assistance throughout the procedures that follow upon the decision.

A properly structured mediation usually includes:

- the agreement by the parties to resolve their dispute through mediation.
- the appointment of a mediator.
- a preliminary conference where the parties discuss, among other things, the role of the mediator and their legal practitioners, confidentiality, the issues, documents, information and reports to be exchanged, and the date, time and venue of the mediation.
- the exchange of documents, information and reports, if agreed at the preliminary meeting.
- the hearing.
- implementation of the outcome, if the mediation has been successful.

There is no prescribed procedure to be adhered to at the mediation. Nevertheless, an experienced mediator will probably follow a staged approach:

- The mediator makes an opening statement, explaining how the process will be conducted, what standards of behaviour will be expected of the parties, and encourage an attitude conducive to a resolution of the dispute.
-

The parties in turn are given an opportunity to state their key concerns briefly.

- The mediator ensures that the parties understand the issues and sets an agenda for the discussion.
- The mediator and the parties go into session, discussing the issues in the order set previously.
- If deemed advisable, the mediator meets with each of the parties separately for confidential discussions.
- The parties negotiate under the guidance of the mediator.
- Any agreement the parties reach is reduced to writing. If the parties cannot agree, they record that fact and may then have to proceed to another form of dispute resolution.

Legal practitioners have an important role to play at various stages of the resolution of the dispute by mediation. It is of the essence in the mediation process that the parties will negotiate with each other with the purpose of finding a mutually acceptable settlement. Thus, the skills, procedures, protocols and ethics of the negotiation process are also brought to bear on the mediation process. The preparation, planning and structure of the mediation resemble that of a negotiation. Such differences as there may be are necessitated by the fact that the negotiations are conducted under the guidance of the mediator.

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You will be involved in the following stages of the mediation process:

- In the initial stage when you are consulted, you must investigate the matter in order to determine whether the client has a claim or defence and whether the dispute is suitable to be dealt with through the mediation process. After the client has been advised on the benefits of mediation and mediation has been decided on, you must seek the agreement of the other party (through his or her legal practitioner, if one has been instructed) that the parties should try to resolve their dispute through mediation.
- You must then advise the client on the terms of an appropriate mediation agreement and draft or settle it. It is usually agreed (in the mediation agreement) that all concessions and discussions in the mediation will be without prejudice and will be kept confidential. Such concessions and discussions will therefore enjoy privilege from disclosure in subsequent proceedings. Once the mediation agreement has been signed by the parties, you must prepare the client for the mediation. This preparation is done the same way as for a negotiation, except that the client must be made aware of the mediator's role. You have to keep the client fully advised throughout the mediation process but the client must make his or her own decisions. Mediation, like other forms of ADR, can only be conducted properly if the client is fully prepared as if for trial. This ensures that the client has a full understanding of the strengths and weaknesses of the case, the facts and documents, the important issues, as well as the risks involved, and has a broad understanding of the legal principles involved.
- You must advise the client fully on the issues and the alternatives which are available to resolve them. The client has to understand the consequences of any settlement. The client also has to be advised on the further means to resolve the dispute in the event of the mediation not being successful in producing a settlement.
- A strategy for the mediation must be developed with the client. The client has to know precisely what to expect and what to do at each stage, especially in a mediation that is to take place behind closed doors and without legal practitioners. If you are allowed to be present and to take part, your mandate to settle must be clarified in advance.

- You have to provide the mediator with such material as the latter requires, including a summary of the issues, a concise statement of the client's main points, a paginated bundle of the client's documents and relevant case or statute law.

- The mediation process is controlled by the mediator. Your principal function is to act as advisor to the client. You therefore have to assist the client to put his or her views across, to listen to the other side's views and to remain focused on seeking a solution which will allow for the views, interests and concerns of both parties to be taken into account. Where necessary, the legal practitioner will give the client legal advice. You also have to help the client to find new options, to reconsider existing options and to proceed in a dynamic fashion, rather than to stick slavishly to pre-determined views and options. The process is by nature dynamic and requires the will and ability on the part of everyone involved to change their initial stances in order to meet each other's concerns. The process relies heavily on goodwill, a good-natured attitude and a lot of give-and-take. It is the legal practitioners' function to assist in maintaining these. Throughout the mediation you must continuously re-assess the client's position in order to advise the client whether any alternatives to a negotiated settlement (such as litigation) should be invoked instead of proceeding with the mediation.

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- If a settlement is reached, the legal practitioners, in conjunction with the mediator, must prepare a written agreement for signature by the parties.

- If the mediation process produces a settlement agreement, it must be implemented; if necessary, by enforcing the settlement like any other contract. If no settlement has been reached, you must advise the client on the benefits of another form of ADR or litigation and, if instructed to proceed, adopt the appropriate course.

Court-supervised mediation is the norm in many countries and it is likely that South Africa will soon follow suit. Draft mediation rules which have been published that:

- recognise that mediation facilitates an expeditious and cost-effective resolution of a dispute between litigants.

- contemplate the appointment of a *dispute resolution officer* to whom the clerk of the court or the registrar (as the case may be) must refer a dispute *whenever an appearance to defend is entered in action proceedings or a notice to oppose is delivered in application proceedings*.

- provide that the *court may at any stage of the litigation refer a matter to a dispute resolution officer to facilitate mediation*.

- provide that a litigant *may at any stage during the litigation apply to court for the referral of a dispute to mediation*.

- prescribe the functions of a dispute resolution officer, which include – after consultation with the parties – the selection of a mediator, fixing a date for the mediation, and, if a settlement is reached at the mediation, placing that agreement before a judicial officer for *noting that the dispute has been resolved*.

- preserve the right of a litigant to refuse to submit the dispute to mediation but require that the consequences be explained to the litigant concerned and that he or she sign a memorandum to that effect.

-

provide that the court hearing the matter may take into account that a litigant has refused to participate in a proposed mediation when considering the issue of costs.

- make provision further for matters such as suspension of time limits pending mediation, rules for the mediation process, settlement agreements, fees of mediators, representation of parties at the mediation, and the qualification and appointment of mediators (to be determined and appointed by the minister).

A pilot mediation service was introduced with effect from 1 December 2014 by amendments to the Magistrates' Courts Rules. By all accounts the project was successful but, apparently, the Department of Justice and Constitutional Development lacks the funds to introduce it in all Magistrates' Court districts and the programme has since been discontinued in the handful of courts where it was tried.

3.5 Negotiation

A dispute can be settled by the conclusion of a contract called a 'compromise' or 'settlement'. A compromise is a contract by which an existing or potential dispute is resolved by the creation of new rights and obligations. When the new contract is concluded, it replaces (novates) the original rights and obligations the parties had, unless they agree otherwise. In some cases it may be necessary to keep the original cause of action alive in order to enforce a party's rights, as occurs frequently when the compromise includes a consent to judgment in the original action.

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A compromise is usually reached by the process known as 'negotiation'. While commercial agreements are usually concluded by the parties themselves, it is inevitable for legal practitioners to be involved when clients attempt to resolve their dispute by concluding a further contract as the purpose is to avoid or settle litigation. For that reason alone, every legal practitioner should know how to negotiate a compromise. However, negotiation skills are also necessary for other purposes. Not all cases involve a dispute. Sometimes a client may want the help of a legal practitioner when negotiating terms of a new agreement, or new terms for a renewal of a lease, for instance. What these cases have in common with attempts to settle an existing dispute, is that there are parties involved with adverse interests who wish to regulate their future relationship for their mutual benefit.

Negotiation skills are entirely different from those required to conduct litigation. The word 'negotiate' has its origins in the Latin verb '*negotiari*', which means 'to trade'. While a litigator is by nature a soldier, a negotiator has to be a diplomat. This explains why it is so difficult to litigate and negotiate effectively at the same time! It is also important to remember that a trade almost invariably requires that something be given in return. Thus, in an action for the payment of money, the claimant often has to give up something. This could mean giving up part of the claim, or the right to interest, or even the right to immediate payment. It may even mean giving up a defence to a counterclaim. The first lesson to learn in the skill or art of negotiation is that one has to be prepared to give something in return. This applies to both sides in the dispute.

If the negotiations are successful the parties can benefit in many ways. A compromise can be achieved quickly and relatively cheaply. It can achieve certainty and finality while avoiding the risk of uncertain outcomes. It can help to maintain the business or family relationships between the parties that litigation so frequently destroys. It is a process the parties control themselves, as opposed to being locked into the rules of court and the law of evidence. Thus the parties can control not only the outcome (whether they settle at all or on what terms they settle) but the method used to resolve the dispute itself.

Negotiation techniques are not usually taught at our universities and the legal profession has not included negotiation skills in the syllabus for admission to the Bar or to the attorney's profession. Nevertheless, in recent times negotiation skills have received more attention in legal publications and in teaching programmes around the world. This reflects recognition of the importance of negotiation skills for every lawyer, not only those involved in litigation practice. A legal practitioner

who has mastered the mutually complementary techniques of negotiation and advocacy will have the complete range of skills necessary to deliver a professional service to clients in all areas of dispute resolution.

A typical negotiation based on scientific principles will have a structure that could be used in every case. The six essential steps in the negotiation process are:

- adopting a basic negotiation strategy.
- the analysis of the facts, the law and the client's objectives.
- anticipating the opposition's case.
- preparing for the negotiation.
- conducting the negotiation.
- concluding the negotiation.

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3.5.1 *Adopting a basic negotiation strategy*

There are three main styles of negotiating, the 'competitive style', the 'co-operative style' and the 'problem-solving style'. Often a particular style is adopted without advance planning or even a conscious decision. However, there is more to a negotiation than meeting the other side and bargaining away. A negotiation has to be planned and executed as carefully as litigation. In your planning the first step is to decide on a style or approach for the negotiation. Often the approach adopted reflects the particular legal practitioner's individual personality and style or even sphere of practice. Advocates, according to the nature of their profession, are adversarial in their approach to solving problems and are likely to adopt a more competitive style than attorneys. Attorneys, on the other hand, may well adopt an approach that is designed to find a solution to a common problem. Each style has its advantages and disadvantages, though.

A negotiator using the *competitive style* seeks to gain as much as possible while giving up as little as possible, and approaches the negotiation as if it were a contest. The main advantages of the competitive style are that it may produce a result close to the starting position, it is more likely to be effective against a weak opponent and to win concessions, and it has fixed objectives and makes it clear that you are out to *win*. This may produce good outcomes and impress clients.

But there are some equally clear disadvantages. A competitive approach increases the chances of a deadlock, it may damage the relationship between the parties irreparably, it may be less likely to produce an agreement both sides can live with, and it may generate mistrust, aggression and frustration on the part of the opposing legal practitioner and client.

A *co-operative style*, like the competitive style, puts the interests of the client first but seeks a solution that would maintain a good relationship with the other side. In order to achieve this, a negotiator using this approach will tend to look for common ground and shared interests. A co-operative style is more likely to achieve a settlement, is less likely to damage the relationship between the parties, is more likely to produce a fair result, and may encourage the other side to make concessions. However, the use of the co-operative style in a negotiation could all too easily lead to the situation where the client's case is not pursued vigorously enough and an insufficient settlement is accepted. This may happen when concessions are made too easily, when the strengths of the client's case are not given their true weight or are not pursued vigorously enough, when a settlement is accepted simply for the sake of settling, or when the co-operative negotiator bows to pressure from a more aggressive negotiator.

The competitive and co-operative styles are both positional, meaning that the negotiator starts from the standpoint of his or her client and seeks to achieve a solution that primarily takes into account the interests of the client. The *positional approach* is the conventional method of negotiating; it is only recently that legal practitioners have started looking at another method to resolve disputes by negotiation. That method has been found in the *problem-solving style* of negotiation. This approach concentrates on the problem faced by *both clients* as a joint problem for which the best possible solution must be found. This requires both sides to work together in exploring various means to find a solution that will enhance the gains for *both clients*. In going about the matter in this way, the legal practitioners consider all the possible effects of various alternatives on both the parties. These effects may stray well outside the traditional sphere of legal practitioners and include such diverse aspects as the legal, financial, social, personal, and even psychological, effects of a particular solution on *each of the parties*.

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While there are undoubted advantages in the problem-solving approach for certain kinds of disputes or situations, it has some disadvantages in a dispute of a legal nature. The main problem for a legal practitioner engaged in litigation is that he or she has to advance the client's case as strongly as the circumstances permit which often means doing as much harm as possible to the other party's case. Clients also expect an adversarial attitude to be adopted, especially in the early stages of a particular dispute. The problem-solving approach works well in cases where there are third parties involved, or continuing relationships, or where there are new deals to be made even while old disputes remain to be resolved. For example: Family disputes where custody and maintenance of children are involved, disputes between builder and owner or charterer and ship-owner and negotiations for the conclusion of new contracts. In cases like these, the parties may start out with adversarial attitudes but they are required by their mutual interest and ongoing relationship to co-operate with each other. Therefore, an approach that concentrates on finding the best solution for the joint or common problem, rather than one which seeks to give *one of the clients* his or her wishes, is more likely to be the right answer in the long term.

The positional approach has certain advantages for litigators. The *first* is that they are familiar with this approach to solve legal problems. The *second*, which should not be underestimated, is that clients often expect this sort of approach to be adopted. They see the other side as the enemy and they want an approach that aggressively pursues their own interests and the outcomes they want, even at the expense of their opponent. The *third* advantage is that the legal practitioner on the other side will probably follow the same approach, allowing both sides to prepare knowing more or less what is likely to happen during the negotiations. The main advantage of the positional approach is that it allows the negotiation to be planned carefully in advance, with a planned opening position, a clear understanding of the concessions which may be made, and a defined *bottom line*.

Which of these approaches one adopts, depends on the circumstances. The positional approach may be preferred to the problem-solving approach when the dispute is one that ordinarily would be resolved by litigation. Care must nevertheless be taken that an approach is adopted which is suitable for a particular case. Factors that could have a bearing on the approach to be adopted include:

- the type of case.
- its strengths and weaknesses.
- the relationship between the parties.
- any points of law affecting the dispute.
- your personality and style.
- the personality and style of your opponent.
- the client's instructions.

- any obligations which may be imposed by the law (for example in a compulsory negotiation between a union and an employers' organisation).

It is suggested that if there is any doubt, the positional approach should be adopted as it is the least likely to result in a settlement that does not take proper account of the client's wishes and the strengths of the case.

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3.5.2 *The analysis of the facts, the law and the client's objectives*

During the negotiations you are going to have to explain your client's case, defend it against attack and persuade the other side to *accept* it. This sounds suspiciously like the litigation process, doesn't it? The reason is that a negotiation proceeds in ways that are very similar to litigation. The strength of your bargaining position depends on the facts, the law and your ability to persuade. While you only have to persuade the judge in a trial, the persons to persuade in a negotiation are the legal practitioner and client on the other side of the dispute. While the legal practitioner on the other side may be objective and rational, the opposing client has a personal interest in the outcome and is therefore less likely to make decisions based on the objective facts and the law. It is this feature which makes it important that a legal practitioner entering into negotiations for a client should have mastered the facts and the law well enough to be able to present them persuasively. Without a persuasive case, there will be no reason for the other side to make any concessions at all.

The methods legal practitioners use to analyse the facts and the law in preparation for a trial, are discussed in chapter 13. Those methods are equally applicable to the preparation a legal practitioner needs to do for a negotiation. When these preparations have been completed, you should have a scheme containing the following three elements:

- Your client's objectives: What exactly does the client want to achieve?
- Your analysis of the facts, including the available oral and documentary evidence: What are the facts? What evidence is there to support the client's claims, defences or objectives?
- Your analysis of the law: What legal principles are involved? How do they affect the strength of the client's case?

These three elements are inextricably linked to each other; what the client wants determines what facts are relevant, and the same principle applies to the law. This analysis is done exactly as for a trial. One simply cannot conduct negotiations for a possible settlement of a dispute properly without knowing exactly how the same dispute could be dealt with by taking it to trial.

3.5.3 *Anticipating the opposition's case*

There is one important *caveat*, however: where litigants enter into negotiations before the case is ready for trial, in a negotiation neither side will have had the benefit of the other's pleadings, discovery, further particulars or expert reports. One enters the negotiations in these instances with less knowledge of the overall case than one would have in the litigation process. To overcome this shortcoming, one needs to anticipate the case for the opposition. What stance are they likely to take? What facts or evidence could they have that you don't have? What surprises could there be in store for you?

In some cases the prior events and exchanges between the parties allow a fairly accurate assessment of the other side's case and their likely attitude at the negotiation. Where that is not the case, it might be advisable to insist on an exchange of information before the proposed negotiation takes place. In either event, the case for the other side must be carefully considered and ways found to answer it. This is again done in much the same way as when preparing for a trial; one has to find and develop a theory of the case which is cohesive, comprehensive and convincing, taking account of all the known facts and circumstances, including those which favour the opposition. If one cannot

find an answer [Page 62] for the opponent's case, it probably means that they have a good case and they will be unlikely to settle on terms that are unfavourable to them.

3.5.4 *Preparing for the negotiation*

The preparation up to this stage ought to enable you to devise a strategy for the conduct of the negotiation. You must know the strengths and weaknesses of your client's case and what your client's objectives are. You should also have a good idea what case the other side is going to advance.

Your plan or strategy for the negotiation must include notes on the following:

- What is the client's bottom line, meaning what is the absolute minimum the client should accept or the maximum he or she should concede?
- What concessions do you anticipate you are going to *have to make* in order to achieve your client's objectives?
- What other concessions will you be prepared to make in order to achieve those objectives?
- What concessions will you require the other side to make in exchange for the concessions you are to make?
- Are you going to adopt a competitive or co-operative style? Or are you going to negotiate aggressively at the start but mellow into a more co-operative style during the negotiations if the competitive style does not work? Are you going to adopt the positional rather than the problem-solving approach? What possible response should you prepare for the style or approach the other side may adopt?
- What are you going to do if your client's bottom line is not acceptable to the other side?
- What tactical considerations can you bring to bear on this negotiation?

As you prepare through each of the preceding steps, you will become steadily better prepared for the negotiation meeting.

3.5.5 *Conducting the negotiation*

There are no clear guidelines for a legal practitioner's role in bringing about a compromise through negotiation. You may have to look at various aspects of your discipline, for example, the client's mandate, the ethics of the profession, your professional responsibility to the client and even the principles of the law of contract relating to misrepresentation, non-disclosure and agency.

A venue and time must be arranged between the legal practitioners. This can be at the doors of the court or at the office of one of the legal practitioners. (It is customary that the meeting takes place at the office of the most senior legal practitioner representing one of the parties.) The negotiation can also be conducted over the telephone or by way of a video-conference, as the circumstances dictate. There must also be some agreement with regard to who should attend the negotiation. If the clients are not present, they should at least be available at a telephone or in the next room for discussion and giving instructions. In most cases, they will be present.

The parties and their legal practitioners must meet at the agreed venue, on time, and exchange greetings and introductions. Exchanging handshakes may help to loosen the tension. (It is also difficult to fight with someone whose hand you have just shaken.) [Page 63] Starting with a cup of tea and some small-talk can help to break the ice. At an appropriate moment, one of the legal practitioners should initiate the negotiation process. This can be done by summarising the main issue or issues in neutral language. Reverting to our client, Mrs Smith, let us assume a negotiation

with the hospital where our client's children are receiving ongoing treatment. We would like an agreement in terms of which the hospital will continue the treatment but wait for the RAF claim to be finalised before claiming payment from our client. We could start by saying: '*Thank you for agreeing to meet with us. Our client is currently unable to pay for the services and treatment her children have received and will need in future. We would like to discuss our request that our client be given an extension of time to pay until her claims against the RAF are finalised*.'

From this point the negotiation may develop rapidly, depending on the opening stance of the person negotiating on behalf of the hospital. There would be no meeting if the main question, allowing our client time to pay, was not negotiable. So we need to find out what the hospital's attitude is with regard to two main issues, namely when payment will be required and what safeguards or security can be offered to the hospital. Suppose the hospital administrator requests this information, one can immediately get to the point by giving an estimate and by making an offer of security, depending on the client's instructions. Usually the party seeking an indulgence will make the first move. However, there are cases where both sides seek a settlement without any clear indication as to who should make the first move. Making the first move should not be seen as a sign of weakness. Either side can open the discussions without showing weakness or losing face, provided the opening gambit is phrased appropriately.

The best opening will be a short summary of the view of the case coupled with your starting position. While you would like payment to be postponed to the date when you receive payment from the RAF, you may have to agree to a shorter term and give security. (Keep in mind that you are going to try and recover the proceeds of an insurance policy soon. If you are successful in that endeavour, your client will have the means to pay the hospital immediately.) You may also encourage the hospital administrator to indicate what the hospital's attitude to your request is or if there are any special difficulties for the hospital in this case. They must have many similar cases where people injured in a motor collision are brought to the hospital, are too ill to be released but are unable to pay the hospital's charges. The concerns raised by the administrator should be considered seriously; it is not good strategy to belittle or demean their problems. You need to give the impression that you understand the hospital's position and that you would like to find a satisfactory solution for a mutual problem. Emphasising the mutual interests of the parties also shows respect for the other negotiator and reduces the level of confrontation. If the emphasis is to be on the problem as a mutual problem, it may be a good idea to restate the problem to give effect to that approach. This can be done as follows: '*Well, it looks as if we need to find a solution which would allow my client time to pay while giving your client adequate safeguards. Would you perhaps like to start by telling us what kind of safeguards you have in mind?*'

The discussion can then continue in this spirit until one side comes forward with a starting offer. The negotiation will proceed through a discussion of problems the other side may have with the offer, their possible solutions and counter-offers. Various options may be proposed and debated. It is important that both sides contribute by raising possible options and discussing them. Concessions need to be made, by both sides, where appropriate. Each change of position ought to bring the parties closer to an agreement, although there is no guarantee of an early agreement. The negotiation may [Page 64] take time – possibly more than one session. It may require confidential discussions with the client on his or her own. It may require a shift in position, especially if new facts that affect the strength of your client's case are brought to light. There may be a deadlock on a particular issue or even a complete deadlock, with or without progress on some issues. The circumstances will dictate whether it is worth proceeding with the negotiation. A deadlock may sometimes be broken by taking a break or by recapping what progress has been made and summarising the outstanding issues. Often the progress already made during the negotiation provides the impetus for further efforts to find a solution. In the process, your skills of communication and persuasion will no doubt be tested to the full. Perhaps your patience too.

The following additional matters should be kept in mind for the conduct of a negotiation:

- Make sure from the outset whether the legal practitioners on both sides are properly authorised and confirm the extent of their mandate when any agreement is reached. You don't want any settlement reached to fail for lack of authority on either side, nor do you want to be sued for breach of an implied warranty of authority. Consider your mandate at every stage and particularly when you are about to make a concession or an offer on behalf of your client.

-

Ensure that the negotiations are conducted on a *without prejudice* basis. Communications and documents forming part of genuine attempts to settle a dispute will be protected by privilege and may not be repeated in court if the communications or documents were expressly or tacitly intended to be *without prejudice*. This protection does not extend to admissions that are properly made or should have been made openly, such as where part of a debt or claim is admitted but a defence is raised in respect of the balance. Further, once a settlement agreement has been concluded, the prior negotiations may be admissible in certain cases, for example where the settlement itself is attacked on the grounds of fraud or non-disclosure. Negotiations between counsel for the purpose of reaching a compromise are by tacit agreement conducted on a *without prejudice* basis, but it is still advisable to impose the *without prejudice* qualification expressly. The same principle ought to apply when attorneys negotiate on behalf of their clients.

- Create and maintain an atmosphere that is conducive to a settlement. Avoid aggressive, confrontational language and posturing.

- Make notes of all concessions which are made during the negotiating process and ensure that the parties are in agreement whether any particular concession or admission is to stand even if there were to be no final agreement.

- Focus on the issues or problem rather than the parties or the general facts. *Separate the people from the problem.* Be objective, not personal, in your approach towards the other side.

- Keep the client informed of all offers which are made. Advise the client on what he or she *can* and *should* do but allow the client to make his or her own decision whether to make or to accept or reject an offer.

- Do not knowingly misrepresent the facts or conceal any fact that ought to be disclosed to the other side. Do not allow yourself to be used as an instrument of fraud or deception.

- If the negotiations were to stall for any reason, take time out and in private discuss the way forward with the client. Inform the client fully of the consequences of [Page 65] reaching an agreement on the terms offered up to this point and of the failure to reach an overall settlement. Take fresh instructions, if necessary, then return to the negotiating chamber.

- Act professionally throughout the negotiations. This includes treating the opposing client and legal practitioner with the courtesy and respect that would be expected and given in court.

- Above all, be realistic in what you can expect to achieve by negotiating with the other side.

3.5.6 Completing the negotiation

If the negotiation is unsuccessful, the legal practitioners involved should try to reach agreement to try again after reconsidering the matter or to find a solution by way of a different form of dispute resolution. Mediation may be appropriate if the parties are still interested in exploring a settlement but feel that they need the assistance of an independent third party to broker a settlement. If none of these alternatives appear to be acceptable, the parties should try to part ways without rancour or blame. In any case where no final settlement has been reached, it will be important to note precisely what admissions or concessions are to stand and to reduce any agreement in that regard to writing.

If an overall agreement is reached, both legal practitioners involved must make sure that the terms of the agreement are acceptable to their respective clients. They must check carefully that the proposed agreement is complete and that it is enforceable. They must then reduce the agreement to writing before concluding the negotiation. The agreement must state explicitly whether the underlying dispute is novated (replaced) and, if not, what the effect of the settlement agreement will be. In some cases, for example where action has already been instituted, it may be advisable

from the plaintiff's point of view to keep the original action alive for the purpose of enforcing the plaintiff's rights if the defendant were to breach the terms of the settlement. In fact, it is common for a consent to judgment to be completed in such cases on the basis that the consent will be used should the defendant not perform his or her obligations under the settlement. The agreement must be signed by the clients individually and by their respective legal practitioners. When they part company the clients and their legal practitioners must know precisely what is to happen next in the execution of the parties' obligations under the settlement.

3.5.7 Common mistakes in conducting a negotiation and how to avoid them

The Inns of Court School of Law has identified 11 common mistakes in conducting a negotiation and has suggested appropriate remedies for them.

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Table 3.1 Common mistakes in negotiation and remedies

Mistake	Remedy
Underselling the client's case.	Don't settle for less than you think the client's case is worth.
Dealing with the case superficially.	Prepare fully instead and get to grips with the true issues.
Adopting a set, inflexible view of the case.	Be flexible to adapt to any kind of opponent and any argument the opposition may raise.
Lacking familiarity with the facts.	Do a detailed fact analysis. (See chapter 13.)
Failing to prepare a logical structure for the negotiation.	Prepare to deal with the issues logically.
A lack of practical planning.	Be prepared to consider the practical effects of any proposals on the client.
Failing to take account of the opponent's case and being caught by surprise as a result.	Be prepared to deal with the situation if new facts were to be raised by the other side.
Failing to plan concessions.	Concede only with good reason and only on the basis of what you have planned to concede.
A lack of attention to detail.	Think ahead to the implementation of the deal offered or contemplated.
Unreasonably blaming the opponent for the failure of the negotiation.	Your preparation needs to be so thorough that you are able to deal with any kind of opponent.
Poor use of time.	Get to the real issues quickly.

3.6 Doing nothing

Sometimes doing nothing is the right thing to do. It may be a good idea to sit back and wait for someone else to take the first step. Reflection may be what is required, even if only for a few days. So meditation joins mediation as a method of ADR. The value of this approach should not be underestimated. Justice Brandeis of the United States Supreme Court is reported to have answered, when asked what the most important thing was he and the other Justices did: 'The most important thing we do is not doing (anything).'

It takes a conscious effort to sit back and let the problem stew for a while, when all our instincts cry out for action. Before you advise a client not to do anything at all in the face of a problem, the pros and cons of all the alternatives will naturally have to be considered and the client advised fully. Some disputes benefit from a cooling-off period during which emotions may subside, enabling the problem to be seen in a more objective light. In some cases one would need to wait for uncertain events to take their course. For example: If the client is the debtor or wrongdoer, one may wait to see what steps, if any, the other party takes to pursue the claim.

But there are also some potential disadvantages to waiting and doing nothing. The most obvious is that the problem is unlikely to go away or resolve itself. The other is that a claim may become prescribed or time-barred, a danger against which legal practitioners should take adequate precautions.

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3.7 Comparative table

Table 3.2 The comparative merits of different forms of dispute resolution

	Litigation	Arbitration	Expert determination	Mediation	Negotiation
Adversarial?	Yes	Yes	No	No	No
Formal?	Yes	Yes	No	No	No
Flexible?	No	A little	Yes	Yes	Yes
Delay in reaching finality?	Long delays	Can be quick, often not	Can be quick	Can be quick	Can be very quick
Cost?	Expensive	Can be very expensive	Not very costly	Relatively inexpensive	Least expensive
Legal aid available?	Yes	No	No	Only in some cases	No
Finality of result?	Subject to appeal	Subject to review	Subject to review	Final as any other contract	Final as any other contract
Proceedings confidential?	Very limited confidentiality	May be agreed	May be agreed	Yes	Yes
Certainty of outcome?	None	None	None	Agreement gives certainty	Agreement gives certainty
Meeting interests of both parties?	No, winner takes all	No, winner takes all	No, winner takes all	Yes	Yes
Enforceable?	Yes, by court execution process	Yes, after applying to court	Yes, after applying to court	No, fresh court action required	No, fresh court action required

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There is another, less obvious aspect to this table. Your ability to deal with or to expose fraud and deception increases steadily as you move from negotiation – where it may be difficult – towards litigation – where the tools of cross-examination and the criminal sanction for perjury are available.

3.8 Alternative dispute resolution for prosecutors

3.8.1 Introduction

There are occasions when prosecutors become involved in ADR. A criminal case involves a dispute after all, and the trial is the means of determining the outcome of that particular contest. But not all

criminal cases need to go to trial. In many some arrangement can be reached between the prosecution and the defence that will obviate the need for a trial. A plea of guilty to a lesser or alternative charge may be offered and accepted. The prosecutor may withdraw the charges altogether. A plea and sentence agreement may be concluded in terms of section 105A of the Criminal Procedure Act 51 of 1977 (CPA).

The general process by means of which these outcomes are achieved is negotiation and prosecutors may adopt the methodology and approach advocated in paragraph 3.5 above in all cases save where there are special provisions or directives in place, for example, a directive under section 105A.

3.8.2 Plea and sentence agreements

Section 105A(1)(*a*) of the CPA is the empowering provision that allows prosecutors to *negotiate and enter into* a plea and sentence agreement. It is implicit in the provision that there must be a negotiation between the prosecution and the defence. The effect of section 105A is that as many as five different parties may be part of the process. They are:

- the prosecutor.
- the accused and his or her legal practitioner (if one has been appointed).
- the investigating officer.
- the complainant (with or without his or her representative).
- the judge or magistrate in whose court the agreement is to be put into effect.

The legal requirements for a section 105A agreement are numerous and they are technical. It is not the function of this book to enumerate them. It will suffice to highlight some of them in order to demonstrate that the negotiation of a plea and sentence agreement corresponds in some ways with negotiations conducted by legal practitioners outside the criminal sphere while differing from it in others. Note the following:

- A plea and sentence agreement may only be concluded by a prosecutor who has been authorised in writing by the National Director of Public Prosecutions (section 105A(1)(*a*)).
- The accused must be legally represented (section 105A(1)(*a*)).
- The agreement must be negotiated and entered into before the accused has pleaded to the charge (section 105A(1)(*a*)).
- So far as the content of the agreement is concerned, the accused must plead guilty to the charge and must be convicted. The agreement must include the sentence to be imposed, which could include an award for compensation in terms of section 300 of [Page 69] the CPA (section 105A(1)(*a*)(i) and (ii)). The agreement must state the *substantial facts of the matter*, meaning that it must cover all the legal elements (*facta probanda*) of the offence concerned (section 105A(2)(*b*)).
- The prosecutor must consult the investigating officer (section 105A(1)(*b*)(i)) and must afford the complainant or his or her representative the opportunity to make representations to the prosecutor regarding the content of the agreement and the inclusion of a condition relating to compensation or service in lieu of compensation for pecuniary damage or loss (section 105A(1)(*b*)(ii)).

- Prosecutors should apply the protocols and procedures suggested for interviews with the complainant and in the case of sex crimes must be particularly careful to involve the complainant (assisted by his or her support person where appropriate) before concluding the plea and sentence agreement. That said, the decision whether to conclude the agreement is that of the prosecutor and not of the complainant or the investigating officer.

The remaining provisions of the section deal with the recording and implementation of the plea and sentencing agreement and are not directly relevant to the subject-matter of this chapter.

A prosecutor who has been authorised in writing to negotiate and enter into a plea and sentence agreement will inevitably have to employ the following skills discussed in this book:

- Conduct a fact analysis to determine what charge or charges are supported by the facts and evidence (chapter 13).

- Consult with the investigating officer and with the complainant or his or her representative (chapter 1).

- Advise and counsel the investigating officer and the complainant (chapter 2).

- Negotiate with the legal practitioner representing the accused (paragraph 3.5).

- Reduce the plea and sentence agreement to writing (chapter 5).

- Represent the prosecution at the hearing when the plea and sentence agreement is put to the court for implementation (this is an example of what, for want of a better description, is called 'non-trial advocacy').

Section 105A has detailed provisions and this discussion should not be used as a substitute for studying its provisions. Note also that the National Director of Public Prosecutions has issued directives to be observed by prosecutors in the application of section 105A.

3.9 Protocol

In arbitration and cases of determination by an independent third party or expert, legal practitioners act in roles similar to what they would fulfil in litigation. The same protocols, adapted for the individual situation if necessary, are therefore applicable. For example: An arbitrator is addressed formally as Mr, Miss, Mrs, or Ms Arbitrator, as the case may be, and a mediator in similar fashion. An arbitrator or mediator may also be addressed by their surname, again with the formal Mr, Miss, Mrs or Ms. The relevant protocols are discussed fully in the chapters dealing with the conduct of trials (chapters 16–22).

Treat the arbitrator or expert as you would a judge, subject to one precaution. The arbitrator or expert may not be a legal practitioner, in which event the duty to assist him or [Page 70] her with the law is understandably higher. Since you are trying to persuade the arbitrator or expert to accept your client's point of view, it would be tactically sound to ensure that your client's case is seen in the full light of the legal principles that are applicable.

For negotiation and mediation the following rules and principles must be applied:

- Be courteous and professional in your conduct towards your opponent, his or her client and the mediator.

- Proceed with caution if your client's opponent is not represented by a legal practitioner. While you are not required or allowed to give the opponent legal advice, you should be slow to take advantage from your superior position or knowledge. It is best in a case where you think that an injustice may be done, to advise the opponent to engage a legal practitioner.

- Do not stray beyond the terms of your mandate.

- Do not get personal.

- Address all participants as Mr, Miss, Mrs or Ms, as required. In rare cases the parties and legal practitioners will know each other so well that this may be artificial; depart from the basic rule with caution, however.

- Allow the client to make his or her own decisions.

3.10 Ethics

The rules of ethics that apply to arbitrations are the same as those applying to a legal practitioner's conduct in litigation in a court of law. The rules of ethics applicable to the various components of the litigation process are discussed in PART 4 – Trial stage.

No special principles of ethics have been laid down in the LPA Code of Conduct for negotiations and mediations. It is suggested that the basic rule of ethics for legal practitioners in negotiations and mediations is this: It is the legal practitioner's duty to take reasonable steps to ensure that both he or she and their client:

- act in good faith in the negotiations.

- make a reasonable effort to settle the matter.

- do not behave in an intimidating, abusive or threatening manner.

- do not exert duress or undue influence over the other party.

- respect the independence and objectivity of the mediator.

- do not employ methods that are fraudulent or misleading.

- make an honest and truthful disclosure of information or documents when required to do so.

- do not put forward a proposition knowing it to be false, or without a reasonable basis for his or her belief that it is true.

- do not allow the other party to labour under a misapprehension of an important fact or document.

The penalty for misleading conduct, by commission or omission, is that any settlement agreement may be set aside on the same grounds as any other agreement.

Chapter 4
Preparing to commence action

Chance favours only the prepared mind.
Louis Pasteur, 1822–1895

The harder I practise the luckier I get.
Gary Player, SA golf player

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4.1 Introduction

Once litigation is decided on you have to prepare for it in a way that will ensure that you are able to cope with the process as a whole. While the litigation process itself is regulated fairly comprehensively by the rules of court and the law of evidence, there is much more preparation to be done before a summons can be issued or a plea can be delivered. Cases are often won or lost on the strength of the work done before the summons is issued. It is in this phase that astute legal practitioners come into their own. By the time the litigation gets underway, they are already fully prepared for almost anything that could happen during the proceedings.

Litigation is adversarial, like war. No general would enter a battle without preparing for it in advance – long before moving a single soldier or machine. Being prepared for war means having your soldiers armed and ready, your equipment serviced and in place and your supply lines open. You must also have sufficient funds and resources available to fight the battle for as long as it is likely to last. You would not put your soldiers at risk without giving an ultimatum to the enemy either. Legal practitioners and prosecutors plan for the litigation process in exactly the same way, even if the stakes are considerably lower.

4.2 Letter of demand or repudiation

It is customary to write a letter of demand to the prospective defendant before a summons is issued. There are many reasons why a letter of demand must precede the institution of an action:

- The defendant may pay the claim or enter into negotiations. This may produce a settlement with a resultant saving in time, effort and legal costs.

- Conversely, the defendant may raise a valid defence to the claim, again resulting in a saving in costs, not to mention saving face.

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- There may be tactical advantages in sending a letter of demand to the prospective defendant. For example: If the defendant does not respond to the letter of demand, any subsequent denial of liability may be regarded with some suspicion. On the other hand, if the defendant does respond, the plaintiff will have advance knowledge of the defence to the claim. This may help the plaintiff to weigh up his or her options with a better understanding of the facts or the consequences of any decision to be made.

- A demand may be necessary to place the defendant in *mora* (default), particularly in cases where a contract does not specify a date for the defendant's performance. (This demand is called an *interpellatio*.)

- A demand may be combined with the exercise of an election, for example, where a claimant has to elect whether to ignore a repudiation of a contract or to accept it and to claim damages.

- Where interest on unliquidated damages is to be claimed, a demand giving sufficient particulars to the defendant to enable a reasonable assessment of the amount of the loss will be necessary.

- In some cases a demand is required by statute. There are usually strict time limits imposed in such cases. Without an appropriately worded and timely demand, the claim may lapse altogether. In some cases action may not be instituted before a certain period has elapsed after the demand has been made. There are many instances where statutory demands are required and it is essential that appropriate legal research into those requirements should be undertaken at the earliest opportunity.

- There are some cases where a statutory demand has to be made in a prescribed form or by giving specified information, for example, in claims for damages under the Road Accident Fund Act 56 of 1996. Again, this is a case where many a mistake has been made in the past and the relevant statutes, regulations (if any) and case law must be consulted.

A letter of demand should tell the defendant what is being claimed, the general basis for the claim, and what will happen if the claim is not met within a stated time. The claim has to be assessed and stated accurately, otherwise it could prove quite embarrassing at the trial if the plaintiff has to explain a discrepancy that should not have been there in the first place. The basis of the claim should equally be stated accurately. While it is not necessary to set them out as completely as particulars of claim, the material facts and legal basis of the claim should at least be given in summary form, using simple terms such as 'negligence', 'breach of contract' or 'unjustly enriched'. Last but not the least, the letter of demand must advise the defendant in clear terms what the plaintiff intends to do

if the demand is not met within the given time. One will obviously give the defendant a reasonable time to consider the claim, take advice and respond.

Where a statutory demand or claim is required, the particular requirements of the statute concerned must be complied with meticulously. In ordinary cases the letter of demand must give:

- the name and address of the legal practitioner representing the plaintiff, usually in the letterhead.
- the name by which the plaintiff is known to the defendant.
- particulars of the claim and the legal basis for it.
- what the defendant is required to do and the time for performance.
- the consequences if the demand is not met.

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A letter of repudiation is a response to a demand and follows a similar format. Instead of giving details of a claim, it gives details of a defence. It can even make a counter-demand. A letter of repudiation must answer every point of substance in the letter of demand; otherwise the conclusion may be drawn that there is no valid answer to any unanswered allegation and that it is true. It is especially important that all defences are raised at the earliest opportunity since the value of an otherwise good defence may be reduced if it is raised late.

Letters of demand or repudiation must not be threatening or abusive. A threat is more likely to provoke resistance than result in a favourable response. Threats and abuse don't belong in the practice of law anyway. The letter must be polite, professional and informative. Write every letter in the knowledge that it may end up before the court. The letter must also be persuasive. If you can avoid litigation by persuading the other side that your client has a good claim or defence you should do so. A letter of demand must therefore be regarded as an exercise in advocacy, not gamesmanship. Writing that the action *will be vigorously pursued* or that the action would be *vigorously defended* is unnecessary. If action is instituted it is your duty to pursue or defend the claim. It will serve a better purpose to point out why the claim or defence is good.

4.3 Preserving the evidence

Cases are decided on the facts proved by the evidence and on the law applying to the proven facts. The law can be found in books: statutes, textbooks and law reports. The evidence, on the other hand, has to be found, then preserved and ultimately presented at the trial. To coin a phrase, the law will still be there tomorrow but the evidence may not. It is therefore extremely important to collect the evidence when it is still fresh and available. One of the first things a legal practitioner has to do when instructed in a litigation matter is to gather and preserve the evidence. Gathering the evidence is not only necessary for the purpose of eventually placing it before the court, it is also necessary for a proper analysis of the case and the client's rights and options. One simply cannot conduct litigation without evidence and without the evidence a legal practitioner's advice amounts to little more than guesswork.

However, it is not enough to gather the evidence while it is still fresh. There must be a continuous process of evaluation and analysis for the purpose of finding more evidence to support the cause of action or defence concerned and of developing and refining a persuasive theory of the case.

There are two main kinds of evidence. They are *oral evidence*, which can be also given in writing in an affidavit, and *real evidence* in the form of exhibits. Each piece of evidence must be gathered

in a way that preserves its integrity and ensures that it is still available at the time of the trial. In searching for further evidence, a legal practitioner will typically interview further witnesses and take statements from them, take possession of exhibits, visit and inspect crime or accident scenes, arrange for photographs to be taken of persons, places or things, arrange for plans and drawings to be prepared and models to be built, and arrange for persons or things to be subjected to expert examination.

In criminal cases it is the function of the police to investigate the case and to collect and preserve the evidence. That does not mean that the prosecutor is not involved. To the contrary: A prosecutor will participate in the process very much like an advocate will do by guiding the investigation and the gathering of evidence.

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4.3.1 Witnesses

The details of all persons who are identified as potential witnesses must be taken as soon as possible. Persons who appear to have little or nothing to contribute may later be essential witnesses, so their details need to be taken too. The important details are those that will allow the witness to be traced later, when needed. You must obtain the full names of the witness, work and home addresses, occupation as well as next of kin and their addresses. The witness must be encouraged to keep in contact with the firm representing the client and ideally given the firm's card stating the name of the legal practitioner handling the case.

Written statements must be taken in accordance with the principles and guidelines discussed in chapter 1, when the events are still fresh in the mind of the witness. The statement must be as comprehensive as the understanding of the case at the time allows and must be signed by the witness. When additional information is obtained from other sources, the witness may have to be approached for clarification of certain aspects or even a further statement. The statement must refer to the exhibits within the witness's knowledge and traverse any additional facts the witness can add with regard to the exhibits. Each witness must be asked to comment on what other witnesses have to say *as far as the witness can, and must, legitimately be asked to comment*. Steer away from the danger of telling a witness what other witnesses say when it is unnecessary for the witness to know. Every statement must be signed. An unsigned 'statement' amounts to no more than a legal practitioner's notes. Legal practitioners enjoy a qualified privilege against defamation claims when they act on instructions. A signed statement from a client or a witness is a good start in such a case. Witnesses are also less likely to retract a written statement or to deviate from it. A signed statement may be accepted in an arbitration and can even be used in negotiations with the opposition. It is therefore very important that the witnesses sign their statements.

In some cases it will be helpful to take a statement from the witness at the scene of the incident. Some witnesses are unable to give the details you need unless they are able to point out relevant features or landmarks at the scene. It may be a good idea to take a camera or video camera along to record what the witness points out. The statement must still be recorded as soon as possible, at the scene of the incident if you can, and signed by the witness.

Witnesses must be kept informed of developments and be told when the case is likely to go to trial in order to ensure that they are available to give evidence. If necessary, their employers must be informed too. As employers don't like to be informed on the morning of the trial that an essential employee has to go to court that day, make these arrangements early. Ask the witness and the employer whether a subpoena will be required. Have one issued anyway, but be careful that you don't serve it at an inconvenient or embarrassing moment.

Witnesses must also be informed if there is a possibility that they may be required for pre-trial consultations with counsel. Make arrangements for such consultations *after* you have ascertained what time and date suit the witness. Don't try to force the witness into your own schedule.

Arrange transport for the witness as he or she is actually doing you a favour, and offer to do the same for the trial. It may even be necessary to arrange accommodation and some subsistence allowance for witnesses who live some distance away. In short, ensure that your witnesses are *willing* to give evidence and don't turn up grudgingly, merely because they have to.

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4.3.2 Exhibits

Real exhibits are things (from the Latin *res*) which tend to prove or disprove a fact. For the sake of convenience, and because the rules deal with them differently, we draw a distinction between documentary exhibits (and similar records) on the one hand and other real exhibits on the other hand. They are referred to as 'documents' (or documentary exhibits) and 'things' (or real exhibits) respectively. The discovery process relates only to documents but you should note that there is an extended definition of what we would normally understand to be a document. Appropriate legal research needs to be undertaken to obtain clarity in cases of doubt.

There is a further distinction between documents and things, which exist as part of the events or history of the case and *demonstrative exhibits* that may be used for the purpose of explaining something to the court. For example: The car damaged during a collision may be a *real exhibit* the court can inspect in order to assess the damage or even to try and determine how the collision occurred. A photograph of the same car could be used as a *demonstrative exhibit* for the same purpose. The fingerprint lifted from the scene by means of a strip of celluloid is a real exhibit; it contains the protein or fatty residue left by the hand of the person who touched the relevant object. An enlarged photograph of the same fingerprint with points of comparison marked on it is a demonstrative exhibit; it is created specially for the purpose of the litigation.

Where there are real exhibits in the nature of things, they must be preserved until the trial. Depending on the practicalities of the matter, they must either be kept in a safe place in the attorney's office, or in some other safe place. Since trust account advocates undertake the clerical and administrative work attorneys traditionally do, they should collect and safeguard the exhibits exactly as an attorney would do. Sometimes exhibits of this nature are held in a safe place by one of the expert witnesses in the case. In each case the attorney must ensure that the exhibit is preserved for use at the trial. Real exhibits may also have to be subjected to examination or investigation. For example: A sample of oil taken from a ship accused of polluting the coastal waters must be analysed to determine whether it matches the oil found in the water. The diversity of real exhibits is such that it is impossible to prescribe a uniform method for their preservation and analysis. Practical difficulties with the preservation of real exhibits may be overcome by creating demonstrative exhibits instead, for example, photographs, sketches, models, video recordings, expert analyses and reports.

Documentary exhibits, on the other hand, have to be dealt with in accordance with the rules relating to discovery. They also have to be preserved for use at the trial, and sometimes for analysis. The best evidence rule requires that the original document must be used, unless it is not available and cannot be found after a diligent search. Ideally, the documentary exhibits must be arranged in suitable bundles. Again, the diversity of these kinds of exhibits is such that one cannot lay down any specific principle for all cases. Apply the following basic rules:

- Keep the documents in a safe place; a safe place for your client's documents may well be a fire-proof safe.
- Group documents of a similar nature together, such as correspondence, contract documents, reports and memoranda.
- Use separate folders for the different groups of documents.
- Keep the documents in each folder in chronological order.
- Keep drafts of the same document together.

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- Keep privileged documents in a special folder (and out of the other folders).
-

Keep the documents in such an order that the preparation of a discovery affidavit is made easier.

Documentary exhibits play a special role in litigation, perhaps because so many different documents have become part of our everyday lives. They could be in the nature of invoices, statements, accounts, receipts, delivery notes, faxes and emails, photostatic copies of documents, letters, agreements, notes, statements, cheques, credit card author-isations, tickets for journey by bus, train, aircraft and ship, waybills, bills of lading, charter-parties, letters of credit, wills and estate accounts, title deeds, log books, identity documents and passports, visas or policies. The list is endless. Recent developments in social media have created new categories of 'documents' such as text messages, WhatsApp messages, YouTube videos and the like. They are all discoverable.

Documents make up a significant part of the evidence put before the courts every day, in all types of cases. Coping with this abundance of evidence is a skill every legal practitioner needs to acquire. The first lesson is to take control of the documentary evidence as soon as possible, for the following reasons:

- Documents complete the facts. People often misunderstand the facts while the legal practitioner is able to get a more accurate view of the facts through the documents.
- Contemporaneous documents are usually a more accurate reflection of the events than memory; this is the result of a variety of influences such as inattention, forgetfulness, bias, interest in the outcome, and even manipulation and suggestion.
- Documents are often the most reliable and sometimes the only admissible evidence of a fact: the provisions of a will or the terms of an insurance policy, for example.
- Documents serve as an aid to memory.
- Documents may serve as decisive aids in the determination of the reliability or credibility of oral evidence.
- Documents can provide presumptive proof of a fact which would otherwise be difficult to establish, like the date of birth of an ancestor or the validity of a marriage.
- Documents often provide leads to other evidence or witnesses. A police accident report, for example, may contain the particulars of eye-witnesses to a collision.

It is important to remember that each document will have to be produced to the court and proved by an appropriate witness, unless some agreement to the contrary is reached with the other side. This means that a record will have to be kept of the source of each document which comes into the possession of the legal practitioner handling the case and that each source (person) has to be added to the list of potential witnesses.

It is not enough to gather the exhibits. Each exhibit must be examined and analysed to determine its value to the facts of the case. Where necessary, experts will have to do the investigation and analysis.

4.4 Fact analysis and developing a preliminary theory of the case

From the first interview with the client to the time a summons is issued you will be engaged in a process of evaluation of the evidence and the legal principles that can have a bearing on the case.

This process is never really over and continues throughout the litigation, even as the trial proceeds from day to day. In the initial stages there may not be much to analyse and no clear indication what the claim or defence is, nor whether the [Page 77] claim or defence is good or bad. But that is to be expected. By the time a summons has to be issued or a plea delivered there has to be a fairly clear cause of action (claim) or defence which can be supported by the available evidence.

The first opportunity for a prosecutor to evaluate the evidence and to direct the investigation of the case comes when the docket is presented to the prosecutor. This usually occurs in one of two situations. The first is when the police submit the docket to the prosecutor for a decision – whether to prosecute or not – or for advice. The second is when the police have made an arrest or warned the accused to appear, and the prosecutor is presented with the matter to appear at the first hearing.

In either case the prosecutor handling the docket has to undertake a preliminary fact analysis and develop a preliminary theory of the case.

4.4.1 Initial fact analysis and legal research

Legal practitioners develop their individual ways to analyse the facts. While the process is called 'fact analysis', it is really an evaluation of the available evidence. That evidence will include not only what witnesses can tell the court but also what the exhibits can contribute to the proof in the case. The exhibits are mostly documents. These, in turn, must be analysed like all the other evidence in the case. So the fact analysis includes an analysis of the documents and other exhibits. One cannot prescribe one method for all legal practitioners or even one method for all types of cases. It can be done in stages, according to the system introduced in chapter 1 and explained in more detail in chapter 13, or in a less structured way, without separating the stages of the process.

The fact-analysis process is used to develop a theory to explain all the evidence in such a way that the client's case is accepted as convincing.

What can you do in the early stages of the case to prepare for the trial in such a way that you can advance and protect your theory of the case?

4.4.2 Taking further statements

First of all, you can, and must, take statements from all the witnesses who can give helpful evidence. Let us revert to our client from chapter 1, Mrs Smith. If you have to prove that the light was red when the defendant entered the intersection, you can start by taking a statement from our client and her children. The witnesses do not have to be from your client's car. Fairly obvious avenues to pursue are to determine whether there were any bystanders who saw the collision who can help or whether anyone spoke to the defendant shortly after the collision and if so, what he said. It will help to know if the traffic lights were in working order. After all, your client, Mrs Smith, and the children saw the lights indicating green for them, but that does not necessarily mean they were red for the defendant. You should approach the city engineer to find out whether they have records that will indicate whether the lights were in working order and how they were phased. You can have an additional witness here, and you may later have to decide whether that person should be called as an expert witness. In other words, you look for as much evidence as possible to prove that fact which you see as the cornerstone of the case, namely that the light was red when the defendant entered the intersection. You would naturally prefer eye-witnesses, admissions by the defendant and circumstantial evidence, all to the same effect.

In the other case, where you have to defend the accused on a charge of murder, you will take statements of the accused and all the witnesses who can support his alibi. [Page 78] Furthermore, you will take a very hard look at the evidence of the prosecution witnesses: Who are the witnesses who place the accused at the scene of the murder? Are they reliable? Under what circumstances did they make their identification? How good is their eyesight? Did they know the accused previously? Are they biased against the accused? In this case you will not limit your efforts in trying to find evidence to support the alibi. You will also look for evidence or circumstances that can undermine the prosecution's theory. As you look deeper into the facts, you may modify your initial theory by perhaps restating it as '*the accused could not have done it because he was elsewhere and there has been a mistaken identification*'.

Seen from the prosecution's perspective, the investigating officer will be given guidance with regard to further investigations that may undermine the accused's potential defence.

4.4.3 *Creating demonstrative exhibits*

You also have to turn your mind to the process of persuasion and will contemplate the following: What can you do to make it easier for your witnesses to tell their story so that your theory of the case will prevail? How can you present the evidence so that it will be easy for the judge to understand it? How can you present it so that it will have maximum impact? The answer is, by creating demonstrative exhibits. Three kinds of demonstrative exhibits are used most frequently, namely photographs, plans and drawings, and models. The use of video-recordings has also become common.

The purpose of this type of evidence is to *demonstrate* or *illustrate* a fact or to help the court to understand the evidence. The witness can use it as an aid to explain something he or she has difficulty in putting in words, or it helps to clarify for the judge what the witness is talking about. In every case the demonstrative exhibit must be accurate. While there may be some demonstrative exhibits available already (for example, aerial photographs of a town, the approved plans of a house or even a model of the human brain), demonstrative exhibits usually have to be created for the specific case. Consider how you would go about to obtain or create demonstrative exhibits, for example:

- photographs of the scene of a collision, of a damaged car or of a plaintiff's scars and wounds.
- a diagram of an intersection showing where the traffic lights are situated, with their phasing.
- an approved plan of a house.
- a district surgeon's sketches of the injuries suffered by an assault victim.
- a working model of a ship's MacGregor hatches.
- a model of grain silos.
- an anatomically correct model of the human brain.
- a video-recording of the scene of a murder.

Like all other evidence, demonstrative exhibits must be produced (proved) by witnesses unless there is an agreement that they may be produced by consent. It is therefore important to ensure that the witness who created the exhibit is available to give evidence at the trial.

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4.4.4 *Finding and retaining experts*

Expert evidence could win the case for your client. An expert witness is a person who, by virtue of his or her qualifications, training or experience, is allowed to express opinions which go to proving a fact in issue. However, the opinion must be based on facts that are either admitted or proved in the case. For example: A district surgeon may express an opinion on the question whether the accused was under the influence of alcohol at the time the accused drove a car. The doctor will have to justify that opinion by reference to proven or admitted facts. Some of those facts will depend on the doctor's own observations – these are 'primary' facts – and even on conclusions that can be drawn from them. Those conclusions are known as 'secondary' facts.

There are two kinds of expert. The one gives factual evidence of his or her own investigations and also expresses opinions on those and further facts, for example, the doctor who treated a plaintiff in a personal injury case or the pathologist who performed a post-mortem examination on the deceased. The other kind of expert merely gives opinions on facts provided by others. Both kinds of expert need to be employed early. They can give you valuable advice with regard to any further investigations needed to advance your client's case.

It is not always easy to find a suitable expert. Many professionals are reluctant to give evidence against another member of their profession. Some professionals are reluctant to become involved in litigation as they do not have time to sit around waiting in legal practitioners' reception offices or outside court. It is suggested that you approach the dean of the appropriate faculty at the local university, the secretary of the professional association concerned, or even other legal practitioners who have done similar cases for assistance to identify an expert in the relevant field. Eventually you will get to know a few of the experts who are available in the field of your practice. Attributes you would look for in the expert include:

- willingness to give evidence.
- relevant academic qualifications and experience in the field concerned.
- independence.
- sound judgment.
- assertiveness (a willingness to express a view and to defend it, but without ignoring reasonable views against his or her own views).

In the case of Mrs Smith, our client from chapter 1, you will need to retain the pathologist who conducted the post-mortem examination on the deceased (to prove that the deceased died as a result of injuries sustained in the collision), the doctor or doctors who treated our client and her children (to prove the nature and extent of their injuries and the amount of their claims), and an actuary (to calculate the amount of the loss of support claims). You will need this information before a summons can be issued.

An initial brief must be prepared for each expert, setting out:

- the assessment the expert is required to make.
- the facts on which that assessment is to be based and, in appropriate cases, the extent to which the expert is required or at liberty to gather those facts.
- the need for impartiality.
- the need for a written report and the form the report is to take.
- the need to update the report as and when new facts emerge.

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- the fee structure for the work to be done by the expert and who will be liable for it. (The usual rule is that the firm of attorneys briefing the expert is liable, unless there is a specific agreement to the contrary.)

4.5

Creating a trial folder

By the time the trial date arrives, a fair amount of material will probably have been collected. The trial materials must be organised in some logical system which works for all sorts of cases, criminal and civil, big and small, High Court and any other court. You need a system that allows you to find your way through the contents of your folder quickly, accurately and with confidence. This becomes more important at the trial where a bumbling legal practitioner scratching away through heaps of papers of no particular or apparent order will appear to be ill-prepared and unprofessional. The process of creating a trial folder starts as soon as it becomes clear that you are going to litigate, which could be as early as during the first interview.

Prosecutors have a default trial folder in the form of the police docket at their disposal. In complex cases the prosecutor concerned may still create his or her own trial folder using a system similar to that used by defence counsel.

How you arrange your trial folder depends as much on your own personality as it does on the case. The essence is that you must have a system that works for you. Attorneys and advocates may create slightly different systems. So it may be with prosecutors. In smaller cases (with only a few documents and witnesses) five separate dividers will be sufficient for an attorney's trial folder (or file). The sections can consist of:

- correspondence and background documents.
- pleadings.
- statements and notes for trial (for cross-examination).
- agreed bundle of documents.
- authorities.

In a complicated case (with lots of documents and many issues and witnesses) a separate file with dividers can be considered with sections for:

- the activity sheet (a sheet on which the person working on the file can note his or her activities.
- a contents page.
- pleadings (including the charge sheet or indictment in a criminal case).
- rule 37 conference minutes and documents.
- advice on evidence.
- statements of our witnesses.
- copies of statements of opposition witnesses (if any).
-

reports, notices and summaries of our side's expert witnesses.

- reports, notices and summaries of opposition experts.
- fundamental documents (such as agreements).
- correspondence.
- maps, plans, sketches, diagrams and photographs.
- privileged documents.

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- formal correspondence between legal practitioners.
- notes.
- legal research and copies of authorities.

Not all of these sections will be required for every type of case. The dividers should be created for the specific case. In some cases you may even have additional sections. A divorce action may, for example, have a rule 43 section. In a damages action you may have a separate section for the quantum of damages.

Each section of the folder should have a list of its own contents at the beginning. Documents you do not want to damage by punching holes in them or which are too large to fit into a standard A4 size ring-binder can be folded and slipped into A4-size sleeves or pockets. Exhibits or documents which are too bulky to be fitted into the trial folder, should be kept in a secure but easily accessible subfile, a box file perhaps, with a note in the relevant division of the main folder recording where they can be found.

The trial folder must be kept as a separate file and kept up to date. You must be able to use it on short notice as a brief to counsel or as the starting point for an urgent interlocutory application. A properly kept trial folder can serve other useful purposes. Having a trial folder with a comprehensive activities sheet, for example, is a starting point for a bill of costs or an itemised account to the client.

However, the system is only as good as its maintenance. If the trial folder is not kept up to date meticulously, it becomes useless. It is better to have no trial folder at all than to have one that gives you a false sense of security. (If you have no trial folder, you can create one overnight. If you have a misleading folder, you may only find that out when you are on your feet in court.) The test of a good trial folder is whether someone else could step into your shoes at a moment's notice if you were to become indisposed. That means that all your thoughts and plans have to be transferred in some form to the file. A written opening address and a final argument can be started and updated as you work on the case; and so can your list of witnesses and your themes for cross-examination. Your plan of action should then be quite apparent to anyone who has to take over from you.

Advocates do not keep files and use a different system. They use the trial-notebook system. (See chapter 13.) However, when they have to advise, draft pleadings or applications, advise on the evidence or prepare for trial, their point of departure will always be the material collected and collated in the attorney's trial folder.

4.6

Fees

Legal practitioners do not enjoy talking about the cost of their services. This is a natural phenomenon. The truth is that clients are apprehensive about the cost of litigation and deserve to be told in advance what they can expect. This forms part of the legal practitioner's duty to advise the client fully about the available options and the legal practitioner's recommendation with regard to the most appropriate course to follow. Clients must be advised what their options are with regard to fees and disbursements. Your advice will depend on the policy of your firm and the nature of the case. It is essential in all types of cases that clients must know that they are ultimately liable for fees and disbursements. Clients must at least be advised of the following:

- Legal aid is available in some criminal cases and may be available in civil cases.

- Generally, the client will be liable for fees and disbursements. The fee tariff of the firm and the legal practitioners handling the matter must be provided with an [Page 82] estimate of the number of hours or days that would be spent on the matter. The expected disbursements must be explained with an indication of the amounts involved.

- The client has the right to demand that the legal practitioner's account be submitted for taxation.

- In some cases you may be allowed to act on a *contingency-fee basis*. The ramifications of this must be explained fully.

- If any fees or disbursements are required in advance, or as *cover* for counsel's fees, the client must be advised of the purpose and the amount of the deposit required. This is a sensitive subject as many clients balk at the idea of having to pay in advance for work which has not been done yet. These funds have to be kept in a trust account.

- There are other ways of resolving the dispute which may be less costly. (See chapter 3.)

The best way to ensure that there is no room for misunderstanding is to prepare a booklet spelling out all the alternatives and to furnish that with a letter to the client confirming the instruction and what has been agreed with regard to fees. For advocates other than trust account advocates the process is different. They do not as a rule discuss fees with the lay client. Nevertheless, it is sound practice for advocates (and the attorneys who make use of their services) to ensure that there is agreement on counsel's fees before the brief is sent to counsel. The discussion must include such aspects as counsel's hourly rate, an estimate of the amount of time the particular brief would take, and any agreed fee.

Chapter 5
Function, form and style of pleadings

CONTENTS

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5.1 Introduction

Pleadings are written statements in which the parties to an action set out the material facts supporting their respective claims or defences. What a party prefers to call 'facts' in his or her pleading are not facts until they are proved to the satisfaction of the court or admitted by the other party. Until then they are merely 'allegations', or 'averments', as they are called in the rules. You may think of them as propositions of fact.

The functions or purposes of pleadings are fourfold, namely:

- to set out each party's claims or defences together with the material facts on which each claim or defence is based.
- to give notice of the case intended to be set up by each party and thus to prevent either of them from being taken by surprise at the trial.
- to define the issues between the parties.
- to provide a brief summary of the case of each party.

A brief word on each of these functions will suffice.

First, when a plaintiff makes a claim, he or she has to set out what relief is claimed as well as the allegations of fact on which the claims are based. Likewise, the defendant has to set out what orders he or she wants the court to grant together with the allegations of fact on which liability is disputed.

Secondly, a claimant is required to give the defendant notice of the claims which are being made as well as the allegations of fact on which they are based so that the defendant may answer them. These principles apply to criminal cases with greater force than in civil cases due to the nature of the 'relief' the court may grant in criminal cases.

Thirdly, once the defendant has delivered his or her own pleading in response to the claim, the court will be able to ascertain what is in issue between the parties. The court can then proceed to hear the evidence on both sides in order to determine the true disputes between the parties. The

court will also exclude evidence that is not relevant to the issues identified by the pleadings. The pleadings therefore determine what evidence will be admissible and what the limits of cross-examination on the merits are. In a criminal case the accused's plea explanation in terms of section 115 of the Criminal Procedure [Page 86] Act 51 of 1977 (CPA) may serve the same function of a plea in a civil case if the plea explanation includes admissions recorded as such in terms of section 220 of the CPA.

Lastly, because the pleadings constitute a permanent record of the questions raised in the action and of the issues decided in the case, it is possible to prevent future litigation on matters already decided between the litigants. If either of the parties should institute further proceedings in which an issue already decided between them is raised again, that issue may be taken as moot, or *res judicata*.

While these are the conventional reasons why we have pleadings, there are also sound reasons why your pleadings must be good. A good pleading may impress the judge and show that you know what you are doing. You may even impress the other side sufficiently to open negotiations for a settlement. A good set of pleadings makes you look competent and assured and gives you confidence. A badly drafted pleading can result in your client losing the case.

5.2 Structure of a set of pleadings

The general structure on which the system of pleading in civil cases is founded, is as follows:

- The plaintiff pleads the material facts relied on in support of his or her claims in a *statement of claim*.
- The defendant delivers a plea in which he or she may:
  - admit allegations pleaded by the plaintiff, which then become *admitted facts*.
  - deny allegations made by the plaintiff, which are then *in issue.*
  - decline to admit allegations made by the plaintiff, which then have to be proved by the plaintiff but are not truly *in dispute.*
  - confess (or admit) allegations pleaded by the plaintiff, (which then become *admitted facts*), and avoid their effect by making new or additional allegations which constitute *an answer* to the plaintiff's claim or facts.
  - add any necessary explanations and qualifications.
- The plaintiff may deliver a replication to the defendant's plea in order to admit allegations in the plea, (which then become *admitted facts*), or to set up a confession and avoidance in respect of a defence raised in the plea.
- If the plaintiff pleads a confession and avoidance in the replication, the defendant may deliver a *rejoinder* dealing with the new allegations in the same fashion as the replication deals with the plea.
-

This process proceeds by way of further pleadings called, in order of appearance, a *surrejoinder*, *rebutter* and *surrebutter* respectively. These are now very rare. Each pleading answers the one before and adds such new allegations as are required to answer fully.

- A defendant may, instead of delivering a plea, raise a question of law as to the legal effect of the facts pleaded by the plaintiff. This is done by way of an *exception*. In effect the defendant says, '*Yes, what you say is true, or may be true, but that still does not give you a valid claim against me*'. Similarly, a plaintiff may raise an exception to the defendant's plea on the basis that it does not disclose a defence to the claim.

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- A defendant may also respond by making a counterclaim. A counterclaim is dealt with as if it is a claim by a plaintiff, except, of course, that it is made by a defendant in existing proceedings where someone else is already being referred to as the plaintiff. A counterclaim has to be delivered at the same time as the plea.

- The defendant or the plaintiff may join further parties by making a third-party claim against them. Claims against third parties have the same format as particulars of claim and third parties set out their defences in their plea. Third parties may join further third parties.

In criminal cases the founding document is the charge sheet or indictment and the plea explanation, if one is submitted to the court. In practice the plea explanation is either given orally or in writing. In both instances the court is required by section 115(3) of the CPA to ask the accused where he or she confirms the plea explanation. Where the plea explanation includes admissions of fact the court usually asks the defence whether those may be recorded as admissions in terms of section 220 of the CPA. In the absence of such a record all the facts concerned remain in issue and must be proved by the prosecution.

5.3 Terminology of pleadings

A short digression is required to avoid confusion.

5.3.1 Summons

A summons is a legal document, (prepared by the plaintiff's attorney or counsel and issued by the Registrar of the court), calling on the defendant to attend before a judge or a court to answer the claim made in the summons. In a criminal case the summons calls on the accused to appear before a named court on a specified day to plead to the charge set out in the summons. In a civil case, the defendant is called on to answer in a prescribed manner (by filing an appearance to defend and eventually a plea). If you don't respond to a summons in a criminal case, you may be arrested and taken to court to answer. In a civil case, judgment may be granted against you in your absence if you don't defend the action in the prescribed manner. The consequences of not answering the summons are set out in the summons. (See First Schedule to the Rules: Forms 1, 3, 9 and 10.)

In criminal cases a summons serves exactly the same function as in civil cases. It calls on the accused to appear on a date and before a court stipulated in the summons to answer the charge set out in the summons.

5.3.2 Cause of action

A cause of action is a set of facts giving rise to a claim recognised by the law. It means that the court has to grant judgment for the plaintiff if those facts are proved to the required standard of

proof. For example: If A suffers a loss because B negligently damaged A's car, A will have a claim against B based on the *actio legis Aquiliae*.

5.3.3 *Charge*

The charge set out in the summons, charge sheet or indictment in a criminal case is the equivalent of the claim in a civil case.

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5.3.4 *Claim*

We use this general term for the assertion of a right to money, property or a remedy in civil cases. The claim is the set of facts on which one relies for his or her entitlement to the money, property or remedy claimed in the matter. The term is often used as a synonym for cause of action.

5.3.5 *Defence*

A defence is an answer to a charge (in a criminal case) or a claim (in a civil case). If the defence is accepted, it has the effect of defeating the charge or claim. The defence can be a denial of a material fact or rely on additional facts to avoid liability for the claim. Many defences have their own specific legal elements, for example, an estoppel. (See the discussion in paragraph 5.4.3.)

5.3.6 *Prayer*

The prayer is a request for judgment. The plaintiff 'prays' for judgment for the money, property or remedy claimed. The defendant prays for judgment in his or her favour or dismissal of the plaintiff's claims. Both sides usually include a prayer for their costs. The prayer appears at the end of the pleading. In application proceedings the prayer is set out in the Notice of Motion or Notice of Application. It is not customary to set out the prayer in the summons, charge sheet or indictment in criminal cases although that used to be the practice.

5.3.7 *Material facts*

The material facts of a cause of action are the legal elements of the cause of action (or the charge in a criminal matter) as applied to the facts of the particular matter. In the example of the claim based on the *action legis Aquiliae*, the legal elements and material facts would stand side by side like this:

Table 5.1 Legal elements and material facts

Stage 3	**Stage 4**
Legal elements	**(Material) Facts**
1. Ownership of car	1. Plaintiff owned car X
2. *Actus reus*	2. Defendant performed an act which damaged the car
3. Negligence (including unlawfulness)	3. Defendant was negligent
4. Causation	4. The negligence caused the damage . . .
5. Loss	5. and the loss

5.3.8 *Issues*

We use this term to refer to points of disagreement between parties. When we say we 'take issue', we mean we 'disagree'. When the plaintiff makes an allegation in the particulars of claim and the defendant denies that allegation, an issue arises between the parties. The plaintiff ordinarily has the burden of proof on an issue arising from an allegation the plaintiff has made in his or her pleadings. The issues between the parties could be issues of fact, or of law, or of mixed fact and law. An issue is said to be an *issue of fact* when it concerns the existence of some fact or event ascertainable by our senses. [Page 89] Issues of fact are determined by reference to evidence and the conclusions we can draw from them by using logic. An *issue of law* concerns the existence, formulation or application of a rule of the legal system. An issue of law is determined by reference to authoritative sources of the law. A couple of examples will clarify the distinction:

- Whether you went through an intersection against a red light or not is a question of fact; whether your conduct in going through the red light in the circumstances that prevailed amounts to negligence, is a question of law.

- Whether the accused did certain things or not is a question of fact; whether the accused's conduct amounts to a crime, is a question of law.

An *issue of mixed fact and law* arises when the decision requires both the facts and the legal principles to be taken into account. If the issue is whether the accused is guilty of the crime of murder, the decision will require both the facts and the legal requirements for the crime of murder to be taken into account in order to answer that question. The distinctions between issues of fact and law are not always absolute or clear. Fortunately it is not often that one is required to explain the distinction to a judge.

5.4 The material facts

Lawyers find it difficult in their early years in practice to distinguish between the facts which have to be pleaded, the 'material facts' (or *facta probanda*), and the facts constituting the supporting evidence (the *facta probantia*). They are *requirements set by the law*. Put differently, they are the *legal elements* of the claim, charge or defence, as the case may be.

The material facts are therefore the essential legal elements of the particular cause of action, charge or defence, but stated in such a way that they incorporate the specific facts of the case concerned. Thus an indictment for murder will charge that '*A, on X date at Y place unlawfully and intentionally killed and murdered Z, a human being*.' The details inserted in the place of A, X, Y and Z will be those of the particular case; without those details the indictment contains no more than an academic definition of murder. In other words, the legal elements are not dealt with in an intellectual or academic vacuum. They have to be stated as applying to the particular case you are dealing with; hence the term 'material facts'.

The supporting evidence, also called the *evidential facts*, consists of the individual pieces of evidence necessary to establish or prove the material facts. The supporting evidence is to be found in the facts and circumstances of the individual case. Naturally the evidence differs from case to case.

The material facts have to be set out in the pleadings in compliance with the rules of pleading – the principles of the law and practice which determine how the particulars of a claim or defence have to be set out in the pleadings.

- The law requires that all the material facts of the particular claim or defence are set out in the pleading. Thus, in the example of the delictual claim referred to earlier, the statement of claim has to contain allegations covering the material facts identified as the essential legal elements of the *action legis Aquiliae*, namely 'ownership' (of the damaged property), the '*actus reus*', 'negligence', 'causation' and 'loss'. These legal elements are not recited in the abstract, as they are above, nor do they exist in a vacuum. They exist in a particular factual setting and

are set out in the pleadings as statements of fact in such a way that they are made applicable to the particular case. [Page 90] In other words, the statement of claim will refer to the *plaintiff's* ownership of the *particular* property which has been damaged, the *defendant's* negligent act and the *amount* of loss which it has caused to the *plaintiff*.

- The Rules of Court require certain additional information to be given because the material facts on their own do not supply the other party with sufficient information to answer the case against them. This additional detail should not be confused with the material facts; they are a mere amplification of the material facts. For example: Rule 18(4) requires that the material facts be pleaded '*with sufficient particularity to enable the opposite party to reply thereto*'. On this basis, particulars of negligence have to be given, for example, by pleading that the defendant failed to stop at the red light, or drove at a dangerous speed, or failed to keep a proper lookout. Rule 18(6) requires that certain particulars of the conclusion of a contract be pleaded, such as whether it is 'written' or 'oral', and 'when', 'where' and 'by whom' it was concluded. This additional information is referred to as 'the particulars' or 'further particulars'.

- It is customary (according to convention) to give details of any demand in the statement of claim but it is generally not required by law or under the rules for a claim to be enforceable.

The distinction between these sources of the obligations to provide certain details in a pleading is emphasised by the different consequences for non-compliance with the obli-gations imposed by them.

First, if the statement of claim or plea does not contain all the material facts for the particular claim or defence, as the case may be, the opposing party may deliver an exception, which, if successful, has the effect of striking out the defective claim or defence.

Secondly, if the necessary particulars or further particulars required by Rule 18 are not given, the opposing party may make an application for an order compelling delivery of the missing particulars. It is only if the guilty party fails to comply with that order that the claim or defence itself may be struck out.

Thirdly, if custom or convention requires that particular details have to be pleaded and they are omitted, the court may penalise the guilty party by making an adverse order with regard to costs.

5.4.1 *First example: A claim under the rei vindicatio*

It frequently happens that the owner of property claims that property from another person who has possession of the owner's property but refuses to return possession to the owner. Such a claim is made by way of a cause of action known as the *rei vindicatio*. The action is based on the principle that the owner of a thing is entitled to possession of that thing unless the defendant has a valid ground justifying his possession. The legal elements for a claim under the *rei vindicatio* are that:

- the plaintiff is the owner of the thing concerned.

- the defendant is in possession of it.

These elements have to be converted into the material facts of the case and pleaded in the statement of claim.

Consider in how many different ways one could prove ownership of a thing, a car for example, and how many different sets of circumstances there could be where one person has possession of another person's car. Change the nature of the thing concerned, [Page 91] (a farm or a gold mine or even a space satellite), and it soon becomes clear that the individual circumstances under which a claim under the *rei vindicatio* can be made are almost without limit. The 'evidential facts' in all these different cases will differ but the legal elements to be satisfied remain constant.

5.4.2 *Second example: A claim based on a contract*

The legal requirements or material facts for a claim based on a breach of contract are:

- the conclusion of a valid and binding contract between the plaintiff and the defendant.
- the relevant terms of the particular contract (The terms which are material are the ones which have a direct bearing on the claims to be set out in the prayer.).
- performance of his or her obligations, or a tender of performance, by the plaintiff.
- if the plaintiff claims performance of an obligation the defendant has undertaken in the contract, the particular obligation has to be identified.
- if the plaintiff seeks damages for breach of contract, additional material facts have to be pleaded namely:
  - the defendant's breach.
  - the plaintiff's loss.
  - that the defendant's breach has caused that loss.

The evidence (Stage 5) proving the material facts will differ from case to case, but the legal elements (Stage 3) (which have to be converted into material facts in the statement of claim) are the same for all of them.

Let's put this in a table using the proof-making model of fact analysis.

Table 5.2: Using the proof-making model to identify the material facts

Stage 1	**Stage 2**	**Stage 3**	**Stage 4**
Area of law	**Cause of action**	**Legal elements**	**(Material) Facts**
Contract	Claim for damages	1. Party A with contractual capacity 2. Party B with contractual capacity 3. Conclusion of contract: Offer Acceptance *Animus contrahendi* 4. Terms: A's undertakings B's undertakings 5. A's performance 6. B's breach 7. Causation 8. Loss	1. The plaintiff is A + capacity (adult etc.) 2. The defendant is B + capacity (company etc.) 3. A and B concluded a contract on [*date*] at [*place*] in terms of which A sold [*thing*] to B for [*price*]. 4. Terms: A was to deliver by [*date*] B was to pay by [*date*] 5. A delivered on [*date*] 6. B failed to pay by [*date*] 7. B's failure caused 8. Loss in amount of [*R. . .*]

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5.4.3 *Third example: The defence of estoppel*

The same principles apply to any defence that amounts to a confession and avoidance. Estoppel is such a defence. The legal elements are that:

- the plaintiff made a representation of fact by words or conduct.
- the representation was false.
- the defendant believed it to be true and acted on the correctness of the representation.
- the defendant so acted to his or her detriment or prejudice.
- the representation was made negligently. (In some types of estoppel negligence may not be a requirement.)

Imagine under how many different circumstances an estoppel can arise. (See the cases referred to in the Noter-up under the heading *Estoppel*.) They range from the obvious to the outrageous. We can only speculate on the wide range of evidence that could be available in some of the cases. Yet, the legal elements are the same for all of them. (This is a matter of legal research.)

5.4.4 *Fourth example: The charge of murder*

In a criminal case the legal elements to be proved on a charge of murder could be treated similarly. For reasons which are canvassed in more detail in chapter 13, the identity of the offender and the date when and place where the offence was committed have to be proved by the prosecution. The legal elements or material facts to be proved on a murder charge are thus:

1 the accused

2 on [*date*]

3 at [*place*]

4 unlawfully

5 and intentionally

6 killed

7 another human being.

Note that element 6 constitutes the *actus reus* of murder and may be broken down into smaller components, for example, (i) an act which was (ii) conscious and (iii) voluntary and (iv) caused the death (of the person named in 7). Element 5, *mens rea,* includes knowledge of unlawfulness. The precise content and meaning of each element is a matter of law.

5.5

Form, format and style

There are several formal requirements with which all pleadings must comply, apart from the principles regulating their content:

- Every pleading must have the title of the action and the case number allocated by the Registrar on its first page (rule 18(2)). The title contains the name of the court, the [Page 93] names of the parties with their descriptions and the name of the pleading. For example:

[*COURT DESCRIPTION as prescribed*] Case no 1/[*year*] Between ABC Limited Plaintiff and Joe Smith Defendant PLAINTIFF'S DECLARATION

- The paragraphs of the pleading must be numbered. Each paragraph should deal with only one fact or allegation. If necessary, subparagraphs should be used to keep related facts or allegations together (rule 18(3)).

- The language of pleadings is formal. Persons are referred to in the third person (he, she, it, they) and by description (plaintiff, defendant, and so on).

- Pleadings must be concise yet contain sufficient particularity to inform the opposing party of the case he or she has to meet and to respond meaningfully (rule 18(4)). For this reason, for example, it is not sufficient to allege that the collision was caused by the defendant's negligence; the grounds of negligence must also be specified. By the same token the grounds for the allegation that the marriage has broken down irretrievably must be listed in the particulars of claim.

- Pleadings must not contain irrelevant, inadmissible or scandalous matter.

- Only the material facts must be pleaded, not the evidence which goes to prove those facts.

- All the material facts must be pleaded. If you omit a material fact, an exception may be taken to the pleading on the basis that it does not disclose a cause of action or defence.

- While it is permitted to make allegations in the alternative, the alternatives should not be mutually destructive as that would leave the opposing party in a state of confusion and he or she will not know which of the two conflicting statements should be acted on.

- The terminology of the pleading should be consistent. This is not only an element of good style but also avoids confusion. If you start with the word 'contract' you should not use 'agreement' in the same pleading.

-

Stilted phrases like 'the aforesaid collision' or 'the plaintiff's said motor vehicle' should be avoided by creating definitions. After pleading the details of the collision you could add, for example, 'the collision' or 'the plaintiff's car' and from then on use those terms instead.

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Rule 18(8) (divorce matters where 'time, date, place' or another person may be relevant), (9) (divorce matters where ('division, transfer or forfeiture of assets' is claimed and (10) (damages claims) requires that certain additional facts have to be provided in the pleading.

[Page 94]

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The device of 'particulars' can be used when a rule (such as rule 18(1)) or a Practice Directive (issued by the Judge President concerned) or general practice requires that more detailed information be given to the other party. For example:

PARTICULARS (of negligence) (of the plaintiff's damages) (of the breakdown of the marriage) etc. (a) . . . (b) . . . etc.

o

The paragraphs of the pleading must deal with the material logically. The sequence is usually determined by the approach followed by the plaintiff in the particulars of claim or declaration. The parties are introduced and the material facts are set out in chronological order. In the plea the defendant deals with the plaintiff's allegations in paragraph order and adds additional allegations at each appropriate stage until the prayer is set out.

o

Every pleading, except further particulars, must contain a prayer for relief. It is sometimes held that further particulars cannot be a pleading because it does not contain a prayer, but nothing seems to turn on this distinction. The prayer is usually commenced with the phrase, '*Wherefore the plaintiff claims judgment . . .*' or, '*In the premises the defendant prays for judgment . . .*', followed by the precise orders the court will be asked to grant.

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Pleadings are signed by the pleader, who could be a party personally. Generally it will be the legal practitioner who represents the party concerned (rule 18(1)). Only a natural person can sign his or her own pleadings; a company cannot.

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The document ends with the signature, capacity and address of the pleader and usually contains the names and addresses of the Registrar and the party to whom the pleading is addressed. The fax number and cell phone numbers and email addresses of the legal practitioner should also be provided (rule 17(3)(*a*)).

This is done as follows:

(*Signature*) JJ Buthelezi *Plaintiff's Counseo*	(*Signature*) Plaintiff's Attorney H Soma and Co [*address and details as per rule 17(3)(a)*]
To: The Registrar [*address*] And to: Messrs X, Y and Z Defendant's Attorneys [*address and details as per rule 19(3)(a)*]	

o

Pleadings can be amended but it is better to get them right the first time as an incorrect allegation in a pleading could affect the credibility of the party at fault.

- A pleading which does not comply with the rules of pleading may be set aside as an irregular proceeding (rule 30).

- In its *content*, a pleading must:
  - reflect the client's instructions accurately.
  - apply the law correctly.
  - comply with the prescribed requirements of the rules in form and content.

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- In its *style* a pleading must:
  - be clear.
  - be concise.
  - be complete.
  - be consistent in its terminology.

- A pleading *should not contain*:
  - evidence.
  - irrelevant matter.
  - vexatious or scandalous matter.
  - argument.

The heading of a criminal case follows the same pattern:

[*COURT DESCRIPTION as prescribed*]

Case no (if any)/[*year*]

The State
versus
1. [*name of accused number 1*]
[+ *details such as nationality, gender, age and address*]
and
2. [*name of accused number 2*]
[+ *details such as nationality, gender, age and address*]

INDICTMENT

5.6 Examples of the citation of plaintiffs and defendants

The description of a party in the pleadings is partly determined by the rules and partly by the substantive law. Rules 14 and 17 have a number of provisions that affect the way parties (such as individuals, married women, partnerships, firms and associations) are cited (described). Over and above these technical requirements, there is a duty on the pleader to set out facts that demonstrate that the party concerned has the capacity to sue or be sued. We call this capacity '*locus standi in judicio*' or '*locus standi*' for short. This capacity has nothing to do with the cause of action. It is the capacity to be a party to legal proceedings without assistance or representation. Minors have to be assisted by their guardian parents if they are to sue or be sued. A trust cannot sue or be sued in its own name; it has to be represented by its trustees.

The term *locus standi* is also used to describe the relationship between a party and the subject-matter of the dispute. A plaintiff who claims money will have to plead facts to show that the debt is owed to him or her.

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The following table contains some examples of the citation of parties:

Table 5.3 Examples of the citation of plaintiffs and defendants

Plaintiff	Defendant	Comment
The plaintiff is Joe Soap, an adult male, architect, who resides at [*street address*].	The defendant is Peter Pan, a male, architect who resides at [*street address*], who is sued herein in his capacity as father and natural guardian of Paul Pan, a boy born on the [*date*], of the same address.	(a) Plaintiff's *locus standi* is apparent from the fact that he is an adult. (b) Defendant's *locus standi* does not depend on his being an adult but on his being the guardian of the minor.
The plaintiff is Joanne Soap, an adult unmarried female, insurance broker, who resides at [*street address*].	The defendant is ABC Limited, a company with limited liability, duly incorporated and registered according to law and having its registered office at [*street address*] and its principal place of business within the jurisdiction of this court at [*street address*].	(a) The marital status of a woman has to be given under rule 17(4)(*b*). (b) The address of a company is its registered office. (c) Service may, in some cases, be effected at a company's principal place of business within the jurisdiction, which may not be its registered office.
The plaintiff is the ABC Partnership, a partnership carrying on business as architects at [*street address*], the partners in which are Joe Soap, an adult male, architect who resides at [*street address*] and Peter Pan, an adult male, architect who resides at [*street address*].	The defendant is Singh's Superette, a firm carrying on business as a supermarket at [*street address*].	(a) Rule 14 allows you to cite a firm or partnership under its own name even though, under the common law, neither is a person in the eyes of the law. (b) Once a partnership has been dissolved you have to cite the individual partners.
The plaintiffs are Gavin Collins and Mike Morley, both adult males and attorneys at [*street address*], who sue	The defendant is the Singh's Superette, a firm carrying on business as a supermarket at [*street*	(a) Trustees have to sue or be sued in their capacity as trustees as a trust

herein as trustees of the ABC Trust (the plaintiff).	*address*] and whose proprietor is Leander Singh, an adult male of [*street address*].	does not have a separate legal personality. (b) Where the proprietor of a firm has been named in the summons, execution may be levied against his or her assets if judgment is granted against the firm. (See rule 14 and the commentary on it.)

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Plaintiff	Defendant	Comment
The plaintiff is the State President of the Republic of South Africa, who is sued in that capacity, of Union Buildings, Pretoria.	The defendant is the Minister of Safety and Security, who is sued in his capacity as Minister, of Union Buildings, Pretoria and whose address for the purpose of service of process in these proceedings is that of the State Attorney [*street address*].	(a) The State President as the head of the Executive branch of government may sue or be sued in that capacity. (b) In most cases there will be a Minister in the Cabinet responsible for the State Department concerned. That Minister can equally be sued in his or her capacity as such. (c) Service on the state may be effected at the State Attorney's office by virtue of rule 4(9).
The plaintiff is Transnet Limited, a public company formed and incorporated under section 2 of Act 9 of 1989, of [*registered office of principal place of business*].		Transnet is an example of a commercial enterprise of the state conducted through the device of a company. It is cited like any other company.
The plaintiffs are the owners of the cargo lately laden on board the mv Claire Tsavliris, whose address for the purposes of these proceedings is that of their attorneys, Messrs X, Y and Z of [*street address*].	The defendant is the mv Claire Tsavliris which is berthed at present in the port of [*name of port*].	Admiralty Proceedings Rules rule 2 allows the owner of a ship, cargo or other property in respect of which a maritime claim is made to be cited as such, that is to say, without naming the individuals who own them.
The plaintiff is Paul Wallace, an attorney at [*street address*], who sues in this action in his capacity as executor of the estate of the late A under letters of executorship issued by the Master of the High Court, [*name of division*].	The defendants are Josephi Casaregis and Paul Santerna who are sued in this action in their capacities as lead underwriters of Lloyds Syndicates 101 and 303 respectively, whose address is care of A . . . an attorney and partner in the firm of X, Y and Z of [*street address*].	(a) A deceased estate has to sue or be sued through its executor. (b) Lloyds underwriters have had to nominate an agent in South Africa who will accept service of legal process on them. (c) The nominated agent does not become the defendant. The relevant syndicates who underwrote the policy have to be cited.

Note: Regard these addresses as fictitious.

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Protocol

- Sign your name legibly on all pleadings you have to sign, or print your name below your signature. You are responsible for the pleadings and should not hide behind an illegible signature. The other side is also entitled to know who has signed the pleading so that they can check whether you are entitled to sign.

- The use of precedents is fraught with danger. The facts of the case should not be forced into a pleading drafted for another set of facts. It is better to use a good book with examples of different causes of action and defences like Harms *Amler's Precedents of Pleadings* 9th edn LexisNexis (*Amler*) than to blindly follow a pleading drafted by you or someone else for another case. *Amler* has a good summary of the legal requirements for each cause of action or defence in the book. That should be your starting point.

- Nevertheless, in cases which occur frequently, the 'known' and 'understood' formulae may be used for the sake of brevity. You may find some examples of the known and understood formulae in the cases that find their way to the Registrar or the Motion Court for default or summary judgment orders. For example: The price of goods is often claimed as '*the purchase price of goods sold and delivered at the defendant's special instance and request*'. What this means is that there was a contract of sale between the parties and the defendant has failed to pay the purchase price.

5.8

Ethics

- Knowingly pleading false claims or defences is unethical and may in extreme cases even be tantamount to fraud.

- It is equally wrong to plead facts for which you have no foundation in your instructions. There must be a 'good faith' basis for every fact pleaded. (See in this regard the discussion in chapters 6 and 14.)

- It is unethical to overstate claims. In compensation cases (such as personal injuries or expropriation cases) where the assessment of the compensation has to be made by the court, there is room for differences of opinion. It will be appropriate to make your own assessment and then to claim slightly more than that amount to be on the safe side.

- A so-called 'tactical denial' is as dishonest as a false denial. If the party does not know whether an allegation pleaded by the other party is true or can be proved by him or her, the appropriate way to plead to that allegation is to decline to admit it. If so inclined, you may plead: '*The defendant has no knowledge of the allegations in paragraph 5 of the particulars of claim and therefore does not admit them*.' You should not deny allegations unless you intend to lead evidence supporting the denial. Remember that a denial is in itself an affirmative statement; its effect is that the opposite of the factual allegation which it denies is true.

Chapter 6
Drafting statements of claim

CONTENTS

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6.1 Introduction

Every legal proceeding is based on a foundational document which sets out what claims are being made against the party who is being sued. In criminal cases the accused receives a summons, a charge sheet or an indictment which sets out particulars of the charge. In civil cases the statement of claim constitutes the fundamental document on which the proceedings are based. Claims are made in the form of written statements of claim which must set out 'who' is claiming 'what', 'from whom' and 'why'. You will encounter statements of claim in different forms in the litigation process. They have been given different names according to their purpose. In this book the term 'statement of claim' is used in the generic sense; it applies to all the various forms of claim documents and can also be used for arbitration claims.

- A liquidated claim is made in a *simple summons*, which has to comply with the requirements of rule 17(1) and be in the form prescribed in Form 9 of the First Schedule to the rules. Although a simple summons states the claim in abbreviated form, it must contain a complete cause of action.

- When an action for a liquidated claim is defended a *declaration*, which sets out the full details of the claim, has to be delivered (filed and served) in terms of rule 20.

- An unliquidated claim is made by way of *particulars of claim*, which is a separate document and is attached to a *combined summons*. The combined summons has to comply with the requirements of rule 17(2) and be in the form prescribed in Form 10 of the First Schedule. A declaration and particulars of claim are practically identical in their content and style.

- A *counterclaim* (or *claim in reconvention*) is a claim made by a defendant against a plaintiff in an existing action and follows the form of a declaration. It is made under rule 22.

- A *third-party claim* under rule 13 and Form 7 is used to join additional parties to an existing action. A third party may join further third parties. (In order to avoid confusion, third parties are given numbers like plaintiffs and defendants, in the order in which they are joined, for example, 'first third party', 'second third party', and so on.)

- An *interpleader claim* under rule 58 is made by an interpleader claimant in the form of particulars of claim.

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- A *provisional sentence summons* under rule 8 and Form 3 may be used for claims based on liquid documents.

In a criminal case the foundational document is a *summons*, *charge sheet* or *indictment*. The principles involved for these documents are discussed in paragraph 6.9.

6.2 Form and content of claims

The form of a statement of claim is regulated by the rules and the Forms prescribed in Schedule 1. The content of a statement of claim is dictated by three separate sets of principles. The *first* is the legal requirement that all the material facts on which the claim is based, have to be set out in the statement of claim. The *second* is the general requirement contained in rule 18(4) that sufficient particulars of the substance of the case against the defendant must be pleaded to enable the defendant to reply to the statement of claim. The *third* is the procedural requirement that certain formal and conventional or customary matters must also be covered in the statement of claim.

A statement of claim gives details of:

- the parties.

- their *locus standi*.

- the jurisdiction of the particular court in which the action is brought.

- the material facts of the claim (with the particulars required by rule 18).

- compliance with any special procedural requirements.

- the relief or orders claimed.

6.2.1 *The parties*

Examples of the citation of different persons and entities are given in chapter 5. It is essential that all the appropriate parties are joined in the action; otherwise a special plea of non-joinder may be upheld. Who should be joined is a matter of substantive law and depends on the facts of individual cases. Multiple plaintiffs and defendants may be joined in one action, but care should be taken that there is no misjoinder either, that is to say, no inappropriate joinder of any party; otherwise a special plea of misjoinder may be upheld. There is a misjoinder if a party with no interest in the relief or against whom no relief is claimed is joined either as a plaintiff or as a defendant.

6.2.2 *Locus standi*

The term *locus standi* is used in its primary sense, meaning a person or party's capacity to participate unassisted in legal proceedings; how a minor can sue or be sued, how to cite a company, partnership, trust, municipality, state department, foundation or even a firm. In its secondary sense, *locus standi* refers to the relationship between the plaintiff and the subject-matter of the claim. A legal relationship has to exist between the plaintiff and the cause of action to explain why *this* plaintiff is entitled to make *this* claim against *this* defendant. *Locus standi* in its secondary sense has to be established as part of the cause of action.

6.2.3 *Jurisdiction*

Jurisdiction has more than one aspect to it, namely whether the court in which the action is to be instituted, has jurisdiction over the particular defendant; whether that court has [Page 101] jurisdiction over the particular cause of action, and whether the claim is subject to special jurisdiction, for example, a maritime claim. You could use a checklist to ensure that jurisdiction is established by asking:

- Does the defendant's reside within the jurisdiction of the court?
- Did the cause of action arise within the area of jurisdiction of the court?
- Does a special court exists for the type of claim concerned?
- Is there a special procedure within the court's existing structures, for example, admiralty?
- Could or should a consent to jurisdiction be asked for?

6.2.4 *Setting out the cause of action*

A 'cause of action' is a set of facts giving rise to a claim recognised by the law. The statement of claim has to traverse all the material facts of the cause of action relied on. Each item in the prayer must be supported by the material facts required for that item of relief.

Causes of action could conveniently be classified under the following headings:

- **Contractual claims**: all causes of action claiming performance under a contract or damages arising from the breach of contractual obligations.
- **Delictual claims**: all causes of action based on delict, whether the delict has negligence or intention as an ingredient or not.
-

Enrichment claims: all causes of action relying on any of the *condictiones* or (possibly) a general enrichment action.

- **Statutory claims**: a cause of action which has its basis exclusively in a statute.

- **Mixed claims**: causes of action of mixed origin, for example, an action under the Road Accident Fund Act 56 of 1996 (RAF Act) or a divorce action – each relies in part on the common law and in part on a statute.

Multiple claims may be pleaded cumulatively or in the alternative, but not in such a way that the statement of claim becomes vague and embarrassing.

6.2.5 Compliance with any special procedural requirements

The Rules of Court lay down various additional requirements for claims. These have to be pleaded in addition to the ordinary facts of the cause of action. Here are a few examples:

- A party suing on a contract must state whether the contract is oral or in writing and, if it is in writing, attach a copy (rule 18(6)).

- In a divorce action where allegations are made regarding 'time', 'date', 'place' and 'another person' (meaning adultery is alleged), those details must be set out (rule 18(8)). A party claiming division, transfer or forfeiture of assets in a divorce action also has to give details of the grounds on which those claims are made (rule 18(9)).

- A plaintiff suing for damages must set them out in such a manner that the defendant can reasonably assess their *quantum*. If the claim is for damages for personal injuries, the plaintiff must give details of the date of birth, the nature and extent of injuries and the nature, effect and duration of any disability. The plaintiff must also set out separately what is claimed for medical and hospital costs, pain and suffering, disability in respect of earnings, loss of amenities and disfigurement (rule 18(10)).

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- A plaintiff suing for loss of support as a result of the death of a person, must state the date of birth of the deceased and every claimant (rule 18(10)).

6.2.6 The prayer

The content of a statement of claim is determined to a large extent by the relief claimed in the prayer. The prayer takes its name from the customary words: 'Wherefore the plaintiff prays for judgment against the defendant for . . .' The prayer plays a far more important role than its position at the end of the statement of claim may hint at. The prayer determines who the necessary parties are, which court will have jurisdiction, how the cause of action is pleaded, and also how the relief itself will be worded and what ancillary relief should be claimed.

A statement of claim without a prayer is deficient; an exception may be taken to it on the basis that no cause of action is disclosed or that the statement of claim is vague and embarrassing. It should be self-evident that a statement of claim that does not tell the defendant what is being claimed, is vague and embarrassing. A statement of claim without a prayer may also be set aside as an irregular proceeding under the provisions of rule 30.

The prayer must specify *all* the relief the court is asked to grant the plaintiff. The plaintiff will not be granted relief that is not foreshadowed by the prayer unless an amendment of the statement of claim and prayer is granted first. Such an amendment may be granted at the plaintiff's expense and after some delay. The court can always grant the plaintiff less than is claimed in the prayer, but not more, unless an amendment has been allowed. The court can grant only the type of relief claimed.

If you claim delivery of a tractor by way of the *rei vindicatio*, you cannot ask for judgment for delivery of anything else, nor for payment of money, unless there is an alternative prayer supported by the necessary factual allegations. See *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd* 1984 (4) SA 87 (T); *City of Cape Town v Mgoqi* 2006 (4) SA 355 (C); *Queensland Insurance Co Ltd v Banque Commerciale Africaine* 1946 AD 272; *National Stadium South Africa (Pty) Ltd and others v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA).

You may therefore question the purpose of claiming 'further', 'alternative' or 'other' relief. If you want more than already stipulated in the prayer, you have to notify the defendant and amend your prayer. If you want something different to what you have claimed thus far, you once again have to notify the defendant and amend the pleading. Each time you amend, the defendant gets another opportunity to raise a defence. The opinion is sometimes held that this type of catch-all prayer enables the pleader to ask the court for procedural relief such as amendments or postponements, but that cannot be correct as the court has specific, as well as inherent, jurisdiction to grant such relief. The truth is that the prayer for 'further, alternative and/or other relief' is a relic of the distant past when a single word out of place defeated a claim or defence.

6.3 Particulars of claim

We now return to our client, Mrs Anne Smith, a widow now that her husband has been killed in the collision. We have established from her that she was driving her own car at the time of the collision and that she now wants to sue for the repair costs. She also had to hire another car while her own was being repaired. The first step is to identify the [Page 103] material facts (or *facta probanda*) which are to be set out in the statement of claim. They are:

- the plaintiff's interest in the car (for example, ownership).
- the defendant's act (driving).
- which was performed negligently.
- and caused.
- damage to the plaintiff's car.
- and a diminution in the plaintiff's patrimony (the loss).

You are required to set out the material facts with sufficient particularity to enable the defendant to reply to the particulars of claim (rule 18(4)). You also have to set out the particulars in consecutively numbered paragraphs containing, as far as possible, separate allegations (averments) (rule 18(3)). Since the claim is for damages, sufficient particulars have to be given to enable the defendant to make a reasonable assessment of the quantum of the claim (rule 18(10)).

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Table 6.1 Particulars of claim in a damages action

Par	Text of pleading	Comment
	Annexure: Plaintiff's Particulars of Claim	The Particulars of Claim is an 'annexure' to the combined summons in terms of Form 10.
1	The plaintiff is Anne Smith, an unemployed widow who resides at [*street address*].	1 Rule 17(4) requires her name, residence, occupation, sex and marital status, (if female).

		2 Describing the plaintiff as a 'widow' gives her gender, marital status and *locus standi* in one word.
2	The defendant is Joe Soap, an adult male, carpenter, who resides at [*street address*].	1 Rule 17(4) again but no marital status required to be pleaded for males. 2 *Locus standi* is demonstrated by his adult status. 3 The jurisdiction of the court over the defendant is demonstrated by the fact that he is resident within the court's jurisdiction.
3	The plaintiff was at all material times the owner of a [*year*] Honda motorcar with registration number NPN 2001 ('the plaintiff's car').	1 Ownership of the car is a sufficient interest in the car to demonstrate the plaintiff's right to sue for the loss. (No interest, no loss.) The first material fact has been pleaded. 2 The phrase '*at all material times*' is used to avoid having to give the date of the collision and loss repeatedly. 3 Since the car will be referred to a few times, a definition is created to avoid archaic and stilted phrases like 'the plaintiff's aforesaid car' or 'the plaintiff's said Honda'.
4.1	On [*date*] and at about 09:30 a collision occurred between the plaintiff's car and another car which was then being driven by the defendant ('the collision').	1 The second material fact, the collision, has been pleaded. 2 The date and time of the collision are necessary to enable the defendant to reply (see rule 18(4)). 3 Why write, 'On or about [*date*]. . .'? 4 One definition (the plaintiff's car) is used and another (the collision) created. 5 It is not necessary to specify who drove the plaintiff's car as it is not relevant to the cause of action.
4.2	The collision occurred at the intersection of [*street*] and [*street*], [*city or town*], within this court's jurisdiction ('the intersection').	1 The defendant should be told where the collision occurred as a particular required under rule 18(4). 2 A second ground for jurisdiction is established. 3 The second definition is used and another created. 4 Paragraphs 4.1 and 4.2 can be combined, but then it will be a longer, unwieldy paragraph. Rule 18(3) requires a separate, numbered paragraph for each distinct averment. 5 The use of subparagraphs may help avoid problems with awkward grammar.

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Par	Text of pleading	Comment
5	The collision was caused by the defendant's negligence.	1 The third material fact, negligence, has now been pleaded. 2

		However, the defendant has not yet been given sufficient details of the grounds of negligence relied on (rule 18(4)). 3 The definitions created earlier are being used consistently.
5.1 5.2 5.3 5.4	*Particulars of defendant's negligence*: He entered the intersection against the red traffic light. He drove at an excessive speed. He failed to keep a proper lookout. He failed to take adequate steps to avoid the collision when he could have done so.	1 The device of 'Particulars' is used to provide a list of details to comply with rule 18(4). 2 The particulars are given, as far as possible, in sequence, as the events unfolded. 3 The use of 'and/or' is avoided. ('The defendant was negligent in one or more of the following respects: . . .', instead of using the device of 'Particulars'.) 4 The grounds of negligence are specific, not general. They relate to the facts of this case.
6	As a result of the collision and the defendant's negligence, the plaintiff's car was damaged and the plaintiff has suffered damages in the sum of R339 000.00.	1 The fourth, fifth and sixth material facts, namely causation, damage to the plaintiff's car and the amount of the loss, have been pleaded. 2 The definitions are being used: They've become quite useful, haven't they?
6.1 6.2 6.3 6.4	*Particulars of plaintiff's loss* Value of plaintiff's car before the collision R440 000.00 Value of plaintiff's car after the collision R110 000.00 SUBTOTAL R330 000.00 Cost of hiring replacement car for 45 days @ R200.00 R9 000.00 TOTAL R339 000.00	1 The device of 'Particulars' is used to give the additional details required by rule 18(4). 2 Legal research will be done to arrive at the amount claimed. What is the basis for the assessment? The answer can be found in *Erasmus v Davis* 1969 (2) SA 1 (A) (in the majority decision). In some cases the repair costs would be claimed and particulars of those would be given instead as: 'The reasonable cost of repairing the damage to the plaintiff's car is R339 000.00, which does not exceed the difference between its pre- and post-collision values.' (The cost of hiring another car should still be added.)
7	In the premises, the defendant is liable to pay the sum of R339 000.00 to the plaintiff.	1 The conclusion follows as a matter of law if all the material facts pleaded are established. 2 The phrase 'in the premises' means 'as a result of what was said earlier'.

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Par	Text of pleading	Comment
8	Notwithstanding demand, the defendant has failed to pay the sum claimed.	1 While a demand is not required as a material fact and is not required by the rules either, it is customary to give details of the demand, if one has been made. 2 You should have given the defendant full details of the pre- and post-collision values and repair costs with a demand to pay within a reasonable time (specified). The court could then have been asked to grant interest on the unliquidated claim for damages from the date the defendant has had a reasonable opportunity to assess the amount of the loss. See sections 1 and 2 of the Prescribed Rate of Interest Act 55 of 1975.

(a) (b) (c)	*In the premises the plaintiff claims judgment against the defendant for –* payment of the sum of R339 000.00; interest on the sum claimed in paragraph (a) in terms of section 2 of Act 55 of 1975; costs of suit.	1 '. . . the plaintiff prays for judgment', can be used. 2 The precise sum claimed has to be specified. 3 If interest is claimed at a specific rate or from a specific date, those details must be given. Section 2(1) of Act 55 of 1975 allows interest from the date of judgment at a prescribed rate, which varies from time to time. 4 If extraordinary costs are claimed, that has to be specified, for example, '. . . on the scale as between attorney and client' or 'including the costs of two counsel'. 5 It is meaningless to ask for 'further, alternative and/or other relief'.
	Dated at [*place*] this [*date*]	These details are given customarily.
	Signature Counsel's name (printed) PLAINTIFF'S COUNSEL	Counsel, or an attorney with the right of audience in the High Court, or an individual party personally, must sign the pleading.
	Signature Attorney's name (printed) X, Y & Z Partnership PLAINTIFF'S ATTORNEYS [*address and details as per rule 19(3)(*a).] Ref: S.101	

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The particulars of claim should now be:

- clear.
- concise.
- complete.
- accurate.
- consistent in its terminology.
- in compliance with the rules in both form and content.

With a bit of luck and effort they could even be eloquent and elegant.

Mrs Smith has other unliquidated claims. They are the claims for the loss of support she and her children have suffered as a result of her late husband's death and the claims for damages arising from their personal injuries. The particulars of claim in that case will be far more elaborate and will require extensive planning and a good grasp of the principles of pleading. As usual, the first step ought to be to identify the material facts to be pleaded. Then the additional requirements of the rules must be identified so that they can be complied with. Before this process is started, it has to be determined whether all the plaintiffs can sue in one action. In this case they can (rule 10(1)). Can, or should, they sue in one action for damages for their loss of support arising from the death of the deceased and also for damages for their personal injuries? They have no choice; they have to sue for all their personal damages arising from the collision in one action against the Road Accident Fund (RAF). See *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A). Ensure that this is still the law as the principle underlying this decision may well be held to be unconstitutional because it denies

the claimant access to justice. Legal research will provide the answer.) A framework for the particulars of claim with a list of material facts, as supplemented by the additional particulars which have to be given in terms of rule 18, can now be constructed.

A

first plaintiff + her date of birth (required by rule 18(11))

second plaintiff + date of birth (represented by first plaintiff as guardian)

third plaintiff + date of birth (also represented by first plaintiff)

defendant and its *locus standi*

B

deceased + his date of birth

the marriage between the first plaintiff and the deceased

the second and third plaintiffs were born of that marriage

C

the collision (the 'insured driver's' act)

his negligence (if a material fact)

which caused

the death of the deceased

D

the deceased owed the plaintiffs a duty of support

he did support them

they needed that support

he would have continued to support them, but for his death

they have lost that support as a result of his death

the amount of each plaintiff's loss + particulars to enable defendant to assess the quantum

E

the insured driver's negligence (if a material fact) caused the first plaintiff to suffer bodily injuries

she suffered damages + rule 18(10) particulars to enable the defendant to assess them

F

the insured driver's negligence (if a material fact) caused the second plaintiff to suffer bodily injuries

and he suffered damages + rule 18(10) particulars

G

the insured driver's negligence caused the third plaintiff to suffer bodily injuries

she suffered damages + rule 18(10) particulars

H

the insured driver's negligence caused the three plaintiffs to suffer a loss of support

the amount of each plaintiff's loss + rule 18(10) particulars

I

RAF Act notices given

time periods complied with

prescribed period has elapsed.

The material facts have been identified and arranged in clusters where they belong together. You can now draft the particulars of claim with this framework as a guide.

6.4 Declaration

Mrs Smith wants to sue the insurance company as well for payment of the amount due on her husband's life policy, which has been ceded to her. Assume that she has already sued by way of a simple summons because the claim is liquidated, but the action has been defended. Assume there has been no application for summary judgment. It is necessary to draft a declaration. We have a copy of the policy. It provides that the insurer will, against payment of a stipulated premium, pay the sum of R750 000.00 to the deceased upon his death. We also have a written cession, signed by the deceased, in which he ceded the policy to our client. She tells us all premiums were paid by way of a debit order on the deceased's bank account. The first step is again to identify the material facts.

They are (not necessarily in the order they should be set out in the declaration):

- a contract of insurance between the deceased and the defendant.
- including a term that the deceased had to pay premiums.
- and a term that the defendant had to pay the sum assured on the death of the deceased.
- payment of the premiums.
- the death of the deceased.
- the cession to our client.

Rule 18(6) imposes an obligation on a plaintiff suing on a contract to state whether the contract was oral or written, and to state when, where and by whom, on behalf of the parties, it was concluded. We must also attach a copy of the policy.

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Table 6.2 Declaration in a contractual claim (with a cession)

Par	Text of pleading	Comment
	[*COURT DESCRIPTION as prescribed*] Case no 123/[*year*] Between: Anne Smith PLAINTIFF and ABC Insurance Limited DEFENDANT PLAINTIFF'S DECLARATION	1 The case number and heading are obtained from the simple summons. 2 The description of the court must be correct (see section 50 of the Superior Courts Act 10 of 2013).

1	The plaintiff is Anne Smith, an unemployed widow who resides at [*street address*].	
2	The defendant is ABC Insurance Limited, a company with limited liability, which is duly registered and incorporated according to law and has its registered office at [*street address*].	1 You will probably sue in the city where the defendant (a company) has its registered office. There may be a good argument that the contract was concluded in the same city as the policy was issued there. 2 Do not take chances with jurisdiction.
3	On or about [*date*] the defendant, represented by its policy manager, Joseph James, and John William Smith ('the deceased') concluded a written contract of life assurance ('the policy') at [*city*], alternatively, at [*plaintiff's town or city*]. A copy of the policy is attached, marked 'A'.	1 You can plead *on or about* if you are uncertain precisely when the contract was concluded, for example, if the policy document does not have a date on it. 2 The 'when', 'where', 'by whom' and whether it was 'written' or 'oral' are given as required by rule 18(6). 3 Attach a copy of the whole policy if it is short enough. If it were a booklet you should only attach the parts relied on. 4 The alternative can be pleaded if you are unsure whether the contract was concluded where the policy was issued or where the deceased received it.

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Par	Text of pleading	Comment
4 4.1 4.2 4.3	*Material terms of the policy* The defendant insured the life of the deceased for R750 000.00 ('the sum assured'). The deceased was to pay premiums of R750.00 per month to the defendant from the date of the policy until the date of his death. The defendant was to pay the sum assured to the deceased or his nominee upon his death.	Only the terms that are directly relevant to the claims in the prayer must be set out as material facts.
5	The deceased paid all the premiums which fell due under the policy to the defendant.	Performance must be pleaded as a material fact.
6	On [*date*] the deceased ceded all his rights under the policy to the plaintiff. A copy of the written cession is attached, marked 'B'.	1 On a strict interpretation you do not need to attach a copy of the cession because it is not a contract as contemplated by rule 18(6). 2 But the existence of a written cession may prompt the defendant to capitulate. 3 These facts may be set out here to maintain the sequence of events although the cession can be pleaded as the last material fact. 4 You should refrain from using the archaic and tautologous 'right', 'title' and 'interest'.
7	The deceased died on [*date*].	1

	A copy of the death certificate to that effect is attached, marked 'C'.	The death certificate is evidence and must not be pleaded. 2 A death certificate is an official document that may provide *prima facie* proof of its contents (see the Births and Deaths Registration Act 51 of 1992). 3 The defendant may perhaps be persuaded to settle when confronted by these documents.
8	In the premises the defendant is liable to pay the sum of R750 000.00 to the plaintiff.	The legal conclusion arising from the material facts must be pleaded.
9	Notwithstanding a written demand delivered to the defendant with copies of the policy, cession and death certificate on [*date*], the defendant has failed to pay the sum claimed to the plaintiff.	1 Pleading a demand is customary, but if you want interest from the time of demand you have to plead the precise date of the demand. 2 You must provide details of the demand to furnish the court and the defendant with the facts on which the client relies for her interest claim.

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Par	Text of pleading	Comment
(a) (b) (c)	Wherefore the plaintiff claims judgment against the defendant for: Payment of the sum of R750 000.00. Interest on the sum of R750 000.00 at the rate prescribed by section 2 of Act 55 of 1975 from [*date*] to the date of payment. Costs of suit.	
	Dated at [*place*] this [*date*]	
	Signature Counsel's name (printed) PLAINTIFF'S COUNSEL	
	Signature Attorney's name (printed) X, Y & Z Partnership PLAINTIFF'S ATTORNEYS [*street address*] Care of Messrs M, N & O [*address and details as per rule 17(3)(*a)]	
	To: The Registrar [*street address*] And to: Messrs J, A & K Inc Defendant's Attorneys [*address and details as per rule 19(3)(*a)]	Since there is already a firm of attorneys on record for the defendant, (they have delivered a notice of intention to defend), a copy of the declaration must be served on them. The original goes to the Registrar.

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Keep in mind the earlier comments about the use of definitions and the need to cover each material fact.

6.5 Counterclaim

A counterclaim is a claim made by a defendant in existing proceedings against the plaintiff who has sued him or her. The counterclaim does not have to be linked to the plaintiff's claim. The idea is that the litigation must resolve all outstanding claims between the parties so that a final accounting may be effected between them. It is not compulsory to make a counterclaim. The defendant may institute a separate action but the separate actions may be consolidated later in terms of rule 11 if it appears to the court to be convenient to consolidate the two actions.

In the action where we act for Mrs Smith, the driver of the other car has delivered a plea and a counterclaim. He blames Mrs Smith for the collision and counterclaims for his own damages.

Note:

This counterclaim has deliberately been drafted in a different style so that deficiencies and inelegant style can be identified.

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Table 6.3 Counterclaim (for damages)

Par	Text of pleading	Comment
	[*COURT DESCRIPTION as prescribed*] Case no 123/[*year*] Between: Anne Smith PLAINTIFF and Joe Soap DEFENDANT DEFENDANT'S CLAIM IN RE-CONVENTION	1 You may prefer 'counterclaim'. 2 The term 'claim in re-convention' is archaic legalese.
1	The plaintiff in re-convention is the defendant in convention and the defendant in re-convention is the plaintiff in convention but *brevitatis causa* the plaintiff in re-convention is referred to as the defendant and the defendant in re-convention is referred to as the plaintiff.	1 There is no need for convoluted pleading like this. 2 The Latin phrase means 'in the interest of brevity', but as you can see, brevity has been completely defeated by what the pleader has done. 3 '*The parties are described as in the plaintiff's particulars of claim*' would have been enough.
2	The defendant repeats paragraphs 1, 2, 4.1 and 4.2 of the plaintiff's particulars of claim as if specifically incorporated herein.	1 You may incorporate allegations from other pleadings but you must ensure that they are correct. 2 In this instance you may wonder if the defendant intended to admit the plaintiff's ownership of the car, but he has perhaps done so inadvertently. 3 The words 'as if specifically incorporated herein' are superfluous.
3 3.1	At all material times: the defendant was the lawful possessor of motor vehicle NU 8888, a Ford Granada Ghia, in terms of a valid hire purchase agreement;	1 This is not a bad paragraph. The opponent has obviously done some legal research to find out what to do

		when his client is not the owner of the car in respect of which he wants to claim repair costs. Then he set out the right allegations.

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Par	Text of pleading	Comment
3.2	under the aforesaid hire purchase contract: (a) the defendant had the obligation to maintain and repair the aforesaid motor vehicle if it were damaged; and (b) the defendant bore the risk of loss and damage in respect of the said motor vehicle.	2 The creation of a definition or two could have avoided the use of stale and stilted words like 'aforesaid' and 'said'. 3 While 'contract' and 'agreement' are synonyms, it is preferable to use the one or the other consistently. 4 Should the pleader have stated whether the HP contract was oral or written and, if written, should he have attached a copy in terms of rule 18(6)? You may argue that the rule is meant to cover the case where the claim is based on a contract between the parties. Here the HP contract is merely evidence supporting the right to sue for the damages.
4 4.1 4.2 4.3	The said collision was caused by the sole and exclusive negligence of the plaintiff who was negligent in one or more or all of the following aspects: She drove at a speed which was excessive in the circumstances. She failed to accelerate, swerve aside, stop, brake, slow down or take any other reasonable steps she could and should have taken to avoid the accident. She failed to maintain her car in a roadworthy condition.	1 The word 'said' again. 2 Do the words 'sole and exclusive' contribute anything? 3 What precisely does paragraph 4.2 mean? Did your client go too fast or too slow? What other steps should she have taken? 4 The defendant should have some evidence to prove the allegation in paragraph 4.3. 5 There is some inconsistency in the terminology, 'accident/collision'.
5	As a result of the collision, the defendant's car was damaged and the reasonable and necessary cost of repair was R247 000.00. Attached are three quotations for the said repairs, marked 'A', 'B' and 'C'.	1 Causation and the cost of repair could have been set out in two separate paragraphs, each containing a 'distinct averment' as contemplated by rule 18(3). 2 The quotations are evidence and should not have been attached.

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Par	Text of pleading	Comment
6	In the premises the plaintiff is liable to the defendant for the said damages but, notwithstanding demand, the plaintiff has failed, refused and/or neglected to pay the said damages or any part of it.	1 The 'said' word again. 2 There should have been two paragraphs. 3 What is the difference between 'failed', 'refused' and 'neglected' in this context? Does it matter? 4 'And/or' to what purpose?
	Wherefore the defendant prays for judgment for payment of R247 000.00 interest and costs.	1 You must put the different prayers in different paragraphs and state against whom the judgment is sought. 2 It is always preferable to state the rate of interest and the date from which it is claimed. If *mora* interest (as interest under Act 55 of 1975

		has become known) is claimed, that must be made clear.
	Dated at [*place*] this [*date*]	
	Signature DEFENDANT'S COUNSEL	Counsel's name should have been printed.
	Signature Attorney's name (printed) Messrs J, F & K Attorneys DEFENDANT'S ATTORNEYS [*address and details as per rule 19(3)(*a)] Ref: S1029.	
	To: The Registrar Masonic Grove, Durban And to: X, Y & Z Partnership Plaintiff's attorneys [*address and details as per rule 19(3)(*a)]	

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Even if you should think this is an irregular proceeding because it attached evidence, you should think twice before rushing to court to have it set aside. An application may cause an unnecessary delay in the proceedings.

6.6 Third-party claim

By way of the third-party procedure an existing party (plaintiff, defendant or even third party) to an action may join additional parties, referred to as third parties, to the action. The purpose of this procedure is to avoid a multiplicity of actions relating to the same subject-matter. In terms of rule 13 the third-party procedure can only be used:

- where a party in an action claims, as against the party to be joined, a contribution from that third party; or
- where a party in an action claims, as against the party to be joined, an indemnification from that third party; or
- where *a question or an issue in the action is substantially the same* as one that has arisen or will arise between the party issuing the third-party notice and the third party to be joined, *and* it would be *appropriate* to determine that issue not only between the existing parties but also between the party issuing the notice and the third party to be joined.

An indemnification may be claimed, for example, from an insurer in terms of an insurance policy or from some other party in terms of an indemnity provided or undertaken by such party. A contribution may be claimed in a number of circumstances, including cases of joint wrongdoers (in delict), multiple insurance and partnership.

The procedure is to file and serve a notice in the form of a summons complying with Form 7 together with an annexure in the form of a statement of claim. We call this form of statement of claim a third-party claim for obvious reasons. The third-party notice serves the purpose of a summons, which calls upon the named third party to take steps to defend the claim and warns the third party of the consequences of failure to take those steps. The annexure to the third-party notice serves the same function as particulars of claim or a declaration.

The third-party notice and the pleadings arising from it create a separate *lis* (or dispute) within the action as a whole but only between the party issuing the notice and the third party on whom it is served. For example: Where a plaintiff sues a defendant for damages arising from a motor collision and the defendant joins his or her insurer as a third party, no *lis* arises between the plaintiff and the insurer. The plaintiff's action is based on a delict committed against the plaintiff by the defendant. The defendant has a separate action based on the insurance contract against the insurer. This means that the plaintiff cannot obtain judgment against the third party for the plaintiff's claim against the defendant. If the plaintiff, after receiving notice of the third-party proceedings, wishes to claim something from the third party, the plaintiff has to join that third party to the plaintiff's own action, either as a second defendant or as a further third party.

A third-party claim must:

- state the complete cause of action of the party issuing it against the third party.
- set out the question or issue to be determined.

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- contain a prayer for the relief claimed.
- comply with the rules of pleading because the third-party claim is a pleading.
- attach a copy of all the pleadings filed to date of the service of the third-party notice.

What follows is a typical third-party claim in a partnership matter. It is based on the following assumed facts: The defendant has been sued for a partnership debt. The partnership (three partners) bought an expensive computer some years ago but the partnership has since been dissolved and the three partners have gone their separate ways. The seller of the computer has sued only our client, apparently because it believes that our client has sufficient funds to meet the claim. Our client thinks it is unfair that he alone should have to pay the whole debt. He feels that his erstwhile partners should pay their fair share of the debt. After doing the necessary legal research, we advised him that he has a right to claim a contribution from his erstwhile partners but only after he has paid the debt. He now wishes to claim such a contribution from the other two partners.

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Table 6.4 Third-party claim for a contribution

Par	Text of pleading	Comment
	ANNEXURE: THIRD-PARTY CLAIM	
1	The plaintiff is ABC (PROPRIETARY) LIMITED, a company whose full particulars are set out in the summons and particulars of claim (the claim), a copy of which is attached marked 'A'.	Rule 13(3)(*a*) requires a copy of the pleadings 'up to the date of service of the notice' to be attached.
2	The defendant is JOHN ALLEN, whose full particulars are set out in the claim, Annexure 'A'.	
3	The first third party is ANDREW POST, an adult male, architect who resides at [*street address*].	
4	The second third party is PETER PAN, an adult male, architect who resides at [*street address*].	
5	The plaintiff has sued the defendant for payment of the sum of R750 000.00, interest and costs on the grounds set out in the claim.	
6	The defendant disputes liability for the claim on the grounds set out in his plea, a copy of which is attached marked 'B'.	
7 7.1	Material allegations in the claim are the following:	1

7.2 7.3 7.5 7.6 7.7	The defendant was at all material times a partner in the partnership known as XYZ partnership ('the partnership'). The plaintiff concluded a contract of sale with the partnership in terms of which it sold an IBM 9000 computer ('the computer') to the partnership for R750 000.00 ('the purchase price') payable on delivery. Notwithstanding delivery of the computer the purchase price remains unpaid. The partnership has since been dissolved. The defendant, as a partner in the partnership when the plaintiff's claim against the partnership arose, is personally liable for payment of the purchase price. The plaintiff is therefore entitled to recover the purchase price, interest and costs from the defendant.	In order to draft this third-party claim you must research the law of partnership, apart from finding all the technical requirements of the rules. 2 You must find out whether a partner is personally liable for the debts of the dissolved partnership. 3 You will find that he is not only liable for the debts of the dissolved partnership, but that a partnership creditor is entitled to recover the whole of his debt from any of the erstwhile partners, who are jointly and severally liable to creditors for such debts. 4 The plaintiff cannot sue the partnership as it does not exist any more. It has to sue the individual partners.

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Par	Text of pleading	Comment
8 8.1 8.2 8.3	In the event of – the court granting judgment in favour of the plaintiff for the purchase price (or any lesser amount), interest and costs; and the defendant making payment of the amount awarded and any interest and costs; the defendant will be entitled to a contribution as contemplated by rule 13(1) of the Uniform Rules of Court from each of the third parties by virtue of the facts and circumstances set out in paragraphs 9–12 below.	1 The defendant has a problem in the sense that, as against the plaintiff, he is going to have to pay the full amount of the claim if the court comes to the conclusion that the plaintiff, in fact, has a good claim against the partnership. 2 It is unfair that only one of the partners should have to pay debts of the partnership or that the liability of a partner should depend on the whimsy of an individual creditor.
9	During or about [*date*] and at [*place*] the defendant, the first third party and the second third party, each acting personally, concluded an oral agreement of partnership ('the partnership agreement') in terms of which they agreed to carry on business in partnership as architects.	If the agreement had been a written one, a copy must be attached to the third-party claim in terms of rule 18(6).
10	In terms of the partnership agreement the defendant, the first third party and the second third party: (a) were to make equal contributions to the partnership business; (b) were to be entitled to equal shares of the profits made by it; and (c) were to be liable in equal shares for its expenses, debts and losses.	
11	The contract sued upon by the plaintiff was concluded and performed by the plaintiff during the currency of the partnership.	
12	In the premises the defendant will, upon payment of the amount awarded to the plaintiff, interest and costs, be entitled to an equal contribution from each of the third parties, namely one-third of the amount paid by the defendant to the plaintiff pursuant to the court's judgment.	1 Further research into the law of partnership disclosed that a partner who *pays* a valid debt of the erstwhile partnership has a right to a contribution from the other erstwhile partners. There is no right to a contribution *before* payment. 2 The general principle is that debtors who are jointly and severally liable have a right of contribution among themselves. The contribution is determined according to

		their number. The principle differs in the law of partnership. 3 For example: Debtors who are jointly and severally liable, are entitled to a contribution from each other on a simple basis. If there are three debtors, each is liable to contribute a third, and the one who pays the whole debt may recover a third from each of the others. If there are four, then the division is as to a fourth, and so on.

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Par	Text of pleading	Comment
		4 Partners have to contribute according to the proportion they have to share in the losses of the partnership in terms of the partnership agreement. This could, for example, be 40%, 30% and 30% respectively, instead of one third each.
(a) (b) (c)	WHEREFORE the defendant, in the event of judgment being granted against him for any amount, interest and costs as claimed by the plaintiff, claims judgment against the first and second third parties as follows: The first third party is ordered to pay to the defendant, upon payment by the defendant of the amount awarded to the plaintiff in terms of the judgment of this court, including interest and costs, one-third of the total amount so paid. The second third party is ordered to pay to the defendant, upon payment by the defendant of the amount awarded to the plaintiff in terms of the judgment of this court, including interest and costs, one-third of the total amount so paid. Costs of suit.	
	DATED AT [*place*] this [*date*]. *Signature* Counsel's name (printed) DEFENDANT'S COUNSEL	The third-party claim is a pleading and has to be signed by counsel, or an attorney with the right of audience in the High Court, or the individual issuing the notice.
	Signature Attorney's name (printed) Messrs Joe Bloggs & Co DEFENDANT'S ATTORNEYS [*address and details as per rule 19(3)(*a)]	
	To: The Registrar of the High Court Masonic Grove Durban. And to: Messrs Alexanders Inc Plaintiff's Attorneys [*address and details as per rule 17(3)(*a)].	

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There are many other cases where an indemnification or contribution may be claimed, for example:

- insurance (defendant joins insurer).
- suretyship (surety joins principal debtor).
-

joint wrongdoers (negligent defendant joins another person whose negligence contributed).

o multiple insurance (an insurer claims a contribution from another insurer of the same risk).

o joint and several debtors (a debtor who paid or is sued joins co-debtors for a contribution).

6.7 Interpleader claim

The interpleader procedure is available under rule 58 to a person who faces competing claims for the same thing or money from different parties. An interpleader situation typically arises when a person is in possession of a thing or money and two others claim it from him or her, or where the sheriff has attached property in the possession of an execution debtor but a third party claims them as his or hers. Interpleader proceedings are necessary to enable the person in possession to approach the court for a determination of the rights of the contesting claimants without having to bear the costs of resolving the dispute. The opposing claimants then have to deliver their statements of claim in the form of interpleader claims. In these they must set out their respective claims to the thing or money concerned.

The procedure is that the applicant (the person in possession) commences proceedings by serving an interpleader notice on the contesting claimants. This notice serves the function of a summons. It calls on the claimants to deliver 'particulars of their claims' within a stated period and advises them of the date the court will be asked to adjudicate on the matter. The applicant must also serve an affidavit stating that he or she claims no interest in the thing or money concerned (other than for charges and costs),) does not collude with either of the claimants, and is prepared to deal with that thing or money as the court directs. The money in dispute is usually paid to the Registrar of the court, and arrangements are made for the preservation of the thing in dispute until the court has finally determined the outcome. On the date of the application the court usually gives further directions with regard to the way the dispute is to be resolved between the contesting claimants who have delivered their interpleader claims.

Assume you have found a valuable ring on the beach. You are a good citizen and you decide to try and find the owner. You place an advertisement in the local newspaper but three different people turn up at the same time and each of them claims the ring from you. Each of them gives you a very plausible story and you are about to give the ring to one of them when the other two threaten to sue you for damages. Your attorney commences interpleader proceedings. You are named as the applicant. The ring was taken to the Registrar, who has directed that your attorney must keep the ring in a safe place. Then your attorney receives similar interpleader claims from two of the three persons who claimed the ring. One of them claims as follows:

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Table 6.5 Interpleader claim

Par	Text of pleading	Comment
	[*COURT DESCRIPTION as prescribed*] Case no 132/[*year*] Between: Jason Appleby APPLICANT Andrew Gates FIRST CLAIMANT Susan Greer SECOND CLAIMANT James Chance THIRD CLAIMANT	

	First Claimant's particulars of claim	
1	The particulars of the applicant and the claimants are set out in the applicant's interpleader notice.	It is acceptable to incorporate details given in the interpleader notice in this way when the details of the parties have already been given in the interpleader application.
2	The applicant is in possession of a 2.5 carat emerald cut diamond of flawless clarity and set in a 22 carat gold ring, engraved on its inner side with the initials 'S.G.' ('the ring').	The claimant decided to give the fullest description of the ring for two reasons. The first is that she intends to ask for a declaratory order to the effect that she is the owner of the ring. The second is that she wants to emphasise the fact that the ring described in her late mother's will and the estate documents matches the ring which is the subject-matter of the dispute.
3	The first claimant is the owner of the ring.	
3.1 3.2	PARTICULARS: The first claimant inherited the ring from his late mother, Silvia Gates, upon her death in 1988. The ring was inadvertently misplaced or lost on the beach at [*place*] during or about Easter [*year*].	1 If each claimant merely pleads that he or she is the owner of the ring there will be no tactical advantage to any of them. They will all have pleaded a *rei vindicatio* and they will not have given any particulars to enable the other parties to answer. Nor will they have assisted the court to make its decision on the procedure for the determination of the issues. 2 The court can order the parties to submit affidavits and the claimant appears to have anticipated that.

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Par	**Text of pleading**	**Comment**
3.3	Copies of the will of Silvia Gates bequeathing the ring to the first claimant and the liquidation and distribution accounts in the deceased estate of the late Silvia Gates allocating the ring to the first claimant, supported by evidence on affidavit, have been served on the applicant and the second claimant and will be made available to the court at the hearing of the applicant's application.	3 It appears that the claimant may have a good case.
4	The first claimant has thus far not been served with any particulars of claim in terms of which the second or third claimant claims any interest in the ring, but denies in any event that the second or third claimant is the owner of the ring or has any other right to it.	
(a) (b) (c)	WHEREFORE the first claimant prays for an order in the following terms: It is declared that the first claimant is the owner of the ring described in paragraph 1 of this Interpleader Claim. The applicant is ordered to deliver the ring to the first claimant. The second and third claimants are ordered to pay the first claimant's costs in these proceedings – (i) jointly and severally, the one paying the other to be absolved; (ii) on the scale as between attorney and own client.	1 The interpleader claim is a pleading and has to have a prayer. 2 A positive prayer rather than a defensive one is to be preferred. The claimant has asked the court to make a declaratory order and an order for delivery. 3 The claimant has asked for costs against the other claimants on the attorney/client scale because their dishonesty has caused this litigation.
	DATED at [*place*] this [*date*] *Signature* Counsel's name (printed) FIRST CLAIMANT'S COUNSEL *Signature* Attorney's name (printed) Janet Price Attorneys [*address and details as per rule 17(3)(*a)]	

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Par	Text of pleading	Comment
	To: The Registrar of the High Court [*street address*] And to: Messrs Sanders Inc Applicant's Attorneys [*address and details as per rule 6(5)(*b*)*] And to: [*second claimant*] [*address*] [*third claimant*] [*address*]	

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6.8 Provisional sentence summons

A provisional sentence summons is used in provisional sentence (or *namptissement*) proceedings. This process can only be used where the plaintiff relies on a liquid document for his or her claim. A liquid document is a document in which the defendant has admitted or acknowledged his or her indebtedness to the plaintiff. There are many different kinds of liquid documents but the most common ones are cheques, acknowledgments of debt and mortgage bonds. Provisional sentence proceedings are therefore available to enforce such a debt quickly.

A liquid document must:

- be written;
- have been signed by the defendant or his agent;
- be unconditional; and
- demonstrate an admission or acknowledgment of the indebtedness by the defendant for a fixed amount.

There is a prescribed form (Form 3) for a provisional sentence summons. The form makes provision for the cause of action to be set out. The way the form is set out requires the cause of action to be set out in summary form and the whole cause of action is usually (but not always) set out in one paragraph.

Paragraph 1 of a typical provisional sentence summons based on a cheque reads as follows:

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Table 6.6 Provisional sentence summons

Text of summons	Comment
To the sheriff or his deputy: INFORM Angus McIver, an adult businessman of [*street address*], and hereinafter called the defendant –	A far more elegant summons could be drafted by numbering the allegations. For example:

1 that he (the defendant) is hereby called upon immediately to pay to David John Smith, an adult male, architect, of [*street address*], (hereinafter called the plaintiff) an amount of R625 000.00 together with interest at the *mora* rate from [*date*] and costs, claimed by the plaintiff on the grounds that: the plaintiff is the lawful holder of a cheque dated [*date*], drawn in his favour by the defendant upon the defendant's bank, First National Bank, [*place or branch*], for the sum of R625 000.00, which cheque was duly presented for payment in terms of section 54 of the Bills of Exchange Act 34 of 1964 but was dishonoured by non-payment, notice of dishonour being dispensed with under section 46 of Act 34 of 1964 because the defendant had countermanded payment of the cheque, a copy of which is attached, marked 'A'; 2 that failing such payment . . . etc.	To the sheriff or his deputy: INFORM Angus McIver, an adult businessman of [*street address*], and hereinafter called the defendant –: A. that he (the defendant) is hereby called upon immediately to pay to David John Smith, an adult male, architect, of [*street address*], (hereinafter called the plaintiff) an amount of R625 000.00 together with interest at the *mora* rate from [*date*] and costs, claimed by the plaintiff on the grounds that: 1 The plaintiff is the lawful holder of a cheque dated [*date*], drawn in his favour by the defendant upon FNB, [*place or branch*], for the sum of R625 000.00. 2 The cheque was duly presented for payment in terms of section 54 of the Bills of Exchange Act 34 of 1964 but was dishonoured by non-payment. 3 Notice of dishonour is dispensed with under section 46 of Act 34 of 1964 because the defendant has countermanded payment. 4 A copy of the cheque is attached marked 'A'; B. that failing such payment . . . etc.

Note:

The case heading and introductory part will follow the format of Form 3 with the necessary detail inserted.

The rest of the document follows the wording of Form 3 with the necessary detail inserted in the appropriate places.

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6.9 The charge (in a summons, charge sheet or indictment)

These three documents have different formats but serve the same purpose and must comply with the same principles so far as setting out details of the offences with which the accused is charged are concerned. Chapter 14 (sections 80–104) of the Criminal Procedure Act 51 of 1977 (CPA) contains the relevant provisions.

The constitutional principle is that the accused must be given sufficient notice of the charges against him or her. Where the attendance of the accused is secured by way of a summons, the summons must comply with the provisions of section 54(1). One of those requirements is that the summons must contain the 'charge'.

Section 84 of the CPA sets out the requirements for the charge.

84

(1)

Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2)

Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.

(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or similar words, shall be sufficient.

Subsections (2) and (3) warrant no further discussion. Subsection (1) lays down four separate requirements:

- The charge must *set forth the relevant offence*. It is not enough to identify the offence by name. Its legal elements (*facta probanda*) must be covered; otherwise the accused may object to the charge in terms of section 85 on the ground that it *does not set out an essential element of the relevant offence.* The legal elements must be stated in such a way that the particular facts of the case are set out rather than a bland and unhelpful recitation of the legal elements of the offence.

- The charge must give particulars of the *time and place* where the offence is alleged to have been committed.

- The charge must give particulars of the *person against whom* or the *property in respect of which* the offence is alleged to have been committed.

- The charge must be set forth in such a manner and with such particulars that it is reasonably sufficient to inform the accused of the nature of the charge.

A typical charge of murder complying with the requirements of section 84(1) reads as follows:

That the accused is guilty of the crime of MURDER:
IN THAT upon or about [*date*] and at or near [*place*] in the district of [*district*] the accused unlawfully and intentionally killed [*name of deceased*].

Note how the charge follows the same pattern and includes the legal elements for murder identified in paragraph 5.4.3. (The district in which the offence was committed is not a legal element of the offence but is customarily added to demonstrate that the court concerned has jurisdiction.)

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Murder is a relatively easy offence to plead because it has so few legal elements. Theft and robbery, for example, are far more complex. A form of charge for theft which is commonly in use reads as follows:

THAT the accused is guilty of the crime of THEFT:
IN THAT, on or about [*date*] and at or near [*place*] in the district of [*district*] the accused stole [*property*] to the value of [*value*], the property or in the lawful possession of [*person*].

This charge is generally accepted as sufficient to comply with section 84(1) of the CPA. Nevertheless, it does nothing to identify the legal elements of theft. A number of these elements have been subsumed under the word 'stole'. The risk for the prosecutor concerned is that he or she might lose sight of one or more of those subsumed legal elements. The legal elements for theft are—

1 the accused (as the perpetrator of the *actus reus*)

2 on [*date*]

3 at [*place*]

4 unlawfully

5 took

6 [*the property concerned*] (must be capable of being stolen)

7 belonging to [*person – the victim*] or in his or her lawful possession

8 with the intention of depriving him or her permanently of it.

Legal research is essential when drawing a charge in respect of a statutory offence. Prosecutors should study the provisions of Chapter 14 of the CPA and the commentary of the relevant sections in a textbook such as Kruger *Hiemstra's Criminal Procedure* LexisNexis.

6.10

Protocol

- It is a lawyer's professional duty to draft statements of claim which are accurate and complete. Accuracy is required so that the plaintiff's entitlement to relief is judged on the true facts, as the plaintiff contends they are. Completeness is required so that all the legal remedies that are theoretically available to the plaintiff are actually available *on the pleadings*. A failure to achieve accuracy or completeness could deny the plaintiff justice and could result in the lawyer being sued for professional negligence. The final product must be checked very carefully for errors.

- Make sure that the proposed court has jurisdiction. It is very embarrassing to lose a case simply because you have taken it to the wrong court.

6.11

Ethics

- It is unethical to plead a false claim knowingly. That goes for legal practitioners acting in civil matters as well as for prosecutors in criminal cases.

- There is a specific provision for prosecutors making it unethical to institute or continue proceedings without a good-faith basis. That good-faith basis will be present only when there is a reasonable belief that there is reliable and admissible evidence [Page 129] to sustain the charge. The subject is dealt with in detail in chapter 14. The clause in the NPA Code of Conduct provides as follows:

> D.
> 1.
> Prosecutors should, furthermore –
> (d)
> in the institution of criminal proceedings, proceed when the case is well-founded upon evidence reasonably believed to be reliable and admissible, and not continue a prosecution in the absence of such evidence . .

Thus, at the stage when a prosecutor has to prepare a charge sheet or indictment, the following legal elements of clause D.1.(d) have to be present: (i) The prosecutor concerned must (ii) actually hold the reasonable belief (iii) that the charge is well-founded (iv) based on reliable and admissible evidence. The test for a 'reasonable belief' is an objective one, which is a test similar to the reasonable person test used for negligence in the law of delict and in criminal offences where negligence is an element. Put another way: The belief will not be reasonable if the evidence – viewed objectively – is insufficient to prove the charge. It is therefore essential for the prosecutor to make a professional and independent assessment of the quality of the evidence that is available *before* preparing and drafting the charge sheet or indictment.

Chapter 7
Drafting pleas and special pleas

CONTENTS

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7.1 Introduction

The plea is the defendant's answer to the plaintiff's statement of claim (for example, particulars of claim and declaration). The main function and aim of the plea is to state the grounds of the defence to the plaintiff's claims and the material facts on which the defendant relies to defeat or oppose those claims. The plea can, of course, only be drafted once the defendant has investigated the facts, considered them carefully, taken advice and so on.

It is necessary from the outset to distinguish between 'a denial which raises a factual issue' and a 'defence which introduces new matter' because the distinction determines how one deals with the relevant matter in the plea. The distinction is best explained by way of two examples, one from the law of contract and one from the law of delict.

If the plaintiff pleads that a contract was concluded between the parties and the defendant denies that such a contract had been concluded between them, the defendant raises a factual issue. The question before the court is whether a contract had been concluded or not. All the defendant has to do in his or her plea is to deny the allegations in the relevant paragraph of the plaintiff's statement of claim and the factual question to be decided by the court will be identified. If, however, the defendant admits that a contract had been concluded but alleges that it had been induced by fraud on the part of the plaintiff, the defendant will have to go further than merely denying the existence of the contract. The defendant must first plead the material facts of the special or affirmative defence he or she wishes to raise. An affirmative defence adds new *facta probanda* – legal elements. The legal elements for fraud as a defence to a contractual claim are that:

(a)

the other contracting party has made a representation of fact to the defendant.

(b)
the representation was false.

(c)
the other party knew at the time of making the representation that it was false.

(d)
the defendant, believing the representation to be true, acted to his or her detriment by concluding the contract or by concluding it on its existing terms.

If those new legal elements were to be established, the defence of fraud would be proven: but you first have to plead the material facts.

Let's assume that the plaintiff sues for the damage to her car and alleges that the collision was caused by the negligence of the defendant. If the defendant denies that he had been negligent, he has to do no more than deny the relevant allegations of [Page 132] negligence. The issue (or question) before the court is then whether the defendant had been negligent. If, however, the defendant were to concede that he had been negligent but were to allege that there had been contributory negligence on the part of the plaintiff, the material facts for that defence (which is a partial defence only) would have to be pleaded and proved by the defendant.

In the rest of this chapter the term 'defence' will be used to indicate that the defendant has a defence which requires the introduction of additional material facts – call them special defences or affirmative defences. They are special or affirmative because the defendant introduces the material facts on which such defences rely. A significant feature of affirmative defences is that the material facts on which they rely have to be pleaded and proved by the defendant. Other examples of affirmative defences are that:

- the goods sold suffered from latent defects.
- the sum claimed has been paid.
- the parties have concluded a settlement agreement in terms of which the defendant has been absolved from the debt.
- the claim has become prescribed.
- the plaintiff failed to disclose important facts to the insurer prior to the conclusion of the contract as a result of which the insurer is entitled to cancel the policy.

7.2 Preliminary steps

You will, if you were instructed before the summons was served on your client, have had a chance to make some preliminary inquiries. These inquiries will now have to continue but with increased haste as the plea has to be ready for filing and service in time; otherwise the defendant will be barred from disputing the claim. Compare the demand and previous correspondence against the statement of claim and make sure that there are no additional claims you have not anticipated. Complete your analysis of the facts. Do the necessary legal research. Then deal with each of the following questions in turn:

- *Is it apparent from the statement of claim that the court has jurisdiction?* This question has three components: Does *this* court have jurisdiction over *this* defendant in respect

of *this* claim? If the answer to any of these questions is in the negative, you must consider what steps to take in order to challenge the jurisdiction of the court. It may also be that the statement of claim alleges factual grounds for jurisdiction which the defendant challenges. The allegation on which jurisdiction is based may be, for example, that the defendant resides within the jurisdiction of the court. If the defendant disputes that allegation, how is he or she to raise the issue? Generally speaking, lack of jurisdiction is a point which is taken by way of a special plea but there are cases where it could also be taken by way of an exception. (It can be taken by way of an exception only if no evidence is necessary to decide the issue.) However, the point has to be taken at the first opportunity; otherwise the defendant's conduct in participating in the proceedings may be construed as a submission (consent) to the jurisdiction.

- *Has the plaintiff set out sufficient facts to demonstrate the necessary* locus standi *(in its primary sense as capacity to sue or be sued without assistance) for each of the parties?* If not, the usual procedure is to raise the issue by way of a special plea, or in cases where the issue can be decided without any evidence, by way of an exception.

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- *Has there been a proper joinder of all the necessary parties?* If not, a special plea or a third-party notice may be necessary. Parties are necessary if they have an interest in the judgment or orders sought by the plaintiff in the sense that their rights may be adversely affected. Conversely, parties with no such interest are unnecessary and should not have been joined. Any defendant may raise the issue of non-joinder of necessary parties and the misjoinder of unnecessary parties.

- *Has the plaintiff pleaded all the material facts for a complete cause of action?* If not, an exception may be required. An exception may also be required if the statement of claim is vague and embarrassing.

- *Does the statement of claim contain scandalous, vexatious and irrelevant matter?* If so, the procedure for removing that kind of matter is an application to strike out.

- *Does the statement of claim comply with the rules and in particular, with the requirements of rule 18?* In a contractual claim, for example, does the statement of claim state whether the contract was oral or in writing and, if in writing, is a copy of the document attached? In a damages action for personal injuries, for example, does the statement of claim set out the details required by rule 18(10)? If not, the statement of claim may be an irregular proceeding which may be set aside under the provisions of rule 30.

- *Does the defendant have a counterclaim against the plaintiff?* If so, the counterclaim must be delivered with the plea. In some instances the material facts which would have supported the counterclaim may with equal effect be set out in the plea, especially when the defence is one of set-off. However, if set-off is to be raised as a defence in order to meet the claim or to reduce it, special care must be taken. Ordinarily the facts underlying the set-off give rise to a claim of their own. Those facts will therefore have to be pleaded as if they constitute a cause of action. A set-off relying on a liquidated debt may be raised in the plea, but if the defendant wishes to raise an unliquidated counterclaim as a set-off, two further steps must be taken. First, the defendant must deliver a counterclaim setting out the material facts for that unliquidated claim. Then, in terms of rule 22(4), the defendant must ask that judgment on the plaintiff's claim be delayed until the counterclaim has been decided. Keep in mind that the defendant has to prove the material facts on which the set-off is based.

- *Does the defendant have any claims for an indemnification or contribution against any person who can be joined as a third party?* Or are there perhaps disputes that arise between the current parties as well as between the defendant and a third party which should be dealt with at the same time? In terms of rule 13 a defendant may join further parties by way of the third-party procedure.

Once the preliminary analysis has revealed that the proper step is to deliver a plea, with or without a special plea (and whether or not it is accompanied by a counterclaim or a third-party claim), the plea may be drafted by taking the following steps:

- Take full instructions from the defendant with regard to each allegation in every paragraph of the statement of claim, including the prayer. Your instructions should include the evidence available to the defendant on every material fact alleged by the plaintiff. This is of the utmost importance because it is unethical to deny allegations in respect of which the defendant has no knowledge and no evidence to dispute the fact pleaded by the plaintiff. Where no direct evidence is available to challenge the plaintiff on any material fact alleged, you have to consider whether there is indirect evidence or documentary evidence available to cast doubt on the plaintiff's version. If there is, a denial may be appropriate.

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- Ascertain the material facts (*facta probanda*) for any affirmative defences the defendant wants to raise. Do you have evidence to support them?

- Where there are several answers to the claim, whether they amount to denials or affirmative defences or a combination of the two, they can be set out cumulatively or in the alternative but take care that the plea does not become vague and embarrassing.

- Draft the plea by going through the allegations in the statement of claim line by line and adding the facts and explanations or qualifications on which the defendant relies. Identify each separate allegation as you go through the paragraphs of the statement of claim and then decide how you want to plead to that allegation. There could be more than one allegation in a paragraph, or even in a sentence. For example: A statement that, 'On 18 June [*year*] and at [*place*] the parties were married to each other in community of property', contains four separate factual allegations. They are that: (a) the parties were married to each other; (b) the marriage took place on 18 June [*year*]; (c) the marriage took place at [*place*]; and (d) the marriage was in community of property. Each factual allegation must be dealt with in the plea.

- Be mindful of the requirement that the defendant has to plead the material facts for any affirmative defence he or she relies on as well as any explanation or qualification of any denial. The defendant may be precluded from leading evidence if the material facts and such explanations and qualifications have not been pleaded. An affirmative defence must be pleaded fully, not merely because the rule requires it, but also because it could persuade the plaintiff to withdraw the claim or to settle on terms which are acceptable to the defendant.

- After completing the first draft of the plea, take a moment to check the following:

  - Have you dealt with every allegation in the statement of claim? An allegation in the statement of claim that is not dealt with in the plea is taken to have been admitted by the defendant (rule 22(3))?

  - Have you made any admissions of any of the plaintiff's factual allegations for which you do not have proof? Change them now. An admission cannot be withdrawn easily.

  - Have you correctly set out all the material facts to be relied on (rule 22(2))?

  - Have you added all the necessary explanations and qualifications required to render any denials meaningful (rule 22(3))?

  -

Have you included an appropriate prayer?

7.3 Form and content of the plea

The plea has to comply with the provisions of rule 18 relating to pleadings generally and rule 22 relating to the plea specifically. According to rule 18, the plea should:

- be divided into consecutively numbered paragraphs, each containing a distinct averment.
- contain a clear and concise statement of the material facts relied on with sufficient particularity to enable the opposite party to reply thereto.
- not contain evasive denials but should deal with the points of substance clearly.
- state whether, if a contract is relied on in the plea, the contract was written or oral, and when, where and by whom it was concluded. If it was written, attach a copy.

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Rule 22(2) gives the complete range of answers that may be given in the plea. The defendant is not obliged to admit or deny a complete paragraph, but is required to deal with each factual allegation within a paragraph separately. The rule provides for four options and two obligations. The defendant may:

- admit an allegation.
- deny an allegation.
- plead a confession and avoidance, meaning to admit an allegation (confessing that it is true) but adding an answer which amounts to a justification or excuse (avoiding liability).
- elect not to admit a material fact, in which event it must be stated to what extent it is not admitted.

In addition to the four options listed, the defendant is obliged to:

- plead the material facts (in the sense of legal elements – *facta probanda*) on which the defendant relies.
- state any explanation or qualification of any denial which may be necessary.

7.3.1 Pleading an admission

If a defendant accepts an allegation in the statement of claim as being true, you may admit it. Once an allegation has been admitted, it is no longer in issue between the parties and the defendant will not be allowed to contest that particular point at the trial by adducing contrary evidence or even by disputing the admitted fact in argument or cross-examination. It is therefore essential that extreme care be taken before you admit a factual allegation. If in doubt, take further instructions or plead that the defendant does not admit the relevant allegation. You can always make admissions later, if

appropriate. If an admission is made by mistake or should facts later come to the fore that would justify a denial of the particular allegation, an application to amend the plea must be made.

Table 7.1 Pleading an admission

Particulars of claim	Plea	Comment
3 The plaintiff was at all material times the registered owner of an immovable property described as [*give full description*], in extent 43.321 hectares ('the property').	3 The defendant admits paragraphs 3 and 4 of the particulars of claim.	1 Do not start the plea with '*Save as is hereinafter expressly admitted, every allegation in the particulars of claim is denied*.' This is a general denial. It does nothing to identify the true issues.
4 The defendant is in occupation of the property.		2 The admission may be combined with an explanation if the defence is in the nature of a confession and avoidance. (See Table 7.6.)
		3 Try not to use the passive case, such as 'Paragraphs 3 and 4 of the particulars of claim are admitted.'
		4 It is unnecessary to introduce a heading such as, '*Ad paragraphs 3 and 4 of the particulars of claim*'.

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7.3.2 Pleading a denial

If an allegation is to be disputed by calling evidence to the contrary, it must be denied. Once an allegation is denied that allegation is in issue between the parties and the plaintiff bears the onus of proving that the allegation is true. It is therefore not necessary to add to a denial of a particular allegation that '*the plaintiff is put to the proof thereof*'. This is also in poor style because the rule does not offer that as one of the options which may be used.

The style for a denial is slightly different from that for an admission because one is required to deal with individual allegations rather than whole paragraphs.

Table 7.2 Pleading a denial

Particulars of claim	Plea	Comment
7 As a result of the publication of the defamatory matter in the article, the plaintiff has suffered damage to his reputation and he has suffered damages in the sum of R500 000.00.	6 The defendant denies each allegation in paragraph 7 of the particulars of claim.	1 There are more than one factual allegation in paragraph 7 of the particulars of claim and it is therefore necessary to deal with each of them; hence the 'each allegation' in the plea.
		2 It is not permissible to deny a paragraph; the specific allegations have to be pleaded to.
		3 It is not necessary to add '*as if specifically traversed*

		herein and the plaintiff is put to the proof thereof.'

There are different ways of pleading when some allegations in a paragraph are to be admitted and others are to be denied (or not admitted).

Table 7.3 Denying some allegations while admitting others

Particulars of claim	Plea	Comment
3 On [*date*] the defendant published defamatory matter of and concerning the plaintiff in an article in *The Daily News*, a daily newspaper circulating in KwaZulu-Natal. A copy of the article is attached, marked 'A'.	2 The defendant denies that he published the article and that it is defamatory of the plaintiff, but admits the remaining allegations in paragraph 3 of the claim.	1 The facts placed in issue should be identified precisely. 2 A different formula is: '*Save for denying that he published the article and that it is defamatory of the plaintiff, the defendant admits paragraph 3 of the claim*.'

7.3.3 Pleading a 'confession and avoidance'

A confession and avoidance is what could be termed a 'yes, but' defence. It means effectively that the defendant admits the particular allegation but has an answer to it justifying his or her admitted conduct or providing a legal excuse for it.

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Examples of this type of defence are justification for an arrest and self-defence as an answer to a claim based on an assault. The pleadings would then read as follows, if the claim were to be for an unlawful arrest:

Table 7.4 Pleading a confession and avoidance

Particulars of claim	Plea	Comment
3 On [*date*] the defendant unlawfully arrested the plaintiff at [*place*].	2 The defendant admits that on [*date*] and at [*place*] he arrested the plaintiff, but denies that the arrest was unlawful by virtue of the following facts and circumstances: 2.1 The defendant was a peace officer as defined in Act 51 of 1977 at the time of the arrest. 2.2 On the date and at the time alleged the plaintiff committed a crime in his presence, namely theft of a motorcar. 2.3 The defendant was therefore entitled to arrest the plaintiff without a warrant in terms of section 47 of Act 51 of 1977. 2.4 The arrest was therefore lawful.	1 The material facts which would constitute the justification (avoidance) would have to be pleaded in amplification of the 'yes, but' defence. Rule 22(2) and (3) require such amplification. 2 Also keep in mind that the burden of proving the allegations on which the 'avoidance' is based rests on the defendant.

7.3.4 *Pleading that an allegation 'is not admitted'*

It happens often that a fact alleged in the statement of claim is beyond the pleader's instructions or his client's knowledge as the latter simply does not know whether the allegation is true or false. Since a denial of that allegation is in itself an affirmative statement that may later turn out to be false, it is best in such circumstances to exercise the defendant's right not to admit the relevant allegation.

The style for pleading where an allegation is not admitted is as follows:

Table 7.5 Pleading that an allegation is not admitted

Particulars of claim	Plea	Comment
3 The plaintiff was at all material times the owner of a [*year*] Honda motorcar with registration number NPN 2001.	2 The defendant does not admit any of the allegations in paragraph 3 of the particulars of claim.	1 More than one fact is alleged in paragraph 3 of the particulars. Each one has to be dealt with. 2 It is enough not to admit the allegations; you do not need to '*put the plaintiff to the proof thereof*'. 3 It is unnecessary to state that the defendant 'has no knowledge of the allegations' concerned but it is customary to do so.

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Read paragraph 3 of the particulars of claim very carefully. There are more than one 'fact' hidden in one rather innocuous sentence. The plaintiff may own a car, but it might not be a Honda. She might even own a Honda with a different registration number. Most importantly, there might be such a car but it may not be true that the plaintiff owns it. She may have possession of it under a hire purchase contract or lease, in which event it belongs to the seller or lessor. For that reason it is wise not to admit 'any of the allegations' in the relevant paragraph.

It is not necessary to add that the plaintiff is put to the proof of those allegations as that is the automatic consequence of the failure to admit the relevant allegations. Allegations that are not admitted still have to be proved. However, the defendant may not lead contrary evidence to dispute those allegations without amending the plea to deny them first.

The election not to make an admission can be pleaded in a different way, namely to the effect that, 'The defendant has no knowledge of the allegations in paragraph 3 of the particulars of claim and accordingly *denies* them.' It has been said that reasons have to be given when an allegation is not admitted but that may not be required in every division of the High Court. *First*, rule 22(2) does not require any explanation. *Secondly*, if the rule provides that it is in order to state which facts *are not admitted*, why do we want to *deny* them? If we mean by this type of denial that we deny because we do not know, then our denial has no more force than a statement that we do not admit. If a true denial were intended, the pleader should plead a simple denial without any advance disclaimers. *Third*, stating that the defendant has no knowledge of the relevant facts set out in the statement of claim pleaded to may not always be true or it may no longer be true by the time the trial date arrives.

7.3.5 *Pleading the 'material facts'*

Rule 22(2) states clearly that the material facts on which the defendant relies for any defence must be pleaded. If the defendant were to avoid liability in a contractual dispute on the basis that the thing sold suffered from a latent defect entitling the defendant to return the thing sold, he should plead the facts giving rise to the *actio redhibitoria*.

Table 7.6 Pleading the material facts of the defence

Particulars of claim	Plea	Comment
5. The plaintiff duly delivered the [*thing*] to the defendant.	2 The defendant admits paragraph 5 of the claim but avers that: (i) At the time of the conclusion of the contract the [*thing*] had a latent defect rendering it unfit for the purpose for which it was bought. Particulars: (a) . . . (b) . . . (ii) The defendant is entitled to resile from the contract and has done so. (iii) The defendant has tendered return of the [*thing*] to the plaintiff and repeats the tender. (iv) . . . etc.	The burden of proof in respect of these material facts will rest on the defendant.

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There are many cases where one has to plead additional facts. If, for example, the defence is that the amount claimed had been repaid, in full or in part, then the payments relied on must be pleaded specifically with reference to the date and amount of each payment. When an apportionment of damages is relied on the facts supporting that defence must be pleaded fully. An estoppel, likewise, has a set of material facts to be alleged in the plea. In each case the material facts of the defence must be identified and pleaded. At the trial those material facts must be proved by the party who pleaded them.

7.3.6 Pleading an explanation or qualification

In some situations it is not enough to admit or deny an allegation as the defendant needs to add something pertinent to what is set out in the plaintiff's pleading for the answer to be informative. An explanation or qualification may be necessary for the denial to be meaningful, or, at least, not to be misleading. For example: When the plaintiff makes a claim in contract for payment of the purchase price of a car, the defendant may wish to rely on terms of the contract not yet pleaded by the plaintiff. If the defendant wants to allege that the car was latently defective to the extent that he or she was entitled to return it to the plaintiff, he or she will have to set out what the relevant additional terms are. That additional information would be regarded as an explanation or qualification of the admission that the parties had concluded a contract on the terms alleged by the plaintiff.

Table 7.7 Pleading an explanation or qualification

Particulars of claim	Plea	Comment
4 The material express or implied terms of the contract were that – 4.1 the plaintiff sold a [*year*] Mercedes Benz motorcar	2 The defendant admits that the terms set out in paragraph 4 of the particulars of claim were part of the contract but alleges that the following additional terms were included:	1 Rule 22(3), which requires the defendant to state any *explanation or qualification of any denial*. 2 An allegation that there were additional terms to the contract does not raise a confession and avoidance situation. When additional

('the car') to the defendant for R800 000.00 ('the price'); 4.2 The defendant was to pay the price to the plaintiff within ten days after delivery of the car.	2.1 The car was to be in running condition with a current road worthy certificate. 2.2 The car was to be free of latent defects making it unfit for its intended use, namely to be used as daily transport by the defendant.	terms are alleged the plaintiff has to prove that they did not form part of the contract (see *Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk* 1976 (3) SA 470 (A)). 3 Since the *exceptio redhibitoria* is here relied on as a defence, the defendant must also plead the further requirements of that defence fully in the remainder of the plea and tender redelivery of the car against repayment of the price paid for it.

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7.3.7 The prayer

A plea has to have a prayer. If it does not have a prayer, the plea may be excepted to on the ground that it is vague and embarrassing. A plea without a prayer is also an irregular proceeding as contemplated by rule 30.

The prayer in a plea is subject to the same general principles as a prayer in a statement of claim. It must set out the relief the court will be asked to grant to enable the other party to determine exactly what relief is asked for. In most cases the defendant will ask for judgment in his or her favour with costs. Judgment 'in favour of the defendant' will only be granted if the court is satisfied that the probabilities favour the defendant. If the court cannot decide which version is the more probable, it will grant 'absolution from the instance'. The difference between a judgment in the defendant's favour and an absolution from the instance is that the former means that the issue has been decided once and for all between the parties. If the plaintiff, having had judgment granted against him or her, were to commence fresh proceedings against the defendant on the same cause of action, that claim may be met by a special plea of *res judicata*.

A judgment absolving the defendant from the instance does not have the same effect and the plaintiff may re-institute proceedings and rely on the same cause of action, provided that the claim has not become prescribed in the interim. Since the court will not grant judgment for the defendant unless the prayer specifies that, it is important to ask for '*judgment in the defendant's favour*' instead of that '*the plaintiff's claims be dismissed*'. The latter formula gives rise to an absolution judgment. For this reason the statement in *Amler's Precedents of Pleading* 9th edn LexisNexis at 4 that, '[t]he normal prayer is for the dismissal with costs of the plaintiff's claim,' must be taken to have been made *per incuriam*, with due respect to the learned author.

When the defendant claims costs, care should be taken that all the special orders are justified by the facts pleaded. For example: If costs on the scale as between attorney and own client are claimed, some facts ought to be set out in the body of the plea to justify that request. Sometimes the reasons are already apparent from the plea, for example, where the defendant has pleaded fraud or similar conduct on the part of the plaintiff, but in most cases that will not be the case. If two advocates are employed by the defendant, the prayer must indicate whether the costs of two counsel will be claimed. The usual formula is to ask for the costs of suit, including the costs consequent upon the employment of two counsel, where applicable.

There is no need for a prayer for 'further', 'alternative' and/or 'other relief' in the prayer.

Table 7.8 The prayer

Prayer	What to avoid	Comment
Wherefore the defendant prays for – (a) judgment in its favour; (b) costs of suit, including the costs consequent upon the employment of two counsel.	Wherefore the defendant prays that the plaintiff's claims be dismissed with costs.	You could ask for the 'costs of two counsel', but the longer formula seems to carry the blessing of some courts.

7.3.8 Inelegant style

A plea could comply with all the requirements of the rules but still be in bad style.

You should strive for simplicity, clarity, precision and elegance in the plea.

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Table 7.9 An inelegant plea

Par	Text of pleading	Comment
	[*DESCRIPTION OF COURT as prescribed*] Case no 12/[*year*] Between: ANNE SMITH PLAINTIFF and JOE SOAP DEFENDANT	
	DEFENDANT'S PLEA	
1	The DEFENDANT denies each allegation in the PLAINTIFF'S PARTICULARS OF CLAIM unless specifically admitted hereinafter.	1 There is no need for capital letters. 2 A general denial of this nature serves no purpose. Each allegation pleaded by the plaintiff has to be dealt with separately. 3 Stilted language, 'hereinafter'.
2	The DEFENDANT admits paragraphs 1 and 2 of the PLAINTIFF'S PARTICULARS OF CLAIM.	A definition ('the claim') could shorten the plea considerably.
3	The DEFENDANT has no knowledge of the allegations in paragraph 3 of the PLAINTIFF'S PARTICULARS OF CLAIM and therefore denies them as if specifically traversed herein and puts the PLAINTIFF to the proof thereof.	All the words after 'them' serve no purpose. When the defendant denies the allegations concerned, it follows as a matter of law that the plaintiff has to prove each of them.
4	The DEFENDANT admits paragraphs 4.1 and 4.2 of the PLAINTIFF'S PARTICULARS OF CLAIM but denies each allegation in paragraphs 5, 6 and 7 thereof.	1 Rule 18(3) requires separately numbered paragraphs, each containing a 'distinct averment'. 2 The admission of some paragraphs must not be joined to the denial of allegations in other paragraphs.

		3 Stilted language, 'thereof'. 4 Can the defendant honestly deny that the plaintiff's car had been damaged in the light of what the defendant says in the counterclaim in Table 6.3 in chapter 6?

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Par	Text of pleading	Comment
5	The DEFENDANT admits paragraph 8 but denies being liable.	1 Paragraph 8 of what? It seems even the defendant's counsel got tired of repeating the 'PLAINTIFF'S PARTICULARS OF CLAIM'. 2 A definition would have prevented tedious repetition.
6	6.1 The collision was caused by the contributory negligence of the PLAINTIFF, who was negligent in the following respects: (a) She drove at a speed which was excessive in the circumstances. (b) She failed to accelerate, swerve aside, stop, slow down or take any other reasonable steps she could and should have taken to avoid the accident. (c) She failed to maintain her car in a roadworthy condition. 6.2 The PLAINTIFF'S aforesaid negligence contributed to her damages. 6.3 In the premises the PLAINTIFF'S damages should be reduced in terms of section 1 of Act 34 of 1956.	1 Notwithstanding the problems with the style of this paragraph, it does contain the material facts for a reduction of the damages by reason of contributory negligence. 2 This defence could have been introduced in the alternative to the denial of negligence in paragraph 4. 3 There ought to have been a paragraph to the effect that, '*In the event of the plaintiff proving the allegations in paragraphs 5 and 6 of the particulars of claim, the defendant pleads as set out below*.'
	WHEREFORE the DEFENDANT prays that the PLAINTIFF'S claim be dismissed with costs.	1 The plea must ask for judgment for the defendant, not merely that the claim be dismissed. 2 The plea must also ask for relief pursuant to the plea of contributory negligence, for example, '*alternatively, that the plaintiff's damages be reduced in accordance with section 1 of Act 34 of 1956 with an appropriate order for costs*'.
	DATED at [*place*] this [*date*]	
	Signature DEFENDANT'S COUNSEL	Counsel's name should be printed, if the signature is illegible.

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Par	Text of pleading	Comment
	A, B & C Partnership Defendant's attorneys [*address and details as per rule 19(3)(*a)]	The attorney should also sign the pleading and his or her name should also be printed.

	To: The Registrar High Court [*Address*] And to: X, Y & Z PARTNERSHIP Plaintiff's attorneys [*address and details as per rule 17(3)*(a)] Ref: S 101	

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7.4 Special pleas

There are some defences that have the effect of terminating or delaying the proceedings without going into the merits of the plaintiff's claims. Such defences include a wide variety ranging from prescription, compromise, *res judicata*, *lis alibi pendens*, a cession of the debt by the plaintiff to a third party, on the one hand, to misjoinder or non-joinder on the other. The difference between these two extremes is immediately apparent. In the case of the prescription point, if the defendant is successful a final judgment will be granted in favour of the defendant and the plaintiff's claim will be dismissed there and then. Note that there can be no judgment of absolution from the instance in this type of affirmative defence. The defence has to be proved on balance of probability for the defendant to succeed. In respect of the non-joinder point, on the other hand, if the defendant is successful on that point the plaintiff's claim will usually be stayed until the plaintiff has joined all the correct parties.

It is not necessary to put labels to these different special pleas. It might even be confusing. A special defence which, if it is upheld, will result in the plaintiff's claims being dismissed for good is called a special plea in abatement, for example, a plea of prescription or *res judicata*. A special defence which merely delays the proceedings until procedural defects have been cured is called a dilatory plea, for example, *lis pendens,* misjoinder (the unnecessary parties have to be removed from the list of defendants in the pleadings) and non-joinder (the necessary parties have to be joined). It is sufficient, with either type of special defence, to call it 'the defendant's special defence' or 'the defendant's special plea'.

There may be a special or separate hearing for the determination of the issues raised by the special plea under rule 33(4).

The special plea makes positive averments to which the plaintiff in turn has the right to reply. The special plea may raise factual issues which can only be determined after evidence has been heard by the court. For example: A special defence of prescription may be raised where the plaintiff responds (in the replication) by pleading that the defendant had subsequently acknowledged liability. (See section 14 of the Prescription Act 68 of 1969.) If the defendant denies having acknowledged liability, the issue will have to be decided after the witnesses have given their evidence.

If the point can be argued on the statement of claim as it stands, the appropriate procedure is an exception; a special plea is only required where extraneous evidence has to be introduced for the question to be resolved.

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Table 7.10 Special plea

Par	Text of pleading	Comment
	DEFENDANT'S SPECIAL PLEA AND PLEA	
1	**Defendant's special plea**	1

1.1 1.2 1.3 1.4	The cause of action ('the claim') sued upon arose on [*date*]. The plaintiff's claim constitutes a debt as defined by the Prescription Act 68 of 1969. The summons in this action was served on the defendant on [*date*], that is, more than three years after the claim arose. In the premises and by virtue of section 11 of the Prescription Act 68 of 1969 the plaintiff's claim has become prescribed.	A separate heading for the special plea acts as a signpost to alert the plaintiff and the court to the fact that an extraordinary defence has to be dealt with first. 2 The material facts for the special defence must be pleaded. 3 If a legal conclusion or a statutory provision is to be relied on, that conclusion or provision has to be stated expressly.
	WHEREFORE the defendant prays for judgment in the defendant's favour with costs.	The special plea must have its own prayer.
2	The defendant pleads over as set out below.	1 The defendant must plead fully to the statement of claim. 2 The phrase 'pleads over' is traditionally used to indicate that the pleader is moving on to the merits of the claim.
3	The defendant admits paragraphs 1 . . .	You then plead to each of the allegations in the statement of claim as if there has been no special plea.

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The plea then continues to deal with the claim as usual, covering every paragraph and allegation as if there were no special defences. The reason is quite obvious: If the special defences are dismissed, the case has to proceed on the underlying factual and legal disputes. If the special plea relates to non-joinder, the prayer will not ask for dismissal of the claim but for the plaintiff's action to be stayed until the plaintiff has joined the relevant parties within a particular time limit, failing which the plaintiff's action is to be dismissed.

7.5 Plea explanation in a criminal case

A plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977 (CPA) may in certain circumstances be employed to have the same effect as a plea in a civil case, namely to identify the issues, advise the prosecution and the court of the defence and make admissions. While some criminal lawyers adopt the approach that the prosecution must prove every allegation in the charge – 'We place every material fact in issue, Your Worship' – they do their clients, their own reputation and the administration of justice no favours by taking such a stance. The cases where the defence does not know what the defence is are few and far between. Experienced criminal lawyers know the value of a good section 115 plea explanation and will use it as an early opportunity to get the judicial officer on his or her side. The process of persuasion starts with a good plea explanation.

The explanation does not follow the format of a plea in a civil case but deals with the matter in a way that gives the accused's version very briefly and in such a way that his or her defence is properly identified. You should avoid being over-elaborate and also being too coy. There is nothing to be gained by withholding the defence when the accused has nothing to hide.

The section 115 plea explanation should reveal the minimum information about the defence that is necessary to disclose the defence to the court and to explain the circumstances within which the defence arose. Care must be taken to avoid:

- providing a detailed version of the accused's version of the events – the accused may later be cross-examined on the details included, and even details omitted from, the plea explanation.
- including argument in the plea explanation, whether that argument is one based on the facts, the treatment the accused has suffered at the hands of the police, or the law.
- when dealing with any factual matter, contradicting the version given by or on behalf of the accused during bail proceedings or during questioning by the police – the accused may later be cross-examined on any discrepancies.

The plea explanation is not the time to argue the case or deal with the credibility of the prosecution witnesses or try to win the judge's sympathies. Provide the minimum of information without being overly terse. In the example that follows, the plea explanation has been drafted in the knowledge that the facts set out in it are in perfect agreement with the version given by the accused to the store detective and the police.

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Table 7.11 Plea explanation in a criminal case (See Appendix 2)

IN THE MAGISTRATES' COURT FOR THE DISTRICT OF [*name of district*]

Case no 12345/[*year*]

In the matter between

THE STATE

and

JUSTIN GRAHAM

STATEMENT IN TERMS OF SECTION 115 OF ACT 51 OF 1977

1. The accused pleads not guilty to the charge.
2. The accused provides the following explanation for his plea:

   On 12 December [*year*] the accused went to Three Rings Sports to look at bags. His old backpack was torn. His interest was aroused when he saw some backpacks displayed on a stand. He put his own backpack down in order to examine one of the backpacks. He did not want to buy that backpack. He walked over to another rack where more bags were on display, inadvertently carrying the store's backpack instead of his own. After looking at a number of bags, he left the store believing he was carrying his own backpack. He had no intention to steal the store's backpack.
3. The accused makes the following admissions, which may be recorded as such in terms of section 220 of Act 51 of 1977:

   One: the backpack referred to in the charge sheet is the property of Three Rings Sports.

   Two: its value is R150.00.

   Three: the accused had no right to remove it from the store.

(Signature)
Attorney for the accused

J Graham
Accused

7.6

Protocol

An elegant plea complying with the rules is the first step in persuading the court. A sloppy plea is a sure sign of a sloppy and unpersuasive defence.

7.7

Ethics

- It is unethical knowingly to plead a fictitious or false defence.
- It is inappropriate and (arguably) unethical to deny an allegation if the defendant does not know whether it is true or not and has no evidence to dispute or disprove it. The plea should rather state that the allegation is not admitted.

Chapter 8
Drafting replications and further pleadings

CONTENTS

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8.1

Introduction

A replication is an answer to the defendant's plea. It serves two primary purposes. The first is to admit allegations made in the plea. This purpose is overshadowed by the second, which is to introduce new facts in the nature of an explanation or qualification, or to raise a special reply or affirmative reply in the nature of a confession and avoidance. This could be done in reply to the facts set out in the plea or in response to a denial in the plea (usually an estoppel situation). It is not necessary to deliver a replication if neither of its primary purposes will be served. If no replication is delivered, all the factual allegations in the plea are automatically placed in issue. A replication that merely denies all the allegations in the plea is therefore a waste of time. Since its purpose is to reply, a replication may not introduce new claims or causes of action, nor may it contradict the statement of claim.

Further pleadings such as rejoinders, surrejoinders, rebutters and surrebutters are also in the nature of a reply to the prior pleading and generally the same principles apply to them as for replications.

8.2 Form and content of a replication

Because a replication is a pleading, it must comply with the requirements of rule 18 for pleadings generally and also with rule 25, which deals specifically with replications. A defective replication may be set aside as an irregular proceeding under rule 30 and may be attacked by way of an exception or an application to strike out under rule 24.

When the defendant's plea has come to hand, you need to consider whether a replication is necessary. There is no purpose in merely admitting allegations in the plea. Such an admission can be made by way of a letter to the other side. It can also be made at the rule 37 conference. It can even be made at the doors of the court at the trial. The replication increases the costs of the litigation. Where counsel has been retained, a brief must be prepared for counsel. Counsel must be paid. The replication must be perused, copied and filed, and served. These steps cost money. A letter costs a lot less and the parties must in any event consider making admissions at the [Page 150] rule 37 conference. Any admissions may be made at that time, instead of by way of a replication.

However, there are cases where a replication is essential. If there is an answer or explanation to facts pleaded by the defendant, that answer or explanation must be pleaded to *avoid* the conclusion the defendant advances in the plea. The plaintiff could have an answer in the nature of a confession and avoidance. For example, if the defendant were to raise prescription as a defence, the plaintiff could rely on section 14 of the Prescription Act 68 of 1969 and plead that there has been an interruption of the prescription, but the plaintiff would first have to plead the material facts which are necessary to support that answer.

Explanations or qualifications could be raised in the replication as follows:

* 1. *Ad* paragraph 6 of the Plea:

The plaintiff admits that the defendant paid the purchase price to X, but denies that X was authorised to receive payment on the plaintiff's behalf.

WHEREFORE the plaintiff joins issue. (This is the customary prayer to a replication.)

* This is an instance where the *ad paragraph* style of signposting is useful.

Estoppel is a defence that is often raised in a replication. Let us assume that the plea in a claim for the purchase price of goods denies that a contract was concluded between the parties on the basis that the person alleged to have represented the defendant lacked the authority to represent the defendant. The plaintiff may wish to respond to that defence by pleading that the defendant is estopped from denying the authority of that person. The estoppel must then be raised in the replication. This could be done as follows:

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Table 8.1 Replication

Par	Text of pleading	Comment
	CASE HEADING PLAINTIFF'S REPLICATION	
1	1.1 Over a period of eighteen months immediately preceding the conclusion of the contract and in a number of transactions, Alan Smith ('Smith') with the knowledge of the defendant, represented the defendant in concluding similar contracts to that relied on in the particulars of claim with the plaintiff. 1.2 The defendant honoured those contracts as if Smith had been authorised to represent it in concluding contracts of such a nature. 1.3 The defendant by its conduct thus represented to the plaintiff that Smith had the necessary authority to conclude contracts with the plaintiff on its behalf. 1.4 The plaintiff, relying on the truth of that representation, acted to its detriment by concluding the contract sued upon with the defendant and delivering the goods sold thereby to Smith.	1 The facts in answer to the plea must be set out in the style of all pleadings. That means separate paragraphs for distinct allegations. The paragraphs must be numbered. (See rule 18.) 2 A certain amount of legal research would have had to be done before the replication could be drafted. 3 Is negligence a requirement for an estoppel of this nature? Legal research will supply the answer.

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Par	Text of pleading	Comment
2	In the premises the defendant is estopped from denying that Smith had been duly authorised by it to conclude the contract sued upon.	
	WHEREFORE the plaintiff joins issue.	1 The replication must have a prayer. 2 'WHEREFORE the plaintiff joins issue' is sufficient. It is not necessary to repeat the prayer contained in the statement of claim.
	DATED at [*place*] this [*date*]	
	Signature Counsel's name (printed) PLAINTIFF'S COUNSEL	
	Signature Attorney's name (printed) PLAINTIFF'S ATTORNEY [*address and details as per rule 17(3)(*a)] To: The Registrar [*address*] And to: Defendant's attorneys *address and details as per rule 19(3)(*a)]	

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8.3 Further pleadings

The most common replication introduces a confession and avoidance in response to allegations made in the plea. The result is that the 'avoidance' part of the replication may introduce new facts to justify the plaintiff's original claims, or to avoid the conclusion contended for by the defendant in the plea. When new facts are introduced in this way, there may be some scope for the new allegations in the replication to be met in turn by a confession and avoidance. Further pleadings may then be delivered. These are called, in the order that they may appear after the replication, a 'rejoinder', 'surrejoinder', 'rebutter' and 'surrebutter' respectively.

The principles for these further pleadings are the same as for replications. It is only necessary to deliver such a pleading if admissions need to be made or additional facts pleaded by way of a confession and avoidance. They also follow the general pattern of a replication and the same prayer is used to join issue.

8.4 Close of pleadings (*litis contestatio*)

A purpose served co-incidentally by the delivery of a replication is that the pleadings are then closed, meaning that the parties have defined the issues and are ready to be allocated trial dates. If no replication is delivered within the time allowed, (which is 15 days), the pleadings are closed automatically. Some procedural steps can only be taken after the pleadings have closed. Some claims that would otherwise lapse if the plaintiff were to die are transferred to the deceased estate if the pleadings in the action were closed before the plaintiff's death.

8.5 Protocol and Ethics

The same principles apply as for statements of claim and pleas.

Chapter 9
Drafting exceptions, applications to strike out and objections to a charge

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9.1 Introduction

An *exception* is a defence or answer of a legal nature; it does not rely on any new or additional facts. The exception procedure is used when a statement of claim or a plea is on the face of it defective. That means that the pleading concerned cannot on any reasonable interpretation deliver what it is supposed to deliver, namely, a clear, identifiable and recognised cause of action or defence. One can then take a legal point by way of an exception in order to bring an early end to the proceedings or to dispose of a substantial part of the matter without having to go to trial.

An *application to strike out*, on the other hand, is an interlocutory application designed to set aside a pleading which either contains scandalous, vexatious or irrelevant allegations or constitutes an irregular proceeding because it does not comply with certain technical requirements of the rules. An application to strike out scandalous, vexatious or irrelevant matter is made under rule 23(2). An application to strike out a pleading as an irregular step is made under rule 30. Irregular steps may also be set aside under rule 30A.

In criminal proceedings an objection similar to an exception may be made to a charge in terms of section 85 of the Criminal Procedure Act 51 of 1977 (CPA).

9.2 Exceptions

An exception can only be taken to a pleading, for example:

- particulars of claim (attached to a combined summons).
- declaration.
- counterclaim.
- third-party claim (attached to a third-party notice).
- interpleader claim.
- plea, with or without a special plea.

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- replication.

- further pleadings such as a rejoinder, surrejoinder, rebutter and surrebutter.

- exception.

These documents are distinguished as pleadings by two main features, namely they set out the material facts of a claim (statements of claim) or a defence (pleas, special pleas and exceptions) or an answer to a defence (replications and further pleadings), and they specify the relief in the prayer.

9.2.1 *The purpose of an exception*

The purpose of an exception is to obtain a speedy and inexpensive decision on a question of law. The question of law is whether the pleading concerned contains the necessary allegations of fact, which if proved, would sustain a cause of action or defence.

Exceptions are mostly the result of sloppy pleading, but in rare cases an exception is set up to test a question of law when the facts of the case are not in dispute. Two well-known cases can be cited as examples where important principles of law were decided on exception. In the famous English case, *Donoghue v Stevenson* [1932] AC 562 (HL) – the snail in the bottle case – the question was whether the manufacturer owed the public a duty of care independent of any obligations owed by it in contract. The answer given by the House of Lords was in the affirmative and English law was set on a new course. In the South African case, *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A), the question was whether the owner of a building had a valid cause of action (for an interdict) against the municipality whose trees dropped leaves in the gutters of the building and thus caused damage. The court held that he did. These were not cases of sloppy pleading. They were cases testing the limits of known legal remedies.

Since the purpose of an exception is to avoid leading unnecessary evidence, it will not be granted unless it disposes of a separate cause of action or defence and all the relief claimed pursuant to it. Where alternative items of relief are claimed arising from a single cause of action, an exception will not be granted if it defeats only some of the items of relief because evidence will still be required to justify the remaining claims. The court hearing that evidence can decide all the legal defences raised by the exception when it hears the evidence. There is no need for a separate hearing for the legal issues in such a case. However, if the same relief is claimed in alternative claims that are based on different causes of action, an exception against one of the alternative causes of action will be allowed because it makes it unnecessary to lead evidence on that cause of action.

9.2.2 *When an exception can and should be taken*

An exception can only be taken in two circumstances (rule 23(1)). The *first* is where the pleading lacks the necessary allegations to sustain a cause of action or a defence. The *second* is where the pleading is vague and embarrassing. Ordinarily litigants are entitled to have their disputes resolved by a trial. Since an exception brings the action to an end without a trial, a clear case will be required before an exception will be granted. The court is unlikely to allow an exception unless it is convinced that there is no arguable case on the pleading as it stands. The test is whether the court *could* (not *should*) hold in favour of the pleader.

An exception can be taken, for example, where:

- there is a question of law that can be decided on the pleading as it stands, that is to say, without evidence.

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- it is clear from the pleadings that the court does not have jurisdiction over the defendant or over the cause of action pleaded.

- the cause of action is incomplete in the sense that an essential allegation has been omitted.

- it is clear that an essential party lacks *locus standi*.

An exception should generally not be taken where:

- the question turns on the interpretation of a contract (as the interpretation could turn on the evidence).

- the issue is whether there were implied or tacit terms in the contract (as this is a question of fact, not law).

- the issue is whether a contract is void for vagueness (as the circumstances under which the contract was concluded and matters of interpretation may affect the outcome).

If an exception *can* be taken, it *should* generally be taken in order to save costs, especially if you can dispose of the whole case or a substantial part of it. If an exception can be taken but is not, and that failure results in unnecessary costs being incurred by the parties, the party who failed to take an exception could be penalised in the court's award of costs. The court may *mero motu* (without being asked by either party) order that the point be decided separately under rule 33(4) before evidence is led. If you have reason to think that an exception may be dismissed because evidence may be relevant on the point in issue, consider drafting a special plea instead. It may add the relevant facts. The court can also be approached for a separation of the issues under rule 33(4). These procedures allow for a speedy resolution of narrower or more defined issues.

9.2.3 *The procedure for an exception*

In the case where the exception is based on the contention that the pleading 'does not contain the necessary averments to sustain a cause of action or defence', the first step taken by the opposing party is the delivery of an exception. That exception is then argued in the ordinary course as if it were an opposed motion. This presupposes that the offending party does not rectify the defect by an amendment after receipt of the exception. If the exception is taken on the basis that the pleading *is vague and embarrassing*, the first step is to serve a notice in terms of rule 23(1) on the offending party to cure the defective pleading by removing the cause of the vagueness or embarrassment within 15 days. If the recipient of the notice fails to remove the cause of the complaint, an exception has to be delivered within 10 days of the expiry of the 15-day period. The exception is then set down for argument. Further pleadings are suspended until the court has ruled on the exception (rule 23(4)).

In both types of exception there will be a prayer for an order that the exception be upheld and that the claim or defence, as the case may be, be dismissed or struck out. The court may, however, grant any one of the following orders:

- It may uphold the exception and dismiss the claim or strike out the defence.

- It may uphold the exception and grant leave to amend the offending pleading within a specified time, failing which the offending pleading will be deemed to have been struck out.

- It may stand the point raised by the exception down for decision at the trial if it is of the view that the point should be decided after hearing evidence or should be heard at the same time as other disputes between the parties;

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- It may dismiss the exception.

- It may award costs on the usual principles.

A decision upholding an exception is usually final in its effect and therefore appealable. A decision refusing an exception, however, is interlocutory. It is not binding on the trial court. Notwithstanding its interlocutory nature, it may be appealable in some circumstances.

9.2.4 The form, format and style of an exception

An exception is a pleading and for that reason has to comply with the rules relating to pleadings generally. It can be taken to 'any pleading', in terms of rule 23(1). That means, ironically, that an exception may be taken to an exception that does not disclose a ground for the point it purports to take. An exception also has to comply with the rule specific to exceptions, namely rule 23. It has to set out the grounds on which the exception is based clearly and concisely. Because an exception is a pleading, it has to be signed by counsel, or an attorney with the right of audience in the High Court, or by the party excepting personally. An exception also has to have a prayer for relief or else it would be vague and embarrassing. An exception without a prayer would also be an irregular proceeding as contemplated by rule 30 and liable to be set aside under that rule.

The substantive points taken in an exception will depend on the circumstances of the individual case, but exceptions generally follow the same format. Let us assume that the defendant has been sued on a written contract pertaining to the purchase and sale of immovable property. A copy of the contract said in the declaration to be a true copy has been attached but the copy does not contain a signature in the space allocated for the signature of the purchaser. The plaintiff has sued for payment of the purchase price against transfer of the property. Your legal research discloses that a contract for the alienation of land has to be in writing and signed by both parties or by their agents acting on their written authority.

The exception in this instance will be to the effect that the declaration lacks the necessary averments to sustain a cause of action.

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Table 9.1 Exception

Par	Text of pleading	Comment
	[*DESCRIPTION OF COURT as prescribed*] Case no 876/[*year*] Between: KLM (Pty) Ltd PLAINTIFF/RESPONDENT and Ian John Smith DEFENDANT/EXCIPIENT EXCEPTION	1 The parties are usually described as excipient and respondent respectively, but it will do no harm to add their conventional descriptions too.
1 2	The plaintiff's claim as pleaded in the particulars of claim is for the payment of the purchase price of an immovable property, alleged to have been purchased by the defendant in terms of a written contract. It is further alleged that Annexure 'A' to the particulars of claim is a true copy of the contract. In terms of section 1 of the Alienation of Land Act 68 of 1981 a contract relating to the alienation of immovable property has to be in writing and signed by the parties thereto, or by their agents acting on their written authority.	1 Some legal research will have been done before the grounds for the exception could be identified and pleaded accurately. 2 An exception does not add facts. It raises a point of law. It would therefore be inappropriate to refer to the statements in the exception as 'material facts'. 3 The individual points on which the excipient

		wishes to rely in support of the exception are set out in the form of a short argument, which is really what an exception amounts to. 4 Rule 23 requires the grounds to be set out 'clearly and concisely'.
3 4	It is apparent, on the face of the particulars of claim and Annexure 'A' thereto, that the contract sued upon has not been signed by the defendant or his agent acting on his written authority. In the premises the contract sued upon is void and the allegations in the particulars of claim cannot sustain a cause of action.	
	WHEREFORE the defendant prays for an order – (a) upholding the exception with costs; (b) dismissing the plaintiff's action with costs.	1 The prayer seeks complementary orders. Prayer (a) on its own is not enough to dispose of the claim. 2 The court may grant leave to amend, but that is for the respondent to seek and to justify.

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Par	Text of pleading	Comment
	DATED at [*place*] this [*date*]	
	Signature Counsel's name (printed) DEFENDANT/EXCIPIENT'S COUNSEL	
	Signature Attorney's name (printed) Angus McAlpine DEFENDANT/EXCIPIENT'S ATTORNEY [*address and details as per rule 19(3)(*a)]	
	To: The Registrar [*address*] And to: Angela Moore and Associates Plaintiff/Respondent's Attorneys [*address and details as per rule 17(3)(*a)] Ref: Ms Moore/KLM101	

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In a case where the exception is based on an allegation that the pleading is vague and embarrassing, the exception must show that the required notice has been given and that the time for removing the cause of the complaint has elapsed.

9.3 Applications to strike out under rule 23(2)

An application under rule 23(2) is aimed at individual allegations or paragraphs of the pleading while an exception is aimed at a whole claim or defence. The purpose of an application to strike out offending material under rule 23(2) is to remove *scandalous*, *vexatious* or *irrelevant* matter from the pleadings.

Scandalous allegations include malicious gossip or rumour, defamatory allegations or disgraceful innuendo. *Vexatious* allegations include baseless, annoying or embarrassing allegations. In either case, when it is alleged that the material to be struck out is scandalous or vexatious, the offending allegations must also be *irrelevant*. That means that they are not necessary to support the material facts or cause of action.

Irrelevant in the context of rule 23(2) means not relevant for any legitimate purpose of pleading even though the material may be relevant at the trial stage. The opposing party should not have to deal with such allegations in a pleading and the court hearing the trial should not see (or hear) them.

The court will grant an application to strike out the offending material only if the innocent party can demonstrate that he or she will suffer *prejudice* if the offending allegations are to remain. A typical example in a claim for damage to a car is an allegation in the particulars of claim that the defendant has been convicted of negligent driving in relation to the incident which gave rise to the claim. Such an allegation is clearly irrelevant; it could not even be led as evidence at the trial because it would be inadmissible. It is prejudicial too, because the judge reading the pleadings will know that another court has already determined that the defendant had been negligent. If it were not for the requirement that the offending material should be prejudicial, most applications to strike out scandalous, vexatious or irrelevant materials could have been made on notice only. However, prejudice must be alleged and proved, which in turn means that evidence is usually required and that the other party be given an opportunity to answer the factual allegations made with regard to the question of prejudice. The procedure is therefore to make an interlocutory application. A notice of motion and a founding affidavit will ordinarily be required. The client should make the affidavit although there may be circumstances where the applicant's attorney will be able to give admissible evidence of the prejudice. Where the prejudice is obvious it may be possible to get by without a founding affidavit.

The prayer in the notice of motion must specify the material to be struck out of the offending pleading precisely, line by line and paragraph by paragraph. The affidavit should state the ground for suggesting why each of the offending allegations is 'scandalous', 'vexatious' or 'irrelevant', as the case may be, and what prejudice will be suffered if they remain. Examples of interlocutory applications are given in chapter 10.

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Table 9.2 Striking out order in the notice of motion

Order prayed
. . . for orders that (a) The following parts of the plaintiff's particulars of claim be struck out on the grounds that they contain matter which is scandalous or vexatious or irrelevant: (i) the first sentence of paragraph 7 (ii) the whole of paragraph 8 (iii) the words from 'and' up to and including the words 'convicted of fraud' in paragraph 9 (b) The respondent be ordered to pay the costs of this application.

It is not necessary to respond to the offending pleading while the application is pending. (rule 23(4)) It would generally be unwise to plead to the offending allegations. An application to strike out scandalous, vexatious or irrelevant matter from an affidavit is made under rule 6(15), which expressly requires prejudice to be proved.

9.4 Applications to strike out under rule 30

Rule 30 provides a general procedure to set aside irregular proceedings of many different descriptions. It also applies to pleadings. It is aimed so far as pleadings are concerned, at irregularities of form, not substance. It could be used where a pleading does not comply with the provisions of rule 18 relating to pleadings generally, or does not comply with the provisions of the rule relating to a particular pleading. Rule 30 could be invoked to set aside pleadings where, for example:

- the particulars of claim or other pleading has not been signed by counsel or a person entitled to sign.
- there has been a failure to comply with the provisions of rule 18(10) which requires particulars of damages to be given to enable the defendant to assess them.
- the pleading does not comply with the requirements of the rule relating to that pleading, such as where a plea does not contain the material facts that must be pleaded by rule 22(2) or the explanations or qualifications of denials required by rule 22(3).

The applicant seeking an order to set aside a pleading as an irregular proceeding, has to demonstrate that he or she will suffer prejudice if the pleading concerned is allowed to stand as it is. A notice giving particulars of the irregularity has to be given. The applicant loses the right to make the application if he or she has taken a further step in the action with knowledge of the irregularity, has not given the offending party an opportunity to remove the cause for the complaint, or has not delivered the application within a stipulated period (rule 30(2)).

The application procedure under rule 30 is the same as for other interlocutory applications of a procedural nature (see chapter 10). The order would typically ask that the relevant pleading be set aside and ask for the costs of the application. The supporting affidavit has to explain why it is suggested that the pleading amounts to an irregular proceeding and what prejudice will be suffered if it were allowed to stand. The court may then grant the application with or without leave to the other party to amend the offending pleading.

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Table 9.3 Comparing exceptions and applications to strike out under rules 23(2) and 30

	Exception under rule 23(1)	**Application under rule 23(2)**	**Application under rule 30**
When to be made	1 When the pleading does not disclose a claim or defence. 2 When the pleading is vague and embarrassing *and* a notice to cure the defect has been ignored.	When the pleading contains scandalous, vexatious or irrelevant matter *and* the inclusion of that matter will cause prejudice.	When the pleading (or other proceeding) is irregular in form; when it fails to comply with the requirements of the rules *and* the irregularity or failure causes prejudice.
Purpose	1 To obtain a decision without evidence on the question whether there is a *prima facie* claim or defence. 2 To cause the offending pleader to remove improper allegations from the pleading.	To remove the offending matter and prevent prejudice.	To force compliance with the rules of pleading in order to remove the prejudice.
Procedure	1 An exception.	Interlocutory application under rule 23(2).	Interlocutory application under rule 30.

	2 Notice to cure followed by an exception.		
Its consequences if not opposed	Claim or defence may be struck out.	Offending matter may be struck out.	The offending pleading (or other proceeding) may be struck out.
Response	An amendment.	An amendment.	An amendment.
Consequences of not pursuing it	Adverse costs order at trial.	The prejudice remains.	The prejudice remains.

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9.5 Objection to a charge in criminal proceedings

9.5.1 Introduction

Section 84 of the CPA states the requirements for a charge. The section does not stand alone and sections 89–104 contain provisions which are specific to particular charges or types of charges (see paragraph 9.5.4).

Section 85 provides a remedy similar to an exception in civil cases should the charge be defective.

9.5.2 Objecting to the charge

Section 85 provides the grounds on which the accused may object to the charge:

> 85
> (1) An accused may, before pleading to the charge under section 106, object to the charge on the ground –
> (*a*) that the charge does not comply with the provisions of this Act relating to the essentials of a charge;
> (*b*) that the charge does not set out an essential element of the relevant offence;
> (*c*) that the charge does not disclose an offence;
> (*d*) that the charge does not contain sufficient particulars of any matter alleged in the charge: Provided that such an objection may not be raised to a charge when he is required in terms of section 119 or 122A to plead thereto in the magistrates' court;
> (*e*) that the accused is not correctly named in the charge.

Note that the accused who wishes to object to the charge must do so before he or she has pleaded to it. Note also that the accused may not object to a charge when the circumstances envisaged by section 119 (accused required to plead in the magistrates' court on the instruction of the attorney-general) or 122A (pleading on a charge to be tried in the regional court) are present.

The manner of objecting to the charge is by *reasonable notice to the prosecution* and the accused must also *state the ground on which he bases his objection*. (The prosecutor may waive the

requirement of notice and the court may dispense with notice or adjourn the matter for notice to be given.)

While there is no express requirement that the notice should be in writing the accused will still have to state the grounds 'on the record'. In practice, the notice is almost without exception in writing. A typical notice shorn of headings and endings will have a format as follows:

> Take notice that the accused gives notice of his objection to the charge and that the objection is based on the following grounds:
>
> (1)
>
> . . .
>
> (2)
>
> . . .
>
> (3)
>
> . . .
>
> Wherefore the accused prays that the charge be quashed, alternatively, that the prosecution be ordered to make such amendments to the charge or to deliver such particulars as are necessary to remove the cause of the objection.

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9.5.3 *Responding to the objection to the charge*

The prosecutor faced with an objection to the charge will have to consider whether the charge as it stands satisfies the requirements of section 84 of the CPA and if it does, will be entitled to set the matter down for argument and defend the charge as it stands. If the prosecutor on reflection should conclude that the objection is good, he or she will have to amend the charge in order to remove the cause of the objection. This is achieved by filing an amended charge (in the form of a summons, charge sheet or indictment).

If the matter is argued and the court finds in favour of the defence, the court may order the prosecution to amend the charge or to deliver particulars. Section 85(2)(*b*) provides that if the prosecution fails to comply with the order, the court may quash the charge.

When preparing a charge or considering whether an objection to it is good, the prosecutor should keep in mind the provisions of sections 89–104 of the CPA together with any provisions that may be laid down in the enactment which created a particular statutory offence.

9.5.4 *Sections 89–104*

Sections 89–104 deal with the requirements for a charge in respect of specific offences or types of offences. Their provisions – which should be studied together with the commentary in and cases referred to in a textbook such as Kruger *Hiemstra's Criminal Procedure* LexisNexis – may be summarised as follows:

- Section 89 – previous convictions must not be mentioned in the charge except where they are an element of the offence.
- Section 90 – the charge need not specify or negative an exception, exemption, proviso, excuse or qualification.
- Section 91 – the charge need not state the manner or means of an act.
- Section 92 – certain omissions or imperfections will not invalidate the charge, for example, the failure to mention 'any matter which need not be proved'. (Section 92(2) contains an important provision with regard to the date of the alleged offence in the charge.)
-

Section 93 – where the defence is an alibi, the prosecution may be held to the date and time alleged in the charge notwithstanding the provisions of section 92(2).

- Section 94 – the charge may allege the commission of the offence on diverse occasions.
- Section 95 – deals with the rules applicable to particular charges.
- Section 96 – provides that it is sufficient to refer to a company, firm or partnership by name.
- Section 97 – deals with the naming of joint owners of property.
- Section 98 – provides that it is sufficient on a charge of murder or culpable homicide to allege that the 'accused unlawfully killed the deceased'.
- Section 99 – the charge need not attach a copy of a document or describe it or state its value; it is sufficient to refer to it by the name it is commonly known or by its purport (meaning or content).

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- Section 100 – on a charge of theft it is sufficient to allege a general deficiency in a stated amount.
- Section 101 – contains special provisions with regard to charges relating to false evidence.
- Section 102 – charges relating to insolvency need not set forth the debt, act of insolvency or determination by a court.
- Section 103 – a charge alleging intent to defraud need not allege such intent in respect of a particular person or mention the owner of the property concerned or give details of the deceit.
- Section 104 – a charge relating to objectionable matter need not set out the words concerned; the court may, however, order that particulars be delivered identifying the relevant passages.

Note: This summary should not be used as a substitute for your own legal research.

9.6 Protocol and Ethics

- It is customary among advocates to warn counsel on the other side before they take an exception to their pleadings and to give them an opportunity to remedy the defect. This custom applies also to criminal cases. It is worth remembering that mistakes are easily made and often just as easily remedied.
- When a mistake has been made, amend the offending pleading so that it complies with the rules. Defending an inadequate pleading through all the stages of an opposed motion is unlikely to endear counsel to the court or the client. It may also amount to unethical or unprofessional conduct.

Chapter 10
Drafting applications

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10.1 Introduction

Applications differ from actions mainly in the way the evidence is presented to the court. In an action, which is initiated by the issue of a summons and then proceeds through the stages of pleading discussed in chapters 6–8, the evidence is presented to the court by way of oral evidence. In an application, which is initiated by the issue of a notice of motion (or a notice of application), the evidence is presented to the court in the form of affidavits. This feature, where the evidence is presented to the court in the form of written affidavits, is the most distinguishing aspect of the application procedure. It is also its major limitation; it is not suited to cases where there are disputes of fact between the parties that require that the evidence be given orally and tested by cross-examination.

Table 10.1 Action procedure compared to application procedure

Proceeding by action	Proceeding by application
Action commenced by summons.	Application commenced by notice of motion.
Pleadings contain only material facts and any specific supplementary particulars required by the rules, not evidence.	Affidavits contain the evidence to prove the material facts.
Issues defined by the pleadings.	Issues defined by the affidavits.
Relevant documents and expert summaries exchanged after the close of pleadings – extensive discovery provisions.	Documents are attached to affidavits as evidence and experts have to give their

	evidence in affidavits – limited discovery under rule 35(12).
Witnesses give *viva voce* evidence and may be cross-examined.	Evidence is received on affidavit. Oral evidence and cross-examination is allowed only in exceptional cases.
Credibility issues are decided by the judge on the evidence and the demeanour of the witnesses.	Credibility issues can usually not be resolved without referring the application to trial or for the hearing of oral evidence.

There are two main forms of application. *Substantive* applications are applications with the purpose of obtaining final relief on affidavit evidence. A substantive application stands on its own. *Interlocutory* applications, on the other hand, are used for interim or procedural relief and are parasitic in the sense that they cannot have an independent existence; they are always made in the course or in anticipation of an action or substantive application. Interlocutory applications take their name from the Latin *loqui*, meaning to speak and *inter*, meaning in the course of.

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Table 10.2 Examples of substantive and interlocutory applications

Substantive application	Interlocutory application
Spoliation order (usually brought as an urgent application but may be brought in an action).	Leave to serve by substituted service or to institute proceedings by edictal citation.
Leave to marry (for under-age person).	*Mareva* injunction (freezing or anti-dissipation order).
Declaration of (presumed) death.	*Anton Piller* order (search and seizure order).
Insolvency applications (sequestration, rehabilitation etc.).	Applications to compel compliance with the rules or for condonation of non-compliance with the rules.
Application for judgment on a settlement (where the agreement settled an existing proceeding the application will be interlocutory).	Summary judgment.
Application to strike attorney/advocate from roll.	Leave to appeal.

This is a very small sample and in some of the examples of substantive applications it may well be wise to proceed by way of action in any event because of the likelihood that factual disputes may arise.

The main differences between the various types of applications is highlighted in the table below.

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Table 10.3 Different forms of application

	Substantive application	Interlocutory application	*Ex parte* application	Urgent application
Form of notice	Form 2(a) of the First Schedule (rule 6(5)(*a*)).	Custom-designed for particular purpose (rule 6(11)).	Form 2 (rule 6(4)(*a*)).	Court may dispense with prescribed form (rule 6(12)).
Affidavit required?	Yes.	May be dispensed with in some cases (rule 6(12)).	Yes.	Yes, including one stating the grounds of urgency.
Service required?	Yes, on respondent and interested officials, if any (rule 6(9)).	Yes, but may be delayed until after granting of interim order.	No.	Yes, but may be dispensed with (rule 6(12)).

Purpose	To obtain final relief against the respondent.	To resolve procedural issues or to preserve the *status quo* in pending proceedings.	To obtain relief when there are no persons with any adverse interests in the orders claimed or to obtain orders which depend on secrecy for their efficacy, e.g., *Mareva* and *Anton Piller* orders.	To obtain urgent relief in substantive, interlocutory or *ex parte* applications.
Date of hearing	Set down in due course after *dies induciae* have expired (rule 6(5)(*b*)).	Set down as the Registrar or a judge directs (rule 6(11)).	Two days after filing papers (rule 6(4)(*a*)).	Court may dispense with time limits.
When not appropriate?	When disputes cannot be decided without oral evidence.	When there is no pending (or contemplated) main proceeding.	When there are persons with an interest in the orders sought who should receive notice.	When there is no urgency as contemplated by rule 6(12).

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Note that lawyers use the term '*ex parte* application' somewhat loosely at times to refer also to substantive applications where there is no respondent against whom relief is claimed. The distinction is perhaps academic; what is important is that the applicant in any application where there is no respondent or where the application is brought without notice has the duty to bring adverse facts to the notice of the court.

Applications are made by way of a notice of motion (or a notice of application) coupled with such affidavits as the case requires. The notice serves the purpose of a summons, giving formal notice to the respondent of the application and setting out the relief claimed, while the affidavits set out the evidence supporting the relief. Since *ex parte* and urgent applications are invariably either *substantive* or *interlocutory* in form and content, the principles for drafting substantive and interlocutory applications are equally applicable to them.

10.2 Notice of motion or application

The rules prescribe the form of the notice. In an *ex parte* application Form 2 has to be used. In a substantive application where there is a named respondent on whom service has to be effected, Form 2(a) must be used; the notice is then called a notice of motion. In an interlocutory application there is no prescribed form of notice, and the notice is referred to as a notice of application. Various forms of notice of application have developed in practice and are used for different types of interlocutory applications. In some cases the interlocutory application is made *ex parte*. In other cases there is a legitimate respondent with an interest in the relief claimed, but initially the application is made without notice. In such a case the notice would ask for relief against that respondent but the relief will be temporary in its operation and will have to be confirmed by the court at a further hearing after the respondent has had an opportunity to put its case before the court. Intricate forms of order have evolved. In some divisions of the High Court the form of order known as a 'rule *nisi*' may not be used. A rule *nisi* is a form of order which calls on the respondent to appear on a given date and to give reasons why the relief set out in the order should not be granted against him or her.

A notice of motion or application usually includes:

- the case heading, meaning the court, the division, the case number allocated by the Registrar, and the names of the parties.
- the description of the document, for example, *Notice of Motion*, *Notice of interlocutory application for substituted service*, or simply, *Notice of Application*.

- particulars of the respondents and registrar, to whom the application is addressed.
- notification that an application will be made at a stated time and date for the orders set out in the prayer.
- the precise orders asked for.
- the names of the deponents whose affidavits will be relied on in support of the orders prayed.
- a request to the Registrar to enrol the matter for hearing on the date and time mentioned. This is not part of Form 2(a). A separate notice of set down is required when you use Form 2(a).
- the date and place of signing of the notice.
- particulars of the applicant's attorney, including his or her address and signature.

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10.3 Affidavits

Affidavits have to comply with the formal requirements for affidavits generally as well as the specific evidential requirements of the case concerned. An affidavit has to be sworn before an independent commissioner of oaths. The reason for the requirement of independence is that the commissioner of oaths *receives* or *certifies* the evidence on behalf of the court.

General matters contributing to good form and style in an affidavit include the following:

- The evidence in an affidavit is given in the first person. The witness will use such words as 'I', 'me', 'my', 'us' and 'mine', for example. Indirect speech may be used, for example, 'The respondent then told me that he had received my letter.'
- Use the natural language of the witness as far as possible. When technical terms have to be used, ensure that the witness understands what they mean.
- The affidavit must be complete, in other words, the affidavit must tell the whole story. Relevant documents must be attached as annexures.
- The affidavit must contain only the relevant and admissible evidence; scandalous, vexatious and irrelevant material must not be included.
- Avoid argument. It is permissible for a deponent to make a submission but take care that the submission is phrased properly, for example: '*I have been advised, and I respectfully submit, that . . .*' Avoid the temptation to start sentences with emotional or argumentative words like 'clearly', 'certainly' or 'obviously'. They add nothing to the meaning except tone.
- Follow a logical sequence. Usually a chronological narrative will suffice.

- Arrange the material in numbered paragraphs and sub-paragraphs, with each paragraph dealing with a separate topic. Within the paragraph there must be a logical structure.

- Use correct grammar and plain English. (See chapter 23 for a discussion of basic language and communication skills.)

- Draft with precision in mind. There are few things as embarrassing as an affidavit that contains contradictory material or material that is inconsistent with the documentary evidence. Include explanations when an inconsistency becomes apparent.

10.3.1 *Founding affidavits*

The affidavit (or affidavits, if there are more than one witness) will have to provide all the evidence on which the applicant relies for the relief claimed. The affidavit(s) must contain:

- the case heading.

- the title of the document, for example, 'FOUNDING AFFIDAVIT OF JOAN SPARK'.

- the commencement, 'I, Joan Spark, state on oath:' or, in the case of a witness who prefers to affirm, 'I, Andrew Simpson, truly affirm that the content of this declaration is true'.

- the address and occupation of the witness together with such additional detail as may be relevant, for example, whether the witness is the applicant or respondent in the matter.

- a statement to the effect that the witness has personal knowledge of the facts deposed to in the affidavit.

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- the witness's account of the relevant facts and events, which traverses all the material facts for the relief claimed and includes:

  - the authority of the deponent if the applicant is an artificial person or is otherwise represented by the deponent.

    Note:
    Although authority to institute the proceedings may be proved in the replying affidavit it is best to deal with it briefly in the founding affidavit.

  - a description of each of the parties.

  - the facts on which each party's *locus standi* is based.

  - the facts on which the jurisdiction of the court is based.

  - the evidence supporting each material fact on which the applicant relies.

- the signature of the witness

- the attestation clause duly completed by the commissioner of oaths before whom the affidavit was sworn or affirmed.

You may use the structure or scheme for an examination-in-chief (see paragraph 17.3) for the section of the affidavit dealing with the witness's account of the events.

10.3.2 Answering and replying affidavits

The respondent has the right to answer the allegations in the affidavits filed on behalf of the applicant. To this end the respondent may file an affidavit made by the respondent personally and further affidavits by any witnesses who may be able to give relevant evidence on behalf of the respondent. Where the respondent is not a natural person – a company, firm or similar entity – the answering affidavit may be deposed to by a person authorised by the respondent to represent it in the proceedings. Ideally such a person should have personal knowledge of the transaction or events giving rise to the application. In practice, deponents of this kind are usually managers or directors of the concerns they represent or partners in the respondent firm.

The applicant's affidavit and the supporting affidavits are sometimes referred to as the 'founding affidavits', meaning that the case is founded on what is contained in those affidavits. The respondent's opposing affidavits are also referred to as the 'answering affidavits'; they answer the case made by the applicant in the founding affidavits. The applicant may reply to the answering affidavits by filing a further set of affidavits known as the 'replying affidavits'.

Here are some guidelines for the structure and content of answering and replying affidavits:

- The basic principles for affidavits applying to the applicant's founding affidavit also apply to the respondent's answering affidavits.

- The answering affidavit must start with the introduction of the witness. The first paragraph of the answering affidavit could be worded as follows: '*I am the respondent in these proceedings. I am a dentist by profession and I reside at [*street address*]*.'

- The court will only receive relevant and otherwise admissible evidence. This means generally that the witnesses must have personal knowledge of the relevant transactions or events. This can be made clear in a paragraph that reads: '*I have personal knowledge of the facts set out in this affidavit, save where the context indicates otherwise*.' The qualification, '*save where the context indicates otherwise*', allows the [Page 173] witness to refer to facts set out in the affidavits of other witnesses. This may be necessary where, for example, the witness did not witness particular events personally but wishes to refer to those events in his or her affidavit.

- The authority of the deponent must be dealt with next, if the deponent is representing an entity like a company, firm or partnership in the institution of the proceedings. This could be worded as follows: '*I have been authorised by the respondent to represent it in these proceedings*.' The relevant resolution should be attached as an annexure if it is available. A witness needs no authority to be a witness and it is poor style – showing a lack of concentration on the part of the draftsman – for an applicant or respondent to say he or she is duly authorised. If the authority of the applicant to institute the proceedings is disputed, the procedure provided by rule 7 must be employed rather than debating the issue in the midst of the application.

- After these introductory matters, the witness must deal with the allegations in the applicant's founding affidavit and in the further affidavits of the applicant's supporting witnesses, so far as the witness is able to comment on the evidence in those affidavits. Note that the evidence also includes any documentary exhibits attached to the affidavits as annexures and that the respondent may similarly attach relevant documents as annexures. It is customary for the respondent to deal with the applicant's affidavits (those made by the applicant and the

applicant's witnesses) one by one. You can use the following formula: '*I respond first to the affidavit of . . .*'

- Each allegation in the affidavit under reply must then be dealt with. The rule is that any allegation not dealt with will be taken to be admitted.

- There is no requirement in the rules that you have to deal with the allegations in the founding affidavit as if you were drafting a plea, but it has become customary to admit, deny, not admit and to confess and avoid allegations in the founding affidavit. This may result in a stilted style when your main purpose is to tell the story in the words of the witness.

- The applicant's evidence, as set out in the various paragraphs of the affidavit under reply, may be dealt with in a way which echoes what you would do when drafting a plea to a statement. There are four basic processes involved:

  - The deponent may *admit* allegations, by saying: '*I admit the allegations in paragraphs 1, 2 and 3 and the first sentence of paragraph 4 of Smith's affidavit*.'

  - The deponent may *deny* allegations, by saying: '*I dispute (or deny) the allegation in the second sentence of paragraph 4 of Smith's affidavit*.' If the deponent wishes to explain the denial, he or she must do so at this point before dealing with the next allegation in the applicant's affidavit. The deponent may, for example, add: '*The contract was not concluded on [*date*] but on [*date*] when I telephoned Smith and told him that I was accepting the quotation on behalf of the respondent*.'

  - The deponent may state that he or she *does not know* whether a particular allegation is true or not and on that basis place it in issue, for example, by saying, '*I do not know whether the allegations in paragraph 5 of Smith's affidavit are true or not, and place them in issue.*'

  - The deponent may *add any additional evidence* he or she can give with regard to the subject-matter of the paragraph being dealt with and should include any *explanations and qualifications* of the evidence. This may be done by way of various different formulae, for example, '*In amplification of the denial of the allegations in paragraph 4 of Smith's affidavit, I say the following:– . . .*' or '*The agreement* [Page 174] *contained additional terms not mentioned by Smith in paragraph 6 of his affidavit. They were as follows: (i) . . . (ii) . . .*'

- Affirmative defences, in particular, must be dealt with by setting out all the facts as fully as possible to ensure that all the evidence necessary to establish the material facts (legal elements) of the defence concerned has been put before the court.

- Documentary evidence should be referred to, where necessary, and the relevant documents attached as annexures.

  Note:

  It is not permissible simply to attach the annexures and refer to them. You must embody the evidence to be extracted from each annexure in the text of the affidavit.

- In the process the respondent's version of the facts or events will emerge chronologically, step by step, as the deponent deals with each paragraph of the affidavit under reply in turn.

-

When all the paragraphs of the first affidavit have been dealt with, the deponent must deal with every further affidavit filed on behalf of the applicant. Before you start dealing with a further affidavit, you may signal your intention to do so by saying: '*I now turn to the affidavit of . . . Jones*.'

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When the respondent has dealt with all the affidavits to be replied to, he or she must end by setting out the order asked for, for example: '*I therefore ask the Court to refuse the application for summary judgment, to grant leave to the defendant to deliver a plea, and to order the plaintiff to pay the costs of this application*.'

The applicant has the right to file a further set of affidavits in reply to the allegations in the respondent's answering affidavits. The same principles, as set out above, apply to the replying affidavits with one main exception: The applicant may not introduce new matter that could and should have been raised in the first set of affidavits. The purpose of the replying affidavits is to respond to the allegations in the answering affidavits, not to make out a new or different case to the one originally relied on in the founding affidavits. If new matter is introduced, the respondent may ask the court to strike out the new matter under rule 30 or 30A, or to grant leave to file a fourth set of affidavits to enable him or her to answer the new matter.

10.4 Drafting a substantive application

There are a number of steps involved in drafting application papers (notice of motion and affidavits). The drafting itself is but the last step in a far greater process. Typically, whether you are an attorney or an advocate, you would take to following steps when you are briefed to draft a substantive application or answering affidavits to a substantive application:

Step 1: Fact analysis: Use the proof-making model to ascertain what oral and documentary evidence is available, what facts can be proved (and alleged in the affidavits), and whether the evidence is admissible, reliable and sufficient to support the proposed cause of action. The material facts (legal elements) for the proposed claims or defences must be identified. These processes are similar to those one would take during preparation for trial.

Step 2: Legal research: The law affects every step of the litigation process. It prescribes the legal requirements for the claims; these have to be covered as the material facts [Page 175] supporting the claims to be made. The same applies to potential defences. So the first step in the research is to determine what these requirements are. The law also determines what evidence is admissible to establish the material facts of the claim, what documents are relevant and admissible, who bears the burden of proof on a disputed issue and what standard of proof is required. Whether the evidence is sufficient to prove the claim to the required standard also requires careful analysis by the person drafting the papers. This must be done before the drafting process itself commences; if the evidence is insufficient, this would be the time to look for further evidence and to advise the client of the shortcoming.

Step 3: Anticipating the response to the application: Application procedure is inappropriate for cases where a genuine dispute of fact is likely to arise. Proceed by application only if there is no reason to anticipate a genuine dispute of fact. In cases where there is a likelihood of a dispute of fact but some harm may result from the inevitable delay in bringing an action to trial, it would be safer to proceed by action (summons) and to launch an interlocutory application to preserve the *status quo* or to obtain interim relief pending the outcome of that action.

Step 4: Drafting the notice of motion: Identifying the relief and formulating it with sufficient precision so that the order can be executed effectively, is the most difficult part of this step. *Amler's Precedents of Pleadings* (always use the latest edition) will help you to identify the material facts of various claims and defences and the general wording of orders. In the absence of a precedent in *Amler* you should imagine yourself in the shoes of the sheriff or deputy-sheriff and ensure that you draft an order which he or she can execute without any further guidance from the court. In short, the orders must make sense and be of the kind that can be executed without further ado.

(When you get totally lost, you could examine orders which have been granted in similar cases in the past.)

Step 5: Drafting the affidavits: The affidavits must be prepared with the specific relief set out in the notice of motion in mind, comply with all formal requirements, and set out the evidence to prove each material fact.

For the respondent the process has to be adapted to take account of the fact that no notice of opposition setting out the grounds of the opposition is required. The respondent must deal with the contents of the notice of motion in the answering affidavits, except where the respondent wants to raise legal points only. If the only point to be taken is a legal point, the respondent must deliver a notice setting out particulars of the point. A practice worth adopting is to deliver a notice of opposition in all cases even though the rules don't require one when affidavits are delivered. A notice specifying the grounds of opposition may be quite helpful to the judge who has to hear the matter. It will also provide some focus to your advocacy. (See Table 10.6 for an example.)

You can now put these steps to the test in a simple case. Assume you have been instructed on behalf of the applicant to draft the papers for a spoliation order. The respondent has removed a car purchased from it on hire purchase by the applicant from the place where the applicant had parked it. You have completed the fact-analysis exercise and are satisfied that you have sufficient evidence to support a spoliation application. There is nothing to indicate that there will be a dispute of fact on any of the material facts to be proved. The facts do not establish a case for urgency under rule 6(12).

Some legal research brings the following to light: Application procedure may be used – *Reck v Mills* 1990 (1) SA 751 (A). The applicant must prove that he or she was in peaceful and undisturbed possession and that he or she had been unlawfully dispossessed – *Yeko* [Page 176] *v Qana* 1973 (4) SA 735 (A) – but unlawfully in this context means no more than without consent or a court order – *Ntai v Vereeniging Town Council* 1953 (4) SA 579 (A). The court will not go into any underlying disputes; it will insist on the restoration of the *status quo* that prevailed before the defendant's unlawful act.

The material facts to be alleged and proved are:

- the applicant was in undisturbed possession of the car.
- the respondent unlawfully dispossessed the plaintiff of the car.

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Table 10.4 Notice of motion in a spoliation application

Par	Text of pleading	Comment
	[*COURT DESCRIPTION as prescribed*] Case no 4321/[*year*] Between: Sipho Buthelezi APPLICANT and Mno (Pty) Limited RESPONDENT	
	NOTICE OF MOTION	
	TAKE NOTICE that Sipho Buthelezi, an adult male, teacher, (hereinafter called the applicant) intends to make application to this Court for orders that:	
	(a) The respondent restore possession of the [*year*] BMW 528i motorcar XYZ 2001 ('the car') to the applicant forthwith.	1

	(b) In the event of the respondent failing to comply with the order in paragraph (a) within two days of the granting of this order, the Sheriff be authorised and directed to seize the car from the respondent and to deliver it to the applicant. (c) The respondent pay the costs of this application on the scale as between attorney and own client,	The orders must be drafted with precision in mind. 2 Non-compliance has to be anticipated. What should happen if the respondent does not hand the car over? 3 If a special order for costs is to be asked for, it must be spelled out in the notice (and justified in the affidavit).
	and that the accompanying affidavit of the applicant will be used in support thereof.	All affidavits to be relied on must be identified and listed.
	TAKE NOTICE FURTHER that the applicant has appointed X, Y & Z Partnership, [*address*] at which he will accept notice and service of all process in these proceedings.	An address complying with rule 6(5)(*b*) must be given.

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Par	Text of pleading	Comment
	TAKE NOTICE FURTHER that if you intend opposing this application you are required (a) to notify applicant's attorney in writing on or before the ….. day of ….. [*year*] (b) and within fifteen days after you have so given notice of your intention to oppose the application, to file your answering affidavits, if any and further that you are required to appoint in such notification an address referred to in Rule 6(5)(*d*) at which you will accept notice and service of all documents in these proceedings.	1 The date to be inserted in paragraph (a) has to be calculated carefully to ensure that the respondent has at least the prescribed period available. Rule 6(5)(*b*) provides for 'not less than five days after service'. This is subject to section 27 of the Act, which allows for 'twenty one days' when the notice is served outside the jurisdiction of the court and more than 'one hundred miles' [*sic*] from the court and 'fourteen days' if less than that distance. 2 Remember that days under the rules means court days but days under the Act are calculated according to the common law.
	If no such notice of intention to oppose be given, the application will be made on the ….. day of ….. [*year*] at 09:30.	The details will have to be completed by the attorney after the affidavit has been signed and an estimate has been made when service will occur.
	DATED at ….. this ….. day of ….. [*year*].	
	to be signed Attorney's name (printed) Applicant's attorneys X, Y & Z PARTNERSHIP [*address and details as per rule 6(5)(*b)]	The address should be a physical address and should be accompanied by the attorney's postal address, facsimile or electronic addresses where available (rule 6(5)(*b*)).
	To: The Registrar High Court [*address*] And to: The Respondent Mno (Pty) Limited [*address*]	

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Table 10.5 Founding affidavit

Par	Text of affidavit	Comment
	[*COURT DESCRIPTION as prescribed*] Case no 4321/[*year*] Between: Sipho Buthelezi APPLICANT and Mno (Pty) Limited RESPONDENT	
	FOUNDING AFFIDAVIT OF SIPHO BUTHELEZI	
	I, SIPHO BUTHELEZI, declare under oath:	
1 2	I am the applicant in these proceedings. I am an adult male, teacher. I reside at [*address*] and I teach at [*school and address*]. The facts set out in this affidavit are within my personal knowledge.	Paragraph 1 gives the customary details to establish the applicant's *locus standi* and paragraph 2 establishes the fact that he can give first hand evidence.
3 4	The respondent is Mno (Pty) Limited, a company duly registered and incorporated according to law, and having its registered head office and principal place of business within this court's jurisdiction at [*address*]. The respondent carries on business as dealers in used cars.	The *locus standi* of the respondent and the jurisdiction of the court are covered by these paragraphs.
5	This is an application for a spoliation order and ancillary relief.	Signposting is used to identify the type of application to make it easier for the judge to follow the evidence.
6	On [*date*] I bought a used [*year*] model BMW 528i with registration number XYZ 2001 ('the car') from the respondent for R225 000.00. The transaction was based on a standard hire-purchase agreement which both the respondent's manager, a Mr Ian Jones, and I signed. I attach a copy of the agreement, marked 'A'.	1 It is necessary to set out the material facts we have identified earlier and I start that process in these paragraphs.

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Par	Text of affidavit	Comment
7	In terms of the agreement I was to pay an initial deposit of R50 000.00 and thirty-six monthly instalments thereafter. Ownership of the car was reserved to the respondent until the final instalment is paid.	2 Documentary exhibits have to be identified and numbered. (They can be numbered according to the initials of the witness, for example, 'SB1'.)
8	I was given possession of the car on the same day and was in peaceful and undisturbed possession of it until the events I describe in the following paragraphs occurred.	The material fact to establish, by way of evidence, is peaceful and undisturbed possession.
9 10	On [*date*] I parked the car in the teacher's parking lot at the school where I teach. The respondent's business premises are across the street from the school. During the first break a pupil came to me and told me that there was a man trying to start my car. I rushed to the parking lot just in time to see one of the salesmen employed by the respondent driving the car out the gate and across the street to the respondent's premises.	1 Each material fact must be supported by the evidence (the evidential facts) which makes it clear that the material fact required has been established. 2 In this instance, the material facts concerned are that: (a) the respondent (b) dispossessed the applicant of the car (c) and did so unlawfully.

11	I rushed over to speak to the salesman but he refused to discuss the matter with me, saying: 'Speak to Mr Jones. I just follow orders.' I then went into the office where I found Mr Jones. I asked him why he had taken my car without my permission. He said: 'You have missed two instalments and we are repossessing the car.'	
12	I disputed his allegation and said that my instalments were deducted from my bank account by way of a stop order. Mr Jones said I was talking nonsense and told me to get out. I said I wanted my car and he said I should get out of his office before he had me thrown out.	
13	I had to return to school for my next class and told Mr Jones that I did not think he was entitled to do what he had done. He said I should go to the police if I was unhappy and that they had told him he could repossess the car.	
14	After school I went to see my attorney and he advised me to bring this application.	

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Par	Text of affidavit	Comment
15	My attorney wrote a letter to the respondent the same day that I delivered to Mr Jones late in the afternoon. A copy of the letter is attached, marked 'B'. After Mr Jones had finished reading it, he told me to get out of his office before he called the police. I respectfully point out that the letter advises the respondent that costs on the scale as between attorney and own client may be awarded against it.	
16.1	The respondent, through its attorney, has since written to my attorney to the effect that I had signed a consent agreement in terms of which I had agreed to the repossession. A copy of that letter and a copy of the alleged consent respectively are attached, marked 'C' and 'D' respectively.	1 A dispute of fact is in the brewing here. If there is any indication that the dispute is genuine, action proceedings should be used instead. 2 It may be permissible, having regard to the facts of a particular case, to approach the court for an order referring the anticipated dispute to oral evidence on an urgent basis. 3 Spoliation applications do receive some special consideration even when there are disputes of fact. But they should not be major disputes. 4 The grounds of urgency should then be stated in the affidavit.
16.2 16.3	I deny that I signed annexure 'D'. I never saw it before my attorney showed it to me and I was never asked to sign anything of the kind. The first hint of trouble I had was when the pupil told me someone was trying to start my car. I respectfully point out that the signature on annexure 'D' differs materially from my signature on annexure 'A'.	
17	I respectfully submit that I had undisturbed possession of the car and that I was unlawfully dispossessed of it by the respondent.	
18	I further submit that the respondent's conduct was so patently unlawful and that his attitude when I complained and when my attorney wrote to it so contemptuous that a special costs order would be justified.	
19	In the premises I humbly pray for an order as set out in the notice of motion.	
	Signature Deponent's name (printed)	

	+Attestation clause signed by the Commissioner of Oaths and full details as required by the regulation.	

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Opposing affidavits are usually filed under cover of a notice listing the affidavits filed on behalf of the respondent and gives details of the respondent's attorneys. Such a notice can easily be adapted to include the respondent's grounds of opposition, as follows:

Table 10.6 Notice of opposition

Par	Text of pleading	Comment
	[*COURT DESCRIPTION as prescribed*] Case no 432/[*year*] Between: Sipho Buthelezi APPLICANT and Mno (Pty) Limited RESPONDENT	
	RESPONDENT'S NOTICE OF OPPOSITION	
	To: The Registrar High Court [*address*] And to: X, Y & Z Partnership [*address and details as per rule 6(5)(*b*)*]	
	TAKE NOTICE that the respondent opposes the relief claimed by the applicant on the grounds that:	
1	(a) The respondent did not dispossess the applicant of the car unlawfully in that the applicant had consented to the dispossession. (b) The applicant was not in possession of the car at the time it was removed from the school yard.	1 The purpose of the notice is to advise the judge what the grounds of opposition are *before* he or she reads the affidavits so that the defences dealt with in the affidavits may be seen in the best light. 2 The main grounds should be stated succinctly.
2	And on the further grounds set out in the affidavits of Ian Jones and Richard Lowe filed under cover of this notice.	All the affidavits should be listed.
	Dated at [*place*] this …… day of …… [*year*].	
	to be signed Attorney (name printed) Respondent's Attorneys GUMEDE & PARTNER [*address and details as per rule 6(5)(*d*)*]	

If an application were to be brought as a matter of urgency, the practice of the particular court with regard to urgent applications must be followed. (A different form might also be required for the notice of application.) In KwaZulu-Natal a certificate of urgency signed by counsel (or an attorney with the right of audience in the High Court) must be filed when the application papers are issued. Naturally, counsel must sign the certificate only after the affidavits have been signed. A certificate

should only be provided if a hearing in due course would not give the applicant substantive redress or protection. The standard format for such a certificate is the same as for the notice of application, with the case heading being followed by the description of the document as 'Certificate of Urgency' in the title bar. This is then followed by the text of the certificate. The text of the certificate will depend on the circumstances but a simple case may have a certificate in this form:

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Table 10.7 Certificate of urgency

I, [*full names*], an advocate (or attorney with the right of audience in the High Court) of the High Court of South Africa, declare that I have read the papers in this matter and certify that, in my opinion, the papers disclose matters of such urgency that the application may be heard as an urgent application as provided by rule 6(12) and that the ordinary rules relating to service, notice and time limits be dispensed with.
Dated at [*place*] this …… day of …… [*year*].
Signature
Counsel's name (printed)

10.5 Drafting an interlocutory application

Since the bulk of the applications attorneys and counsel have to draft are interlocutory in nature, a bit more time needs to be spent on them. Interlocutory applications are part of everyday practice. They are as ubiquitous as the process of pleading itself. There are two types of interlocutory applications, 'procedural' applications and '*status quo*' applications.

10.5.1 Procedural applications

Procedural applications serve three main purposes. The *first* is to obtain directions or permission from the court with regard to procedural steps a party wishes to take in order to pursue or defend an action.

The *second* type of procedural application is to force the other side to comply with some procedural obligation, or to obtain an indulgence from the court which has the effect of excusing non-compliance with one's own procedural obligations. The *third* is to obtain summary judgment or similar relief in the midst of the action.

Applications for the court's directions or permission are usually made *ex parte* and without notice to any other party. They could also be made before an action is actually instituted. Three common cases where such applications are made are:

- where the appointment of a *curator ad litem* is required to assist persons who lack the capacity to sue or be sued on their own, for example, where minors who have been orphaned wish to sue for loss of support arising from the death of their parents.
- where a plaintiff has to obtain leave to serve a summons by way of edictal citation because the defendant is resident overseas.
- where a party needs permission to serve any process in the action by substituted service, that is to say, by way of a mode of service not specifically allowed by the rules, for example, by publication in a newspaper.

Compliance applications are made when a party wishes to enforce his or her procedural rights against another party (for example, to force the other party to file a discovery affidavit or to provide further particulars), or when a party seeks an order from the court to excuse its own breach of a procedural

obligation (for example, lifting a bar and condoning the late filing of heads of argument in an appeal). These applications invariably have to be made on notice to the other side.

The *third* type of procedural application includes summary judgment and interpleader applications. It is perhaps not strictly correct to describe them as procedural. Summary judgment and interpleader applications are regulated by rules 32 and 58 respectively. In each case, the provisions of the specific rule have to be complied with as far as the form and content of the notice and affidavits are concerned.

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10.5.2 *Status quo applications*

It is undesirable that the parties should be allowed to deal with the subject-matter of a legal dispute in such a way that the court's judgment becomes academic or the plaintiff's rights are defeated or diminished. It is preferable in cases where there is a danger that such a thing could happen to keep things in their current state or order (*status quo*) while the dispute winds its way through the litigation process. An interlocutory application has to be made for an order maintaining the *status quo*, pending the final resolution of the dispute. Some common examples are:

- Rule 43 provides for a special type of *status quo* order in divorce cases in terms of which the court determines the primary care and residence (custody) of and access to children and questions of maintenance pending the divorce action.

- An interim interdict may be granted in a case where a permanent interdict is claimed in an action. In such a case the interim interdict may go beyond merely preserving the *status quo*; it may have the effect of granting the plaintiff similar relief to that claimed in the action but on an interim basis. In some of these cases an interim interdict in the nature of a protection order is granted to enforce rights that may be in dispute but where it would be too late to protect them if one has to wait for a final determination at trial stage. A prohibition of the publication of defamatory matter falls in this category.

- An *Anton Piller* order (also known as a 'search and seizure' order) may be granted in anticipation of an action or during a current action. Its purpose is to search for evidence and to preserve it for use in the action.

- A *Mareva* injunction (also known as a 'freezing' order or 'anti-dissipation' order) is designed to freeze a defendant's assets to ensure that when the action is finalised the defendant will not have dissipated his or her assets to the extent that the judgment becomes a hollow victory for the plaintiff.

10.5.3 *Example of a procedural application: An application to compel discovery*

The following rules apply to an application to compel discovery: Rule 35(1) allows a party to require any other party to make discovery on oath within 20 days (of the notice). Notice cannot be given, except with the leave of the court, before the close of pleadings. Rule 35(7) provides that the party giving the notice to discover, may apply to the court for an order for compliance by the other party and, failing such compliance, dismissing their claim or striking out their defence. Rule 37(1) obliges a party who has not yet made discovery, to do so within 15 days from receipt of notice of the trial date.

The material facts (legal elements) for the proposed application are:

- there is an existing action between the parties.

- the pleadings in that action have closed.

- the date of *litis contestatio*.
- plaintiff served a notice to discover under rule 35(1) *after* the close of pleadings.
- 20 days have elapsed since service of the notice (only court days are counted).
- defendant has failed to make discovery.
- the prejudice suffered as a result of non-compliance with rule 37(1) (not expressly required).

This case does not fall under rule 37(1).

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Table 10.8 Notice of application in interlocutory proceedings

Par	Text of notice of application	Comment
	[*COURT DESCRIPTION as prescribed*] Case no 422/[*year*] Between: Anne Smith PLAINTIFF and Joe Soap DEFENDANT	1 I keep the descriptions of the parties as in the pleadings. If you feel strongly about form, you may refer to them as applicant and respondent respectively. 2 The notice is not a notice of motion. That term is reserved for substantive applications or motions.
	NOTICE OF APPLICATION IN TERMS OF RULE 35(7)	The rule under which the application is made, is given in the title bar. This is called 'signposting' and is a technique used to direct the reader's attention to something specific.
	To: The Registrar of the High Court [*address*] And to: A, B & C Partnership DEFENDANT'S ATTORNEY [*address and details as per rule 6(5)*(d)]	
	TAKE NOTICE that the plaintiff intends making application to this court on …… the …… day of …… [*year*] at 09:30 or as soon thereafter as counsel may be heard for the following orders:	1 It is not necessary to address the notice to a person, 'Sir' or 'Madam', nor to say, 'Please take notice' either. Look at Forms 2 and 2(a). 2 The date and time of the application will have to be inserted by arrangement with the Registrar's office when the papers are issued.

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Par	Text of notice of application	Comment
1	The defendant is ordered to comply with rule 35(2) by making discovery on oath within seven days from the date of this order.	1 The orders have to be set out exactly.

2 3	The plaintiff is given leave, in the event of the defendant failing to comply with the order in paragraph 1, to approach this court on the same papers, supplemented if necessary, for an order striking out the defendant's defence to the action. The defendant is ordered to pay the costs of this application.	2 The defendant's failure to comply must be anticipated. In that case you might not want to start all over. So you may ask for leave to come back to court on the same papers, supplemented if necessary, to ask for the second stage of relief provided by rule 35(7).
	TAKE FURTHER NOTICE that the attached affidavit of Xanthe Yallop will be used in support of the application.	It is necessary to refer to all the affidavits to be relied on. Here there is only one.
	KINDLY place the matter on the roll for hearing accordingly.	The wording of Form 2 is used.
	Dated at [*place*] this …… of ……, [*year*].	
	Signature Attorney's name (printed) PLAINTIFF'S ATTORNEY X, Y & Z Partnership [*address and details as per rule 6(5)(*b)] Ref: S 101	

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This is the type of interlocutory application where the plaintiff's attorney could make the affidavit on the plaintiff's behalf as the facts are within the attorney's knowledge.

Table 10.9 Founding affidavit in interlocutory proceedings

Par	Text of affidavit	Comment
	(COURT DESCRIPTION AS PRESCRIBED) Case no. 422/[*year*] Between: Anne Smith PLAINTIFF and Joe Soap DEFENDANT	
	AFFIDAVIT IN SUPPORT OF AN APPLICATION IN TERMS OF RULE 35(7)	
	I, XANTHE YALLOP, declare under oath:	There are different ways to start the affidavit, but it is customary to give the name of the deponent.
1 2 3	I am an attorney of this court and practise as such as a partner in the firm, X, Y & Z Partnership, ('the firm'). The firm represents the plaintiff in this action. I am the member of the firm handling the matter. I therefore have personal knowledge of the facts set out in this affidavit. I have been duly authorised to represent the plaintiff in the action and in this application.	1 These introductory matters allow the court to make a basic assessment of who the witness is and what the witness can contribute. 2 Since only admissible evidence may be put before the court, it is important that it should be demonstrated that the witness has personal knowledge of the events. 3 Where the application is made by a person representing another, or is made on behalf of a fictitious person such as a company, the authority of that person has to be established. In a proper case, a signed power of attorney or a company resolution

		must be put up as evidence of that authority.

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Par	Text of affidavit	Comment
4 5 6 7	This is an application for orders under rule 35(7) to compel discovery by the defendant, with associated relief. The plaintiff has sued the defendant for damages arising from a motor collision on the grounds set out in her particulars of claim, which are in the bundle of pleadings in the court file. The action is defended and the defendant has delivered a plea and a counter-claim. The plaintiff, in turn, has delivered a plea to the counter-claim. The last day for the delivery of a replication to the plaintiff's plea to the counterclaim was 31 July [*year*] but no replication has been delivered. The pleadings were therefore closed on 1 August [*year*].	4 Signal what type of application this is to make it easier for the judge. 5 There is no need to give the full details, such as name, *locus standi*, gender, occupation and address of the plaintiff and defendant again. 6 It is necessary to set out the material facts we have identified earlier and start that process in these paragraphs.
8	On 2 August [*year*] I prepared a notice to discover in terms of rule 35(1) for service on the defendant's attorneys of record, A, B & C Partnership. A copy of the notice is attached marked 'A'.	
9	The notice was served on the defendant's attorneys of record on the same day by a clerk in the firm, who obtained a signed receipt from the defendant's attorneys. That receipt appears on annexure 'A'.	1 Strictly speaking, there should be a separate affidavit for the clerk's evidence but attorneys have relied on this sort of hearsay evidence for years on the basis that the rules do not even require evidence. 2 If service of the notice should be disputed, an affidavit will be required.
10	The defendant was obliged to make discovery by the 20th court day after service of the notice. That period expired on 30 August [*year*].	
11	On 4 September [*year*] I wrote to the defendant's attorneys and demanded that the defendant make discovery by no later than 11 September [*year*]. A copy of my letter is attached marked 'B'. There has been no response to it.	The courts require the attorneys to sort out interlocutory matters themselves and not to rush to court prematurely. A demand should therefore be made and referred to in the affidavit.

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Par	Text of affidavit	Comment
12	The plaintiff is prejudiced by the defendant's failure to make discovery in that I am unable to brief counsel for an advice on the evidence as I do not know what documents the defendant has that are relevant, nor can the plaintiff otherwise prepare for the trial without the defendant's documents.	While prejudice may not be required, it is better to allege and prove prejudice.
13	In the premises and on behalf of the plaintiff I pray for orders that: (a) The defendant be ordered to comply with rule 35(2) by making discovery within 7 days from the date of the court's order; (b) The plaintiff be given leave, in the event of the defendant failing to comply with the order in paragraph (a), to approach this court on the same papers, supplemented if necessary, for an order striking out the defendant's defence to the action, with costs; (c) The defendant be ordered to pay the costs of this application.	
	Signature XANTHE YALLOP	

	(Attestation clause)	

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10.5.4 *An example of a status quo application: A Mareva injunction*

This application, to freeze the defendant's assets pending the outcome of the proposed trial and the execution process, is far more involved. The facts and the law are likely to be quite difficult. Since the application is based on the allegation that the defendant may dispose of his or her assets so that any judgment the plaintiff may eventually obtain will be worthless, the application must be prepared urgently. So the pressure is on the attorney or counsel who has to draft the papers. They may be quite inexperienced at the level of skill this application may, at first blush, require. However, these difficulties can be cured by sound research and a solid framework for the documents you have to draft. How to draft an application of that degree of difficulty is beyond the scope of this book. You could prepare for the drafting process and construct a framework for the notice and the affidavit by adopting the following approach.

The first thing you must do is to research the law in order to determine what the legal requirements for a *Mareva* injunction are. Start with English law as there is a wealth of material there. Then look at South African cases.

10.5.4.1 The law

- A *Mareva* injunction (also called a 'freezing order' or, in South Africa, an 'anti-dissip-ation order') is an interlocutory order freezing the defendant's assets pending trial, judgment and the ordinary steps of execution. It is named after the case *Mareva Compania Naviera SA v International Bulk Carriers* [1980] 1 All ER 213. As Lord Denning acknowledged, it had been available as a remedy in continental law for a long, long time.

- The object of the order is to maintain the *status quo* until the final determination of the dispute to ensure that no irreparable harm will come to the parties prior to the finalisation of the trial. (See *American Cyanamid Co v Ethicon* [1975] AC 396.) The order prevents a defendant from removing his, her or its assets from the jurisdiction or from disposing of or dealing with them in such a way as to frustrate execution under proceedings brought, or about to be brought, by the plaintiff. Defendants usually do this by transferring assets overseas or putting property in the names of relatives.

- The main requirements for a *Mareva* order are:

  - A *prima facie* case: The plaintiff must establish an arguable case that he, she or it will recover a judgment against the defendant for a certain or approximate sum of money.

  - A real risk of disposal of assets: The plaintiff must establish that there is good reason to believe that the defendant has assets within the jurisdiction with which to meet the judgment in whole or in part but may take steps which will result in those assets no longer being available or traceable when judgment is given for the plaintiff.

- If these requirements are met, the court has a discretion whether to grant the order. If the court grants the order, it will be subject to very stringent safeguards, including undertakings with regard to damages the defendant may suffer and the rights of third parties.

- Other relevant principles are:

  - The power of the court to grant *Mareva* orders is based on the common law.

- Unlike other interlocutory orders, a *Mareva* order may run after judgment in order that the execution process can be completed against the frozen assets. (See *Stuart Chartering Ltd v C&O Managements (The Venus Destiny)* [1980] 1 All ER 718.)

- The defendant may apply for the order to be discharged or for a variation of the order to free some of the assets needed for legitimate purposes, for example, to pay the legal costs of defending the underlying claim. (See *A v C (No 2)* [1981] 2 All ER 126.)

- Where the order affects or will affect the rights of third parties such as a bank, special safeguards and undertakings will be required.

o A *Mareva* injunction can be made with extra-territorial effect to freeze foreign assets of the defendant only in respect of defendants who are subject to the court's jurisdiction. The defendant is ordered not to dispose of the assets overseas and upon breaching the order is prosecuted for contempt of court. (See *Babanaft International Co SA v Bassante* [1989] 1 All ER 433.) The better way to deal with this problem is to approach the foreign court where the assets are for a complementary order.

o *Mareva* orders may include special ancillary orders designed to make the order effective. The most common ones are for discovery of the defendant's assets, the appointment of a receiver to take possession of the defendant's assets, and delivery of the defendant's assets.

o *Mareva* injunctions are frequently granted *before* proceedings are instituted. Equally frequently, the application is made without any notice to the defendant because it is feared that the defendant will quickly remove the assets if he, she or it has notice of the impending order. In such cases the plaintiff's attorney has a heavy burden to place all the relevant facts, even those which are against the plaintiff, before the court. The highest degree of disclosure is required.

o A *Mareva* order is applied for by way of a notice of application supported by affidavit evidence. In the affidavit the plaintiff and his, her or its witnesses will have to traverse the following areas:

- In order to establish a *prima facie* case the plaintiff has to put evidence before the court about the underlying cause of action, any defences the defendant may have raised to the claim and the reasons why it is suggested the plaintiff will prevail (win) in the main case.

- In order to establish that there is a real risk of disposal of assets which will defeat the execution process, the plaintiff has to establish what assets the defendant has, where they are, why it is suggested that the defendant will dispose of or hide those assets, and what other assets, if any, the defendant might have against which execution may be levied.

o If proceedings have not yet been instituted in the main action when the order is sought, the plaintiff must indicate to the court when proceedings will commence as the whole purpose of the order is to serve the main proceedings.

o The courts will refuse to grant (or will discharge) a *Mareva* order if the purpose for which it is sought, amounts to an abuse of the court's process, for example, where there is no real danger of any disposal of assets but the plaintiff tries to gain a procedural advantage or security to which he, she or it is not otherwise entitled. (See *Z Ltd v A-Z and AA-LL* [1982] 2 WLR 288.)

South African law is similar, as could be expected when one has regard of the origins and purpose of a *Mareva* order. However, the courts are jealous to protect the image of the application as an indigenous South African remedy rather than an imitation of the English model; so much so that the name *Mareva* injunction is frowned upon. We therefore have to call it an anti-dissipation order.

A look at the South African law reports brings the following to light:

- This particular remedy has been applied in South Africa as long ago as the nineteenth century and in a reported case in 1913 already. (See *Mcitiki and Another v Maweni* 1913 CPD 684.)

- Then there is the Knox D'Arcy and Jamieson saga which accounts for four reported decisions, culminating in *Knox D'Arcy Ltd v Jamieson and Others* 1996 (4) SA 348 (A).

It appears that English and South African judges may require some evidence that the respondent is likely to dispose of the assets *with the aim to frustrate execution*; a *Mareva* injunction is not designed to prevent a respondent from dealing with its assets in the ordinary course of business as it would have done if there had been no claim against the respondent. (See *Polly Peck International plc v Nadir and others (No 2)* [1992] 4 All ER 769 (CA)) This point may require more extensive research as the authorities are not entirely clear.

In *Pohlman and Others v Van Schalkwyk and Others* 2001 (1) SA 690 (E) the court advocated the use of the form of *Mareva* orders set out in the English Civil Procedure Rules. The suspicion that the differences between South African practice and English practice lies mostly in the terminology, may be justified.

* The constitutionality of the remedy may be an issue as it may be with any remedy that interferes with rights to property, the right to access to the courts, and other constitutional rights that may be brought to bear on the issue.

10.5.4.2 The founding affidavit, its form and content

Now that you have a better idea what the law on the subject is and what the courts require, make a provisional list of matters you will need to cover in the affidavits. Use the proof-making model. Start with the affidavits first. It appears that the main affidavit must be signed by the client and be supported by affidavits of other witnesses whose evidence can prove the essential allegations listed below:

A

plaintiff + *locus standi*

defendant + *locus standi*

B

the underlying cause of action

+

all its material facts and the amount of the claim

+

the reasons why we say the defendant has no answer to it, or an inadequate answer a submission that the plaintiff therefore has a *prima facie* claim as required

C

details of the defendant's assets

their whereabouts (in the court's jurisdiction?)

their value (the court won't freeze more than is required to meet all our claims)

D

the reasons why we suggest the assets may be removed or hidden

if we have such information, why we suspect the defendant will remove or hide them

the defendant's motives (to avoid or frustrate the execution process)

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E

whether third parties may be affected by the order we seek

how the rights of third parties could be protected

G

details of undertakings we offer to the court

and to the defendant

and to third parties

how those undertakings will be sufficient to safeguard the defendant and third parties

H

the facts which support the court's exercise of its discretion in our favour

I

the reasons why particular parts of the order are necessary

J

the grounds of urgency under rule 6(12)

provision for service of the order

provision for the defendant or an affected third party to approach the court for relaxation or lifting any part of the order

K

when summons will be issued and served for the main relief claimed.

10.5.4.3 The form of the notice of application

Since the application will be made without notice to the defendant, the order will have to make provision for the defendant to approach the court to discharge the order or to amend its terms once it has been served. The order is likely to be so complicated that you may prefer the style used by maritime lawyers in their applications. They draft a very rudimentary notice and attach the order sought as a separate document headed 'Draft Order'. The notice must refer to the defendant's right to anticipate the hearing. Any undertakings to be given must also be mentioned in the notice. It is at this point in the preparation that you may start looking for an appropriate precedent. Here is a checklist for the notice of application:

o

The court with jurisdiction:

–

the date and time of the hearing.

–

reference to the orders to be sought (to be attached as an annexure – separate checklist).

–

reference to the undertakings to be given (to be attached as an annexure – separate checklist).

–

notice to the defendant that he or she may anticipate the return day.

–

listing the affidavits to be relied on.

- the request to the Registrar to enrol the matter for hearing.

- The draft order as an annexure, containing:
  - the order freezing the assets.
  - a precise description of each asset.
  - the name and address of the person in possession of it.
  - directions to the defendant and the persons in possession of assets on how to deal with them.
  - directions to the defendant on how to approach the court for a variation or lifting of the order.
  - ancillary orders.

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- The draft undertakings as an annexure, containing:
  - the undertaking as to the defendant's possible damages.
  - the undertaking as to any third party's possible damages.
  - undertakings to the court with regard to the execution of the court's order.

There are draft *Mareva* orders in the Civil Procedure Rules applying in England and Wales. The format for a *Mareva* order in English law is as follows:

- The order:
  - freezes the defendant's assets.
  - excludes assets above the value of the claim.
  - excludes the defendant's reasonable living and business expenses and assets disposed of in the ordinary course of business.
  - lapses if security is given for the claim.
  - requires the defendant to disclose his or her assets (on oath).
  - makes provision for the service of the order.

- Guidance Notes must be included to:

- explain the effect of the order.
- advise those affected by it they may apply to court for a variation or discharge of the order.
- explain the effect of the order on third parties.
- deal with the interpretation of the order.

- The undertakings required from the plaintiff must be included.

Before you go any further, check if there is a prescribed form of order in the Practice Directives that applies to the court where you intend to bring the application. You may now have a far clearer idea of what you are required to do. It is at this point that you must start analysing the facts of the case in order to add the evidence to the framework you have created for the affidavit and draft order. At this point the drafting of the application does not look quite as daunting a task anymore. Preparation produces confidence.

Note:
Check if there is a prescribed format in the Court's Practice Directives, and if there is, apply that format.

10.6 Hearing of opposed applications

Opposed applications are heard in the Motion Court. (That court may be known by another name in some divisions, for example, 'the Third Division'.) There are different procedures in the different divisions of the High Court. In some divisions there is a Motion Court dedicated to opposed motions. In other divisions the opposed motions are heard daily after the unopposed matters. The skills and techniques required for the preparation and argument of opposed motions, are dealt with in chapters 23, 24, and 25.

10.7 Protocol and Ethics

Affidavits contain the evidence of the witnesses. It is important that the evidence is not tainted. It has to be obtained, preserved and conveyed accurately and without any [Page 195] contamination by the lawyer drafting the affidavit. There are a number of duties associated with these principles:

- Draft with precision in mind.
- Do not *create* or *suggest* facts. Let the witness tell his or her story.
- Avoid hearsay, character evidence, irrelevant material and scandalous or vexatious matter.
- Strictly observe the formalities of the oath.

Chapter 11
Preparing the case for trial: Advising on the evidence

CONTENTS

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11.1 Introduction

Trial preparation involves a number of related processes which combine to allow the case to be presented in the best possible light. They are:

- advising on the evidence.
- assembling the evidence.
- conducting legal research.

- analysing the facts and developing strategy.

These processes are mutually supportive. Each serves the greater purpose of preparing the case and the person who has to conduct it so that the client will enjoy the greatest possible chance of success at the trial. The first two stages, advising on the evidence and assembling the evidence, are designed to *prepare the case for the trial*. The next two stages, legal research and fact analysis and strategy, are designed to *prepare counsel for the trial*. These processes are the subjects of this and the next two chapters, starting with the process of advising on the evidence in this chapter.

Note:

The use of a commentary on the Rules of Court such as Harms *Civil Practice in the Superior Courts* LexisNexis looseleaf service) is essential.

All four stages are equally applicable to criminal cases. In practice criminal cases are conducted with less time for reflection and at greater risk of losing due to inadequate preparation. Paragraph 11.7 is devoted to advising on the evidence in criminal cases for both the prosecution and the defence. That said, the general scheme and principles described in the following paragraphs must nevertheless be applied *mutatis mutandis* when you prepare a criminal case.

11.2 Purpose of an advice on evidence

Every trial is conducted according to a framework of rules which controls the whole process from beginning to end. That framework is provided by:

- the procedures of the court due to hear the trial.
- the law of evidence.

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- the issues between the parties
- the evidence relevant to those issues
- the substantive legal principles which apply to the claims and defences
- the court's terms, recesses and procedures for the set-down of cases for hearing.

The ideal situation requires counsel to prepare the advice on evidence after the pleadings have closed, the discovery process has been completed fully and comprehensive statements of all the available witnesses have been taken. Counsel should then be able to comment and advise on the sufficiency of the available evidence. This is the true function of an advice on evidence. Counsel is expected to analyse the contents of the discovered documents and the statements of the witnesses in order to advise what further steps must be taken in preparation for trial. For example: A letter may refer to a document that has not been discovered. That document must then be obtained unless it is patently irrelevant or, if a witness has referred to other potential witnesses, their statements must be obtained. It may be that the statement taken from a witness may not be clear on a particular point or may even be entirely silent on it. Counsel may want the witness to clarify or supplement the original statement. It may be necessary to visit the scene of the relevant incident so that the witness can point out the relevant features of the scene.

However, in practice an advice on evidence is usually little more than an initial advice on the procedural steps to be taken for the purpose of getting the trial preparation process underway. This

does not really matter as the preparation for trial continues through the steps discussed in the next few chapters.

An advice on the evidence serves the following purpose:

- It ensures that all the procedural steps which are necessary for the proper conduct of the trial have been taken.
- It allows the sufficiency of the available evidence and the prospects of success to be considered at an early stage.
- It allows for the statements of witnesses to be clarified or supplemented where necessary.
- It enables counsel to give practical advice on the future handling of the matter, including the use of alternative dispute resolution methods.

11.3 Structure and style of an advice on evidence

The advice on evidence has to take into account the facts and circumstances of the case in the brief. Some of the steps referred to below may not be appropriate to all cases. For example: An inspection *in loco* is hardly ever necessary in a divorce matter. By the same token, a medical examination by a specialist is hardly appropriate in a claim for goods 'sold and delivered'. Nevertheless, the following format will at least allow you to start with a plan that can work in almost any type of case.

(Paragraph headings can be used to identify the subject-matter of each step in the process.)

11.3.1 Introductory paragraph

State in one paragraph what the case is about. This immediately focuses attention on the nature of the case.

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- *This is an action for damages under the provisions of the Road Accident Fund Act 56 of 1996.*
- *In this action the consultant (the plaintiff) has sued the defendant for damages for breach of contract. It is said that a stud bull by the name of ZINZAN, which was sold by the defendant to the consultant on [*date*], is sterile.*
- *This is an admiralty action* in rem *for the enforcement of a claim for damage to cargo.*

11.3.2 A discussion of the pleadings

A close scrutiny of the pleadings is necessary to identify the issues so that the preparation can concentrate on the true issues. Before that is done, a number of other questions need to be addressed:

- *Are the pleadings properly closed?* If not, advise on the steps to be taken.

- *Is a replication or further pleading necessary?* The answer may not be obvious at the first reading of the pleadings, but keep this question in mind as you work your way through the other steps of the advice on evidence. A document or statement you consider later in the course of the advice may change your view.

- *Are any amendments to the pleadings called for?* This may be the case if the documents and statements point to that conclusion. Keep an open mind on this question while you prepare the rest of the advice.

- *Is a request for further particulars for trial necessary?* Prepare one only if it is necessary to enable you to prepare properly for the trial.

- *How long is the trial likely to take?* Advise generally and ensure that the necessary steps are taken to set the trial down for the anticipated duration. (The set-down procedures depend on the rules of each individual division, not the Uniform Rules.)

- *Are there issues that can be decided separately to bring an early end to the case?* If, for example, the issues of liability and quantum could be separated in a damages action, advise your side to take the matter up with their opponents. Advise them on the procedure to follow if the other side does not agree. (An interlocutory application to the court for an order under rule 33(4) may force the issue.) Determine whether there are any special defences that can be dealt with under rule 33(4).

- *Is there a legal issue that can be dealt with as a special case under rule 33(1)?* This procedure is available where the facts are agreed but a question of law remains. If that appears to be so, advise on the steps to bring a special case before the court for hearing.

- *Have the pleadings been paginated and indexed?* Many a case has lost its place on the roll because the court file had not been put in order. Advise on the appropriate steps to take and the consequences if they are not taken.

11.3.3 Summarising the issues

The issues have to be identified individually. Go through the pleadings carefully to determine what allegations made by each of the parties are in issue. This is an essential step because one of the main purposes of the advice on evidence is to advise the client on the necessary and relevant evidence on each of the issues.

The easiest way to identify the issues is to compare the plaintiff's pleadings with the defendant's pleadings, paragraph by paragraph, line by line. For example: One would [Page 202] compare paragraph 1 of the declaration with what is said in the plea to determine whether that paragraph is admitted or not. If it is, the allegations in paragraph 1 of the declaration are not in dispute; they are taken as having been proved by the defendant's admission. However, if allegations are denied in the plea, they become 'issues'. Allegations that have not been admitted are also treated as if they are in issue because they still have to be proved. The process of identifying the issues continues through all the pleadings (and any further particulars that may have been furnished in response to a request for further particulars or a request under rule 37(4)).

The issues are then listed, one by one, in numbered paragraphs. Matters that are not in issue can be listed separately. It is a matter of personal preference. If that style were to be adopted, it can be done as follows:

'The following facts and circumstances are common cause on the pleadings:

(a) The names and *locus standi* of the parties . . .

(b)
That the plaintiff was at all material times . . . etc.'

You can then list and paraphrase the issues as follows:

'The following issues are apparent from the pleadings:

(a)
Whether there was a collision . . .

(b)
Whether the collision was caused by negligence . . . etc.'

It may become apparent, from an examination of the discovered documents and perusal of the statements of the witnesses, that some of the issues you have identified can be eliminated by way of admissions. Keep this in mind for the part of the advice dealing with the rule 37 conference.

11.3.4 *A discussion of the burden of proof and the duty to begin*

The sufficiency of the evidence is determined by the amount and quality of the available evidence, the incidence of the onus and the standard of proof. Determine and state who bears the onus of proof on each issue. Then consider which of the parties has the duty to begin (rule 39(11)). This is an important exercise. You could summarise your conclusion as follows:

> 'The plaintiff bears the onus of proof on all the issues listed above except issues X, Y and Z. The ordinary standard of proof in civil cases, namely a preponderance of probability applies. Because the plaintiff bears the onus in respect of some of the issues, the plaintiff is bound to commence adducing evidence first.'

11.3.5 *A discussion of the oral evidence available to the plaintiff (or defendant)*

By this stage of the analysis you will have a fair idea of what the case is about. You will know what the issues are and who bears the onus of proof in relation to each of them. It is now necessary to make a preliminary assessment of the witnesses, the available documentary evidence and the sufficiency of the available evidence, having regard to the onus and standard of proof. If you were to conclude that there is insufficient evidence to sustain your client's claim or defence, this is the time to explain that to the client so that further evidence may be obtained or negotiations may be opened with the other side. The available evidence must be considered in detail, in the context of the case as a whole.

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You may need witnesses to prove disputed documents. You have to consider whether witnesses are available to prove the relevant documents. Documents by themselves do not prove a fact except in exceptional circumstances. You need a witness who is able to say, for example, '*I signed this contract and I was present when the defendant signed it there*' or, '*I wrote this letter and posted it to the defendant*'.

Analyse the evidence of each witness and summarise the salient parts of their evidence. This does not mean that one has to recount word for word what each witness has said in his written statement. In an RAF case where negligence is or may be an issue you might mention the following:

> 'The plaintiff has to be called to explain the circumstances under which the collision occurred. According to him, he was crossing the street at a marked pedestrian crossing when the Durban Corporation bus ran him over.'
>
> 'Sergeant NAIDOO of the Phoenix Police Station who attended at the scene of the collision afterwards, has to be called as a witness. He says that he spoke to the driver of the Corporation bus who admitted to him that he was unaware of the plaintiff's presence on the road because, although he was already driving at 60 kilometres per hour, he was still collecting money from passengers and issuing tickets to them.'

'Sergeant PILLAY of the same station also attended at the scene of the collision. He drew a plan after measuring the relevant distances between important points, all of which are depicted on a plan and a key thereto. He ought to be called as a witness.'

If the evidence is insufficient in any respect or incomplete, or if new evidence has come to light which another witness can and should comment on, advise on the steps to be taken to ensure that the evidence is complete. Ensure also that the necessary witnesses will be available at the hearing. Advise on the need for subpoenas. If additional witnesses are necessary, advise on the need to take statements from them and note the topics on which their evidence is necessary.

11.3.6

A discussion of the documentary evidence available to the plaintiff (or defendant)

A systematic approach is necessary in order for you to cope with documentary evidence; the more documents there are in the case, the greater the need for a good system.

- Ensure that the discovery procedure has been fully complied with by both sides. If it has not, advise on the steps to take. For example: If a document has not been discovered by the other side and you regard it as relevant, advise the attorney to serve a rule 35(3) notice requiring the discovery of the relevant document.

- Carefully peruse the discovered documents. You must have them in a bundle in chronological order. Consider their contents, analyse them and get your thoughts in order. Where is the case going? Where do the documents lead? What do they mean? What effect do they have on what the witnesses have to say? Isolate the documents that are relevant to each issue by way of a separate list. The analysis of the documentary evidence could be done according to the scheme discussed in chapter 13.

- Consider whether the parties should agree that the documents are what they purport to be and that they were written and were received by their apparent authors and addressees. Their contents may well remain in dispute. Advise whether any of the documents may be admitted as having been properly executed and whether their [Page 204] contents may be taken as true. Isolate the documents that appear to be truly in issue and discuss how your side is going to prove them or cast doubt on them, as the case may be.

- Consider and discuss, in relation to problematic documents, the possibility that they may be proved or admitted under the provisions of the Civil Proceedings Evidence Act 25 of 1965, the Law of Evidence Amendment Act 45 of 1988, the Electronic Communications and Transactions Act 25 of 2002 or rule 35(10). There may be special rules in other Acts. Different procedures apply to the proof of documents under these provisions. It is counsel's duty to know these procedures off by heart. Consider if a witness who has relevant documents in his or her possession needs to be subpoenaed to deliver the documents to the Registrar (rule 38(1)). Ensure that the documents that become available in this way do not gather dust in the Registrar's office, unread and unused.

- Advise on the preparation of a bundle of the relevant documents for use in court. There should be sufficient copies for the judge, the witnesses and the parties. The bundle must be paginated and indexed. The status of every document in the bundle must be clear. The best way to do this is to give an indication in the contents page whether a document is agreed or not.

- You may need to divide the documents so that there are separate bundles, for example, a correspondence bundle, a contract documents bundle, a bundle of medical reports, another for invoices and similar statements, a bundle for expert summaries and reports, and a bundle of plans and photographs. The bigger the case, the more important it is to have separate bundles.

-

Keep in mind that the process of persuasion requires that a difficult case be kept simple – for counsel, for the witnesses and for the judge who has to hear the case. Plan the documentary evidence to be used at the trial with this principle in mind.

11.3.7 *The need for conferences and inspections*

It is preferable for counsel to interview and brief the witnesses well before the hearing. Advise the client of the witnesses you want to interview before the hearing. In some instances an inspection *in loco* will be necessary to enable you to be fully acquainted with the scene and with the facts. When in doubt, always go on an inspection. It could mean the difference between winning and losing the case. It is often helpful to take the witnesses to the scene to explain there what happened.

Do you think the court may understand the facts or evidence more clearly if the court were to hold an inspection during the trial? Do you have witnesses who can best convey to the court what they saw and experienced if they could explain that at the scene? Advise on the arrangements to be made (the inspection may have to be held far from the seat of the court) and list this aspect for discussion at the rule 37 conference.

11.3.8 *The need for independent examination of persons or things by experts*

Rule 36(1) provides for an examination of the plaintiff claiming damages arising from bodily injuries by a medical adviser nominated by the defendant and rule 36(2) sets out the procedures for such an examination. If you require the plaintiff in an RAF action to be examined by an independent specialist to give evidence on the defendant's behalf, you must comply with these provisions. Advise on the procedures set out in rule 36(2)–(5).

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The same principle applies under rule 36(5A) to a plaintiff who claims damages for loss of support where that plaintiff's state of health is a relevant factor in determining the amount of his or her loss. If you act for the plaintiff, advise the plaintiff on the procedures to expect and, in particular, advise the plaintiff that he or she must not discuss the merits of the case (the collision or underlying event giving rise to the injuries) with the plaintiff's medical advisers.

Rule 36(6) and (7) have similar provisions for the examination of property (movable and immovable) where the nature or condition of the property may be relevant to any issue in the case.

11.3.9 *Expert witnesses and summaries of their opinions*

Rule 36(9) requires that notice has to be given of the intention to call an expert witness and that such notice has to be given at least 15 days before the trial. A summary of the opinions and reasons of the expert also has to be served on the other side at least ten days before the trial.

Consider whether any evidence to be given is of an expert nature and if so, ensure that your client knows that these notices and summaries have to be provided. It is often necessary to consult with the expert witnesses in order to be able to draft the relevant summaries and if you think that is the advisable course, tell your client what needs to be done. If your client needs assistance in order to brief an appropriate expert, deal with the matter in the advice on evidence. (See paragraphs 11.6 and 11.8 for a more detailed discussion on the procurement of expert evidence.)

11.3.10 *Plans, diagrams, photographs and models*

Rule 36(10) requires that notice be given of the intention to use plans, diagrams, photographs or models at the trial. The standard notice is worded in such a way that the other party is called on to admit the relevant plans and photographs. If there is no response, the plans and photographs will be admissible as evidence without further proof.

In many cases there are plans or diagrams and even photographs already in existence when the dispute arises. These form part of the evidence relating to the issues. These must be proved like any other facts if they are not admitted. Ordinarily you would have to call the photographer who

took the photographs you intend to use to establish that they accurately depict what they show. In the case of a diagram, you would usually call the person who drafted it to establish that the diagram is accurate. Those persons must be added to the list of witnesses. In other cases plans, diagrams, photographs or models may be created for the purpose of the trial. These are 'demonstrative' exhibits. They are prepared for the purpose of assisting a witness to convey the evidence accurately to the court, or to assist the court in following and understanding evidence that might be unclear or difficult to follow. Rule 36(10) applies to both pre-existing and demonstrative exhibits.

Consider and advise generally whether there are exhibits in the nature of plans, diagrams, photographs or models to be used at the trial. Further consider whether demonstrative exhibits of this type must be created for the trial. Advise generally on the way to procure and preserve this type of evidence.

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11.3.11 *Rule 37 procedures*

Rule 37(4) requires the parties to exchange what amount to summaries of the matters they intend to discuss at the rule 37 conference not less than ten days before the conference. Advise and draft the necessary notice if required to do so. Advise on the admissions to be made at the rule 37 conference and also on the admissions to be sought from the other party. Advise on the prospects of a settlement and how a settlement could be achieved if that is at all deemed feasible.

Consider the requirements of rule 37 carefully and advise on any aspect of the rule that may be applicable to the case at hand. Make a list of the matters to be raised at the conference and try to anticipate the other side's approach at the conference. Remember that some divisions of the High Court have special rule 37 procedures and that there may be Practice Directives in place. Ensure that your side will be able to comply strictly with those requirements; otherwise your case may lose its place on the roll. (See also paragraphs 11.5 and 11.9.)

11.3.12 *A discussion of the prospects of success and the quantum of the claim*

It is not essential to advise the client on the prospects of success when doing an advice on evidence but it is a helpful tool in your preparation for trial to do so. It is, however, your duty to advise the client at the earliest opportunity if you think that his or her prospects of success are poor. If you have come to that conclusion, advise the client fully, either in the advice on evidence or in a consultation.

The process of considering a suitable settlement and what the client's prospects of success are, may require an assessment of the quantum of his claim, especially in a damages action. At this juncture you may make a preliminary assessment of the court's likely award and advise the client appropriately.

11.3.13 *General comments on the state of preparation for trial*

You can make general remarks in conclusion. The advice given at this stage is usually in the nature of practical advice. For example: If you are briefed in a matrimonial action and it appears to you that the parties may benefit from counselling, you may mention that in the advice. Or in a partnership dispute you may conclude that the partners are in the process of ruining an otherwise prosperous business by the litigation and suggest that they go to mediation instead. If you think the case should be settled, this is the time to say so. The client should not receive that kind of advice for the first time at the doors of the court.

11.3.14 *A run through the rules*

There are other rules that may apply to the case:

- Rule 11: Should the trial be consolidated with another trial?

- Rule 34: Should an offer to settle be made or accepted?
- Rule 34A: Is there a case to be made for an interim payment?
- Rule 38(3): Is there evidence that may have to be taken on commission?

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- Rule 39(16): Is a running transcript of the evidence necessary? If so, the other side must be approached for their consent and for an agreement to share the initial expense on the basis that the costs of obtaining the transcript will be costs in the cause, meaning that the loser ultimately pays the full amount.
- Rule 39(22): Can (or should) the case be transferred to the Magistrates' Court?
- Rule 41: Are the plaintiff's prospects of success so poor that he or she needs to be advised to withdraw the action?
- Rules 45 and 46: Will there be assets to execute against if the case is won? If not, the wisdom of proceeding must be reconsidered. Will it help to make an interlocutory application for a freezing order (*Mareva* injunction)?
- Rules 60 and 63: Do any of the documents relied on need to be translated or authenticated?
- Rule 61: Will an interpreter be necessary for any of the witnesses? If so, advise on the arrangements to be made to acquire the services of a reliable interpreter. If it appears that the other side also needs an interpreter, advise that they be approached for the purpose of reaching an agreement that an interpreter be employed. Advise that the parties must share the initial expense on the basis that the costs of employing the interpreter will be costs in the cause.
- Are there any Practice Directives (issued by the Judge-President of the division concerned) that must be complied with? If so, advise on the steps that are necessary to ensure compliance with them.

11.3.15 *Date and place of signature and name of counsel/attorney*

It is customary to sign the advice on evidence and to date it.

11.4 Request for further particulars

Further particulars for the purpose of preparing for trial may be requested under rule 21, not less than 20 days before the trial. The request has to be signed by an advocate or an attorney with the right of audience in the High Court, or the client (who must be a natural person). The request adopts the format of the other pleadings. While the purpose of further particulars is to enable the party requesting them to prepare for trial that does not mean that the other party could be subjected to a series of questions in the nature of cross-examination. Be aware of the fact that the court may

make punitive orders for costs with regard to requests for particulars that constitute an abuse of the process of the court.

In the following example the plaintiff had sued a garage for the value of his car. The car had been stolen while in the custody of the garage for the purpose of a service. The garage pleaded contributory negligence on the basis that the plaintiff had failed to take reasonable steps to safeguard his car.

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Table 11.1 Request for further particulars for trial

Par	Text of request for particulars	Comment
	[*COURT DESCRIPTION as prescribed*] Case no 3986/[*year*] In the matter between: OJ Trading Company PLAINTIFF and MC Group Limited DEFENDANT	
	REQUEST FOR FURTHER PARTICULARS TO THE DEFENDANT'S PLEA FOR THE PURPOSE OF TRIAL	
1	AD PARAGRAPH 4(b) OF THE PLEA: What steps is it alleged the plaintiff should have taken to ensure that the vehicle was not stolen?	1 The question concentrates on the issue. The purpose of the question is to ensure that the plaintiff is not caught by surprise at the trial. 2 The answer was to the effect that the plaintiff had lent his spare keys to a third party, who then used them to steal the car. 3 Imagine if the plaintiff were to have been confronted with this allegation for the first time when under cross-examination!
	Dated at [*place*] this …… day of ……, [*year*].	
	Signature Counsel's name (printed) Plaintiff's counsel *Signature* Attorney's name (printed) L & L Defendant's Attorneys [*address and details as per rule 19(3)*(a)	
	To: The Registrar [*address*] And to: P X & Company Plaintiff's Attorneys [*address and details as per rule 17(3)*(a)	

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The response was short and to the point:

Table 11.2 Further particulars

1.

AD PARAGRAPH 4(b) OF THE PLEA

The plaintiff

(i)

failed to look after the spare keys to the car

(ii)

allowed the spare keys to the car to fall into the hands of the person who unlawfully removed it from the defendant's premises.

The further particulars were signed by counsel and an attorney and addressed to the Registrar and the plaintiff's attorneys. So everyone knew what to expect on this issue.

The formal style of a declaration or a plea would be used in the further particulars. An inadequate response could be followed by an application to compel and, in an extreme case, dismissal of the claim or striking out of the defence. Further particulars for trial bind the party who supplied them. Take care that they accurately reflect the facts as given by your client.

11.5 Rule 37(4) notice and reply

Rule 37(4) requires every party to furnish every other party with a list of admissions required, enquiries he or she will direct at them at the rule 37 conference, and any other matters to be raised at the conference. This notice has to be given at least ten days before the conference. The practice with regard to rule 37 conferences differs in the various divisions of the High Court. Those differences are also apparent in the different styles adopted in respect of rule 37(4) notices. In some divisions judges pay scant regard to rule 37(4) and are quite content to hear cases on the basis that counsel would have made use of the provisions of rule 37(4) if it was necessary. In other divisions judges take an opposite view and scrutinise the rule 37 procedures with a fine tooth comb in order to determine whether, in their opinion, the case is ready to proceed. Generally it would be sufficient to show that a serious attempt has been made to eliminate unnecessary disputes of fact. A rule 37(4) notice could serve a useful purpose if it is drafted with the intention of obtaining meaningful admissions of fact or admissions with regard to documents.

The format of a rule 37(4) notice and response is the same as for a request for further particulars and its answer respectively.

11.6 Expert notices and summaries

A party may not, except with the leave of the court, call a witness to give expert evidence without first having given notice of the intention to do so (rule 36(9)(*a*)) *and* having delivered a summary of the expert's opinions and the reasons for his or her opinions (rule 36(9)(*b*)). The purpose of the notice is to alert the opponent to the fact that expert evidence will be given and to prevent the opponent from being caught by surprise at the trial. An appropriate notice will give the name and address of the expert and even a copy of his or her *curriculum vitae*. Armed with that information, you could investigate the background, knowledge and experience of the proposed expert and even employ experts in the same field of endeavour to give evidence for your side.

The purpose of the summary is also to prevent surprise. It goes further in that it gives the opponent an opportunity to consider the opinion evidence to be relied on and to [Page 210] counter that evidence with other evidence, both factual and opinion. No great amount of detail is required, but the summary must provide sufficient detail to constitute a fair synopsis of the opinions and the reasons on which the expert relied to arrive at those opinions. When in doubt, one should err on the side of giving too much, rather than too little, detail. The consequences of an error the wrong side

of the line could be an adjournment with an adverse order for costs attached to it, or worse, the court ruling the evidence inadmissible. Most expert witnesses provide the side which calls them with written reports which contain their opinions, the facts on which they are based and the reasons which have led them to those opinions. There is no harm in serving a copy of such a report, edited if necessary, to remove privileged material and irrelevant material, as part compliance with the rules.

The following example of an expert summary relates to an expropriation action involving a dispute about the development potential of the expropriated property. The plaintiff contends that the land had the potential to be developed into a golf course estate. The defendant contends that the plaintiff would not have been given town-planning approval because of environmental concerns. The notice under rule 36(9)(*a*) and the summary under rule 36(9)(*b*) are combined. Care must be taken that the time limits of both rules are complied with and that the annexure to the summary provides both the opinions to be expressed by the expert and his reasons for holding those opinions.

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Table 11.3 Expert summary in terms of rule 36(9)(*b*)

Par	Text of summary	Comment
	[*COURT DESCRIPTION as prescribed*] Case no 669/[*year*] In the matter between: Sydney Hart PLAINTIFF and The Municipality of West Suburbia DEFENDANT	
	SUMMARY IN TERMS OF RULE 36(9)(*b*)	
1	The plaintiff intends to call Mr. JOHN FULLERTON as an expert witness at the trial.	
2 2.1 2.2 2.3 2.4	The qualifications and experience of the witness are as follows: He has a BSc degree in biological sciences from the University of Cape Town. The degree was awarded to him in [*year*] with distinction and with a special merit for outstanding work in environmental biology. He has a BSc Honours degree (*year*) in ecology and an MSc [*year*] in urban and regional planning from the same university. The Honours Degree was pursued through a scholarship awarded by the CSIR, and researched aspects of the ecology and management of small urban nature reserves. The Masters Degree was awarded on the basis of applied research done on the behalf of the Wildlife Society of Southern Africa and the Town and Regional Planning Commission. His services have been called upon in environmental, planning and management issues by a wide range of central government, provincial and local government, quasi-government bodies, research institutes, non-government development agencies, private companies and individuals. (Full details are set out in his *curriculum vitae*, which is Appendix 1 of his report, Annexure 'A' to this summary.)	1 The qualifications and experience of the witness are not strictly required by the rule. 2 However, the expert is most likely going to be required to give evidence of his expertise and it may be good advocacy to set his qualifications and experience out in a document which the judge will have reference to repeatedly during the trial and also while writing a judgment. 3 If the witness has a written CV, it may as well be attached as a separate annexure.

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Par	Text of summary	Comment
3	Mr FULLERTON will express the opinion that the potential for development of Rem of Lot 1606 of West Suburbia could be	1

4 5 6	realised by a golf course estate type of development as proposed by Mr JOHANNES VLOK. The development potential can be realised in such a way that the reasonable requirements of the owner, the environment, environmental protection agencies, local, regional and central government organisations and the site itself could be met. Mr FULLERTON will further express the opinion that the necessary permission for the development to proceed would in all likelihood have been granted. Pursuant to his brief to advise on the environmental aspects of the matter, Mr FULLERTON has prepared a comprehensive written report, a copy of which is attached marked 'B'. His opinions and reasons are fully set out in Annexure 'B'.	Notwithstanding that the written report which contains the full opinion is to be attached, the main conclusions of the expert must be emphasised in the summary itself. 2 The crucial principle is that the opinions and reasons must be adequately set out in the annexure. It is of no use to attach a report that does not comply with the rule. 3 If for some reason you do not want to give the other side a copy of the expert's report, you must set out the reasons and opinions in the body of the summary. 4 In that case you must ensure that the expert agrees with the way you have paraphrased his or her opinions and reasons.
	DATED AT [*place*] this …… day of ……, [*year*]. *signature* Attorney's name (printed) WAREINGS INC. Plaintiff's attorneys [*address and details as per rule 17(3)(*a)]	
	To: The Registrar High Court Masonic Grove DURBAN And to: P X & Company Defendant's Attorneys [*address and details as per rule 19(3)(*a)] Ref. 60/006/afs	

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The opinions and reasons could be given in the summary itself rather than in a report attached to the notice. In such a case care must be taken that the salient facts on which the expert based his or her opinion are also provided in the summary. If the facts are not given in summary form, it will be impossible to follow the expert's reasons. The summary could be styled as follows, using the case of a claim for damage to a car as the example:

Table 11.4 Expert summary in damages action

The witness will express the following opinions for the reasons which are indicated:
(a) *Opinion*: The reasonable and necessary cost of repair of the plaintiff's car is R250 000.00, being R150 000.00 for labour and R100 000.00 for parts. *Reasons*: (i) The repair work would take a qualified and competent panel beater at least X hours. This is an estimate based on the nature and number of the parts to be removed, the time it would take to do so, and the time it would take to fit and repaint the replacement parts. (ii) The market rate of remuneration for a qualified panelbeater, which accords with the rate prescribed by the Department of Manpower, is RY per hour. (iii) The parts that needed to be replaced because they could not be repaired would have cost at least R100 000.00, being the manufacturer's price for the replacement parts. See the attached price list from the manufacturer. **Note**: Details of each item and its price must be given.

(b) *Opinion*:
The market value of the plaintiff's car before the collision was at least R750 000.00.
Reasons:
(i)
Cars of the same make and model sold on the second-hand market for R750 000.00 or more at the time of the collision, if they were in reasonably good condition.
(ii)
The plaintiff's car, on a visual inspection after the collision, appeared to have been in a reasonably good condition prior to the collision. This is supported by the car's service records and by what the plaintiff has informed the witness.

(c) *Opinion*:
The market value of the plaintiff's car after the collision was no more than R500 000.00.
Reasons:
(i)
The estimated repair cost of R250 000.00 would have had to be spent before the car could be roadworthy.
(ii)
A buyer would have taken that into account when negotiating a price for the car in its damaged condition.

The summary must always give the expert's reasons separately.

11.7 Advising on the evidence in criminal cases

11.7.1 Introduction

Defence lawyers and prosecutors underestimate the value of an advice on the evidence in criminal matters. The fact of the matter is that there is no reason why the advantages of a well-constructed advice of the evidence contribute or can contribute to a successful outcome if a criminal case should be brushed aside. The Criminal Procedure Act 51 of 1977 (CPA) determines the procedures of a criminal trial and prosecutors and defence counsel must look to the CPA when they prepare for trial.

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Remember the purposes of an advice on the evidence: It ensures that the necessary procedural steps have been taken. It allows you to assess the sufficiency of the evidence. It allows you to determine whether further evidence should be obtained. It enables you to give practical advice with regard to the handling of the matter. These purposes combine to enhance your chances of winning.

The defence starts with an advantage in the sense that they will have copies of the statements in the police docket. The prosecutor may have a statement by the accused but usually doesn't know in advance who will be called as defence witnesses. Different strategies are therefore required for prosecutors in their preparation for the trial.

11.7.2 Advising on the evidence for prosecutors

One has to sympathise with prosecutors who have to conduct large numbers of trials against almost impossible odds. Some have time constraints and often see the docket only on the morning of the trial. Others are sent on circuit with a month's worth of cases to run one after the other and with no breathing space – time for preparation – between trials. Irascible magistrates and judges and impatient defence lawyers may add to the pressure. It is absolutely necessary for prosecutors operating under those conditions to have a simple yet efficient system to cope and in coping to enhance their performance and to improve their chances of winning.

Such a system starts with the preparation of an advice on the evidence. That advice does not have to be in writing; all that is required is a systematic review of the evidence and a meaningful discussion with the investigating officer.

In some cases the trial prosecutor will have seen the docket prior to the trial date and may have assisted the investigating officer by giving directions with regard to further investigation. All of that work will have been done in preparation for trial. But the fact of the matter is that in the larger centres where there are many courts running simultaneously, the prosecutor to whom the trial is allocated may only see the docket for the first time on the remand date when the trial date is fixed. The investigation will have been – or ought to have been – completed by then and the trial prosecutor will then have an opportunity to do the equivalent of an advice on the evidence for the guidance of the investigating officer. Such an advice will differ in structure and content from the advice lawyers will do in civil cases, but not in the basic principles and techniques which are involved. The purpose of the advice is to ensure that the case will be ready for the trial and it will include at least the following steps or processes:

- *The issues:* Determine what the issues or main issues are going to be. The accused may have pleaded to the charge by this time and the defence ought to be apparent from the plea explanation. If it isn't, the likely defence will have to be identified from the statements in the police docket. Consider which of the legal elements of the offence concerned are no longer in issue. Don't assume anything. Unless an element is eliminated by an admission recorded as such in terms of section 220 of the Criminal Procedure Act 51 of 1977 (CPA), regard that element as being in issue.

- *Identify the witnesses to call on each issue:* Give the investigating officer a list of the witnesses to be called. Make arrangements for subpoenas for those who need to be subpoenaed and prepare minutes (see chapter 2) for officials in other departments, for example the district surgeon, to ensure that all the witnesses attend on the trial date. Use the proof-making model of fact analysis to determine whether a person from whom a statement has been taken should be called as a witness. The test is [Page 215] whether the evidence of the witness is essential, or at the lowest, likely to strengthen the prosecution case.

- *Identify the exhibits to be used:* Give the investigating officer a list of the exhibits to be used at the trial. Make arrangements for the exhibits which have been handed in at the court to be available. Arrange for a sufficient number of copies to be made of documentary exhibits; the original for the court, a copy for each accused's lawyer, a copy for the witness to look at, a copy for yourself, and a spare copy for the gremlins haunting the trial process.

- *Identify the witness or witnesses necessary to prove each exhibit, including the 'chain of evidence':* Enter the name or names of every witness you need to prove the exhibits on the list of exhibits you give to the investigating officer. Keep a copy for your own use at the trial to ensure you don't forget to lead the evidence when the witness is in the witness box.

- *Identify the likely defence witnesses:* Carefully consider the evidential material available in the police docket in order to identify potential defence witnesses. It is not too late to direct the investigating officer to take statements from them. You need to eliminate as far as possible the risk of being caught by surprise at the trial and you need to plan your cross-examination as well. Give the relevant details to the investigating officer and ask him or her to take the necessary statements. Note that in some cases it will be necessary to communicate the intention to take a statement from the witness to the defence. Ensure that the defence gets copies.

- *Identify the themes for the cross-examination of each defence witness, the accused included:* Conduct this exercise irrespective of whether you have a statement for the witness or not (see paragraph 18.8). Discuss your themes with the investigation officer and consider whether it is necessary to take statements from further witnesses or to subpoena additional witnesses. For example: You may need a witness to prove a prior inconsistent statement by the accused or a potential defence witness. Although that evidence may not be directly

relevant to an issue in the case, it is admissible and relevant to the credibility of the witness. Ensure that the defence gets copies.

- *Identify or refine your theory of the case:* See paragraph 14.6, Step 5.

- *Identify any constitutional safeguards that may be applicable and ensure compliance:* Some constitutional safeguards are obvious, such as the accused's right to information, the right to a speedy trial, the right to silence, and so on. Others may be less obvious. Consider the issues and the procedure very carefully to ensure that compliance has occurred or that outstanding matters will be taken in hand before the trial date. Ensure that the prosecution has complied fully with its duty of disclosure under the NPA Code of Conduct.

- *Identify any special requirements for the case concerned:* For example: Assume the defence is an alibi and the defence has given notice to that effect. The main issue is therefore whether the prosecution can prove the identity of the offender (the accused) beyond reasonable doubt. That proof may consist of three or four different types of evidence, namely direct or eye-witness evidence, circumstantial evidence (fingerprints, DNA, other circumstances), admissions or confessions, and evidence to counter the alibi witnesses. The first three types may already be part of your trial strategy, but what about the last one? How does one counter the evidence of alibi witnesses? The short answer is that you must prepare and that preparation will [Page 216] include an advice on the evidence to the investigating officer. Consider doing the following: (i) Direct the investigating officer to investigate the circumstances of the alibi so far as place, time and the people present are concerned; (ii) have him or her take statements from each alibi witness after giving notice to the defence (who may have the right to be present during the interview); (iii) in respect of each witness work out how you can undermine that witness's evidence, for example, by using one or more of the themes for cross-examination described in paragraph 18.8; (iv) determine whether the evidence to undermine the alibi will be led during the prosecution case or in rebuttal. (For example: Evidence to prove bias, prejudice, corruption or a prior inconsistent statement on the part of the alibi witness may be introduced in rebuttal.); (v) research the law: see for example section 93 of the CPA and the commentary in Kruger *Hiemstra's Criminal Procedure* LexisNexis at 14-31 and 14-32.

Where the pressures under which you have to operate as prosecutor are such that you are unable to give an advice on the evidence before the trial date, you may nevertheless be able to spend a fruitful half hour with the investigating officer the day before the trial or even during the hour before the court is due to sit to discuss the matters listed above.

It is a fact that the performance stress that is so much part of the adversarial litigation process is ameliorated by having a good plan and sound strategy. Don't overlook the assistance you can get in this regard by doing an advice on the evidence.

11.7.2 ***Advising on the evidence for defence counsel***

There should be no difference in principle for defence lawyers between an advice on the evidence in civil and criminal cases.

Defence counsel (attorney or advocate) has the advantage of copies of the police statements. They serve as the basis for an analysis of the issues, the onus and standard of proof, who the prosecution's witnesses are likely to be, what exhibits are available and so on. The steps in an advice on evidence discussed earlier in this chapter should be followed where they are applicable and adapted where appropriate.

There are special requirements in criminal cases. Consider for example the failure of the accused (or his lawyers) to give notice of an alibi before the conclusion of the prosecution case. Does this perhaps devalue the alibi? (See (i) the CPA section 93; (ii) the commentary in Kruger *Hiemstra's Criminal Procedure* LexisNexis at 14-31 and 14-32; (iii) *S v Zwayi* 1997 (2) SACR 772 (Ck) at 778*d–j*.) Consider whether notice needs to be given that you intend to call expert witnesses. Consider whether there were inadmissible admissions or confessions made by the accused and the procedure to adopt in having them excluded. Consider whether you need to interview prosecution witnesses

and, if so, the procedure to follow (see paragraph 1.5.3.3). Consider whether you need to have prosecution exhibits examined by your own expert and, if so, the procedure to be adopted to obtain permission and what safeguards need to be put in place. Consider the constitutional principles that are applicable to the case and what to do if any of them has been breached.

This is not a closed list of matters for defence counsel to consider. Each case will have its own demands. The time for doing an advice on the evidence in a criminal case is before the accused pleads and gives a plea explanation. This should be obvious.

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11.8 Assembling the evidence

In the adversarial system the parties are responsible for producing the evidence on which the court will be asked to make its findings of fact and law. The advice on evidence dictate how that evidence must be procured. It remains for that evidence to be assembled in such a way that it may be presented persuasively. In a typical case assembling the evidence involves the following processes:

- Once the necessary statements have been taken from your side's witnesses, steps must be taken to ensure their presence at court on the date of the trial. Where necessary, a subpoena must be issued and served.

- A provisional bundle of documents must be prepared for discussion with the other side with the aim of reaching agreement on their production. Start with a draft agreement, for example. The following general formula should suffice in most cases:

  '1. It is agreed that each document in the bundle:

  – is what it purports to be.

  – was properly executed by the person or persons indicated in the document as its author or authors.

  – was so executed on the date reflected in the document.

  – in the case of correspondence, was received by its addressee in the normal course of email, text message, WhatsApp, Facebook, postal delivery or telefax, as the case may be.

  2. The content of the documents in the bundle is not in issue, except for the following documents: – (Prepare a list to be attached to the agreement.)'

- Inspect the scene where the scene features in the case and prepare demonstrative exhibits – plans, photographs, models – if that may help witnesses to give their evidence. Precognise the witnesses concerned so that they are not confronted with these exhibits for the first time when they are already in the witness box (and when you will not be allowed to interview them until they have completed their evidence).

- Prepare expert reports and ensure that the required notice and summary under rule 36 have been served. The following general principles apply to expert witnesses: (Note that there is

no substitute for studying the Rule, the commentary in Harms *Civil Practice in the Superior Courts* (LexisNexis) and the cases cited there.)

11.8.1 *Consulting and briefing experts*

Judges draw inferences from the facts that are proved in the case before them. However, some cases involve facts and inferences falling outside the ordinary experience of judges (and other lawyers). Expert witnesses are used to explain subjects outside the court's normal experience and to express opinions on the inferences to be drawn from the facts. An expert's evidence can make or break your case. In some cases expert evidence is indispensable; in other cases it can help you to present your case more persuasively.

11.8.2 *Who is an expert?*

An expert is a person who, by virtue of his or her academic qualifications, experience or research (or a combination of them), is able to give relevant evidence in the nature of information and opinions not generally available to the public.

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11.8.3 *Types of expert evidence*

There are two types of expert evidence: The *first* is where an expert is required to give evidence of his or her own independent investigations and observations, which may include opinions based on those investigations and observations. This type of expert evidence is encountered often in RAF actions when the orthopaedic surgeon who treated plaintiffs for their injuries, gives expert evidence of their injuries, the treatment they received, the cost of the treatment, whether future treatment will be necessary, and the cost of future treatment. In the process, the surgeon may express opinions on the nature and degree of pain and discomfort, disability, loss of amenities of life, life expectancy and other matters relevant to quantum.

The *second* type of expert evidence is where an expert is asked to give evidence based on documents submitted to him or her for the purpose of providing an expert opinion on some issue or question or other. For example: A radiologist may be employed by the defendant to examine X-rays of the plaintiff's leg in order to express an expert opinion on the question whether there is a likelihood that future medical treatment will be required. The expert will do no independent fact investigation in this situation but will base his or her opinion on the facts provided to him or her.

When employing an expert, it is important that you should make it clear whether the expert is expected to make an independent investigation of the facts or whether he or she is restricted to the material supplied to him or her.

11.8.4 *Admissibility of expert evidence*

There is still some controversy whether an expert witness should be allowed to express an opinion on the very matter the court has to decide, the so-called 'ultimate issue'. This question has not been resolved yet, but opinion evidence is generally allowed when it can help the court to decide the issues. Opinion evidence is admissible when it is relevant and it is relevant when it can help the judge to make a decision. This is not a very precise test, is it? There are nevertheless some principles to be applied as a general guide:

- A lay witness may give opinion evidence if the subject-matter falls within ordinary human experience, for example, whether someone was 'angry', whether a car was going 'fast', and even whether someone was 'drunk'. However, he or she is not allowed to express an opinion about the fundamental question before the court, for example, whether the accused was so angry that he was unable to form the necessary intention, or whether she exceeded the speed limit by 11 kilometres per hour.

- Expert opinion evidence is generally not allowed on matters of common knowledge, matters of human attitudes and behaviour, credibility of witnesses and the construction of documents and statutes.

- Before allowing a witness to express an expert opinion, the court must be satisfied of the expertise of the witness and that the facts on which the opinions are to be based have been, or will be, proved. That does not mean that the opinion evidence has to wait until the court has made its final findings of fact. The witness will be allowed to express his or her opinions and to state the facts, proved or assumed, which support the opinions expressed by him or her.

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- The court is not bound to accept the expert's opinion. The court may reject it, even if no opposing views have been expressed by other witnesses. When opposing opinions are expressed by the expert witnesses called by the parties, the court may determine the approach to be followed to resolve the issues. The court alone is responsible for findings of fact and law.

11.8.5 The field of expertise

Because the evidence of the expert has to be relevant to be admissible, the expert will have to be expert in the subject-matter before the court; otherwise his or her opinion will not be helpful. You must therefore try to find an expert in the relevant field. The nature of the dispute determines whom you would employ and call as an expert. For example: An orthopaedic surgeon should be able to express helpful opinions on the degree of pain and discomfort to be expected in an RAF case involving bodily injuries. An architect should be able to give helpful expert opinions in a dispute relating to the compliance (or non-compliance) of building work with the approved plans and the national building regulations.

11.8.6 How to select an expert

Due to the degree of speciality in virtually all areas of human endeavour, particular care must be taken in the selection of an expert. In the case where a particular expert has already been involved, for example as the orthopaedic surgeon who treated the plaintiffs for their injuries, there may still be good reason to appoint another expert although that would not usually be necessary. If an expert has to be appointed from scratch, it may not always be easy to find one. The following steps may be taken:

- Make enquiries among colleagues who practise in the same area of law involved.

- Approach the relevant faculty or department at the local university, technical college or similar institution.

- Approach the chairperson or administrator of the professional or other body to whom the expert may belong for the details of experts in the relevant discipline.

- Obtain a detailed résumé of the proposed expert's qualifications, experience and expertise. Look for practical experience. There is no substitute for experience!

- Meet the expert and discuss the matter generally. Make an assessment of the way the expert projects himself or herself. Will he or she be confident and convincing without being arrogant or overbearing? Will the expert stand up to cross-examination? Has he or she given evidence before? Was his or her evidence accepted on those occasions?

- If the proposed expert is suitably qualified to give an opinion, give him or her sufficient detail of the facts of the case and ask him or her to confirm that the issue is well within his or her expertise. If it is not, ask him or her if he or she knows an expert within whose field of expertise the matter falls.

- Once a suitable expert has been found, ensure that the basis of his or her retainer is agreed and confirm the relevant details in a letter.

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11.8.7 *Preparing the expert's brief*

The expert must know exactly what is required of him or her. The expert report will also have to be structured in such a way that it could be used as the basis of the expert's evidence or, failing that, an expert summary under rule 36(9)(*b*). For these purposes, an expert brief must be prepared. This could be done in a consultation, but even then there must be a written record. The expert's written brief should contain:

- any written material to be supplied to the expert for consideration (If there are any exhibits involved, ensure that the chain of custody is preserved.).

- the facts which are relevant to the opinion (You have to ensure that the facts you want your expert to rely on can be proved by independent evidence.).

- the disputed facts which give rise to the need for an expert evaluation and opinion.

- the precise question or issue to be addressed by the expert.

- the desired structure of the report to be submitted by the expert.

The expert's report must be structured in such a way that it can be used as a summary of his or her evidence. The report must be kept simple so that lay persons such as the judge and counsel can follow the expert's reasoning. Include:

- a brief summary of the expert's qualifications, experience, publications and expertise, with a detailed *curriculum vitae* to be attached to the report. The summary must move from the general to the specific so that the expert's ability to assist the court on the issue before it is clearly established.

- the issues or questions submitted to the expert for his or her opinion.

- the facts on which the expert has based the opinion, together with any assumptions made by the expert.

- the methods or reasoning adopted by the expert to arrive at his or her conclusions.

- the expert's conclusions or opinions.

- the reasons for each conclusion or opinion he or she has reached.

- any qualifications or reservations the expert wishes to impose on the opinions expressed.

- a list of any reference works relied on by the expert in reaching the conclusions or opinion.

11.8.8 *Problems to anticipate*

There are some practical and ethical matters to keep in mind when briefing an expert.

- An expert witness has a duty to the court to provide an accurate, independent opinion. While the expert witness is employed and paid by the one side in the dispute, the expert's overriding duty is still to the court. This must be made plain to your expert from the outset.

- The expert must be ready to make concessions where concessions are called for. Being too dogmatic could reduce the value of an expert's opinion.

- The subject-matter of the expert opinion may be difficult and taxing for counsel to understand. Nevertheless, it is counsel's duty to educate himself or herself to the required standard. You can't lead the evidence of your witness, cross-examine any opposing expert or argue the case properly, without fully understanding the expert [Page 221] evidence. Don't underestimate the amount of work to be done or the amount of pleasure you can derive from being a student again.

- Your expert may be asked to comment on alternative factual scenarios. You must explore these with your expert witness before the trial.

11.9 Conducting a pre-trial conference

The objects of a pre-trial conference are:

- to curtail the duration of the trial.

- to narrow the issues between the parties.

- to curb costs.

- to facilitate settlements.

These objects can only be met if both parties arrive at the conference fully prepared. To this end rule 37(4) requires that a notice be served on the other side advising them what admissions will be sought, what particulars will be requested and what other matters will be raised at the conference. Rule 37(6) is to the effect that certain matters have to be discussed at the conference and that the parties have to report to the court what they have done in respect of those matters. It is anticipated that the court's supervision and management of the pre-trial procedures will be extended by means of case management procedures where judges exert direct control over the preparation of the case for trial.

Leaving aside the matters you have to deal with in terms of rule 37, your preparation for the pre-trial conference must cover the matters discussed thus far in this chapter. Questions you may consider for discussion at the conference could include:

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Has there been a full disclosure of the relevant documentary evidence by both sides?

- Is there an issue with regard to the admissibility of a document which could be resolved by agreement?
- Could a joint or agreed bundle of documents be prepared?
- Could the status of any of the documents be agreed on?
- Is a joint inspection necessary? Are any plans or photographs relating to the scene in dispute? Could those disputes be eliminated by appropriate admissions?
- Could the parties jointly prepare demonstrative exhibits for the assistance of the court and the witnesses? What else can be done with regard to demonstrative exhibits?
- Is an interpreter necessary and, if so, who should be employed and on what terms?
- Should the expert witnesses be asked to meet and to discuss the matter? Should they be asked to submit a joint report to the parties and the court in which they can set out in what respects they agree with each other, in what respects they disagree and how their disagreement can be resolved?
- What admissions of fact can be made by either side?
- How can the case be settled?
- If it cannot be settled, is there perhaps an alternative dispute resolution method available which suits the requirements of the case?

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These are but a few of the matters you must consider before you attend the conference. Rule 37 provides for others and each case will almost certainly have its own requirements. Use the general checklist provided by rule 37 and add to those topics any topics the circumstances of your case demand.

The conference must be held at least six weeks before the trial date. In practice it is seldom possible to hold the conference earlier because the parties would not have completed their preparation; a conference of this nature can only be successful when both sides are ready for the trial itself. Leaving the conference for later than six weeks before the trial creates other problems; there may not be enough time to implement decisions taken at the conference and the clients may become liable for trial fees even though the case may settle.

The convention is that the conference is held at the chambers of the most senior advocate briefed in the case, at the seat of the court. If attorneys are to handle the matter as counsel, the same principles will apply. It is customary for the plaintiff's attorney to draft the minute. It is often possible to dictate the minute at the end of the conference. Any objections, qualifications and explanations can be dealt with there and then. The minute must be placed in the court file before the hearing.

A properly handled pre-trial conference is a valuable tool of preparation for the trial. It allows you to prepare the case for the trial and it allows you as counsel to be better prepared for the trial.

11.10

Assembling the evidence: The prosecutor's position

Prosecutors may adapt the processes described thus far to the needs of criminal cases. Generally speaking the assembling of the evidence in a criminal case will be done for the prosecutor by the investigating officer, acting under the guidance of the prosecutor. Unlike civil cases, criminal cases usually involve a number of court appearances. At each appearance the prosecutor must have access to the docket in order to determine whether the investigation has been completed to his or her satisfaction and whether the case is ready for trial. When that stage has been reached the prosecutor must have a short meeting with the investigating officer before fixing the trial date.

There are some processes that are unique to a criminal case and the guidance provided to the investigating officer during the litigation phase – which for a prosecutor starts at the first appearance – must include:

- the need for and conduct of an identity parade (section 37(1) of the CPA);
- the need for taking the fingerprints, palm-prints or foot-prints of the accused (section 37(1));
- the need to have blood or tissue samples taken (section 37(2));
- advice on any bail application, including suitable conditions for bail;
- the need for steps to be taken for the protection of any witness (under the Witness Protection Act 112 of 1998);
- the need to ask that the hearing or part of it should be conducted *in camera*, whether in terms of the Child Justice Act 75 of 2008 or any other Act (section 153 of the CPA);
- the need for evidence to be given through an intermediary (section 170A);

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- the need for a prohibition against publication of certain information relating to the proceedings (section 154);
- the need for a prohibition against publication of the identity of persons towards or in connection with whom certain offences have been committed (section 335A).

Plea and sentencing agreements are discussed in chapter 3. At the sentencing stage after conviction the prosecutor will have another opportunity to guide the investigating officer in the quest to obtain evidence that may be relevant to the sentence the court might or ought to impose. Ideally this kind of evidence must be sought during the original investigation of the matter and not be left until a conviction has been obtained. Evidence that may be relevant to sentence includes the accused's record of prior convictions, evidence of criminal conduct while out on bail pending the trial (showing that the accused is unrepentant), and evidence in support of a compensation order in favour of the complainant.

This is not a closed list and prosecutors must take advice and guidance from their seniors when deemed necessary.

Chapter 12
Preparation for trial: Legal research

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12.1 Introduction

It is self-evident that a lawyer has to be able to conduct legal research. It has been said that a good lawyer is one who knows where to find the law. Legal research can be defined as the process of identifying and retrieving the information necessary to support legal decision-making. It begins with the analysis of the facts (see chapter 13) and concludes with the application of the research results to the facts. In the litigation context the legal principles that have been identified can be applied to the facts of the case to provide an answer to the question or issue before the court. Legal research is therefore not undertaken in a vacuum, as some academic exercise, but against the background of a known or anticipated set of facts. In this sense, legal research and fact analysis go hand in hand. There is a symbiotic relationship between the law and the facts. The law is the same for all cases of the same type. The facts, on the other hand, differ from case to case. Legal research should therefore not be regarded as a separate exercise; it is part of the analysis of the facts and documents of the case.

Recent technological advances have accelerated the pace of legal practice and have made it more scientific. Other developments have contributed to make legal research more efficient. Old texts have been translated; it is no longer necessary to be able to understand Latin or High Dutch. Vast areas of the law have been codified; it is no longer necessary to look for it in textbooks and law reports. The law library is getting smaller every day as old editions of the standard textbooks are replaced by new ones and become available online. Every current statute and all the law reports are available via the internet for immediate access on your notebook computer. Even unreported

judgments are included. Books still form the better part of the typical law library. Modern legal researchers have the advantage of being able to consult the old and the new, the rich texture of Justinian's *Codex Civilis* and the writings of the Roman-Dutch lawyers of the sixteenth and seventeenth centuries, in hard copy, as books are now called, as well as the latest legislation, cases and textbooks, onscreen. This gives rise to different styles in legal research; recent graduates prefer online research while older lawyers tend to head for the library where they find comfort in handling real books. Different universities teach different research methods too. In practice, many lawyers have developed their own methods of research that work well for them.

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The disadvantages of the traditional, manual method of searching through libraries, books, law reports, law journals, statutes and old opinions are that:

- they are laborious and time consuming – and thus costly.
- the materials are more often than not, not arranged or stored in a systematic form allowing easy access, or available in the same facility.
- hard copy (meaning paper) storage is expensive – requiring the rental of storage space, security and fire controls etc.
- there are environmental issues relating to sustainable or eco-friendly sources of paper.

The first stages of the move towards digital resources saw the employment of microfiche for storage of whole archives, the use of CD-ROM for similar purposes, the early days of online databases and multimedia. Digital resources that are available for legal research now fall into three broad categories, with some overlapping and duplication between them. They are CD-ROM, which for practical purposes has become obsolete, the internet, and intranet.

Access to the databases can be gained from almost anywhere in the world by means of a smart-phone or a laptop computer. There are a number of different databases available, for example free sites such as SAFLII (for Southern African materials) and Findlaw (for American materials), pay sites where access is controlled by subscription fees and passwords, official (and usually free) sites to government databases, including the judgments, for example, of the Supreme Court of Appeal, and search engines such as Google and even YouTube.

The cost of access to internet-based subscription databases may be ameliorated somewhat by the use of an intranet system where a firm or set of chambers may create a common database for use by its members. While the suppliers of services such as LexisNexis charge a higher fee for the inclusion and therefore availability and use of their databases on an intranet system, the cost is reduced for the individual user.

The so-called Fourth Industrial Revolution has arrived. We have e-mail, e-books, e-commerce, e-banking, e-money, and e-filing. Transactions of every description are being conducted electronically, the 'e-' in each of the systems mentioned. The courts have recognised service of documents and process via email, on Facebook, Instagram and the like. An electronic signature has been accepted as sufficient for a contract relating the sale of land to be valid. It is anticipated that the courts will soon operate as a paperless and environmentally friendly, modern establishment.

What all of this means for lawyers is that computer literacy has now become as essential a skill as numeracy (numbers) and literacy (language) skills.

None of this means that the underlying skill of legal research has become obsolete; quite the opposite is true. With the resources and materials so much more readily accessible, a higher standard of legal research is now expected of all lawyers. Some of that will still take the lawyer to books and libraries, but the research process always starts with fact analysis.

Legal research in the litigation context will typically span four different processes, namely:

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fact analysis, which is concerned with finding out what the relevant facts are (This process is dealt with in chapters 1, 4 and 13 and is not revisited here.).

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- *legal analysis*, which is concerned with the placement of the problem in a suitable legal category.
- *legal research*, which is concerned with finding the legal principles to apply to the facts.
- the *application* of the legal principles to the facts.

While the process includes all four stages, it revisits prior stages as the circumstances require. For example: While you are doing research in the library you may come across a statute, decision or textbook that puts a different complexion on the problem and requires you to investigate the facts along a different line or with a different claim or defence in mind. Thus each step of the process is left incomplete until you are in a position to take a holistic approach to find a solution or answer to the problem. The stages of legal research are also not entirely distinct from each other; they overlap to an extent. The fact investigation, for example, is done with one eye on the law. The law determines the direction of the fact investigation. If, for example, it appears at an early stage during the fact investigation that a contract existed between the parties, the further investigation of the facts would proceed with the principles of the law of contract firmly in mind. The legal research would then concentrate on that branch of the law.

12.2 Classification of the problem: Legal analysis

At university legal problems came in neat little compartments. The contracts lecturer set problems requiring you to apply the law of contact; the criminal law professor only asked questions relating to criminal law. You could be tested only on the courses you took and the problems you were required to solve were within the prescribed syllabus. Exams were also written according to a timetable. It was quite easy. You knew what to expect and when you were to be tested. Clients are not so considerate. They don't know what courses you did at university; in fact, they assume that you know all the law. They often arrive in a panic, give you incomplete or incorrect instructions and demand to know the answer there and then. Sometimes the instructions are so vague that you need to undertake an investigation of the facts yourself. On other occasions the client gives you fuller instructions, enabling you to classify the problem and to start analysing it during the first interview.

Getting from a jumble of facts and documents to the appropriate legal classification of the problem is not too difficult. The breadth of the subjects taken at a university for an LLB degree is such that a law graduate could spot the area of law concerned reasonably easily. From that initial classification one could move to an appropriate textbook and research the legal principles from there.

The starting point is to categorise the relevant relationship. The law is there to regulate relationships between people. If you were alone on a deserted island, you would have no need for law. It is for this reason that Robinson Crusoe could say that he was master of everything he could see on the island, a law unto himself. It was only when a second person came to the island (the man Friday) that a legal relationship could exist. The relationship between Robinson Crusoe and Friday was dynamic and complex. They were friends and partners, master and servant, protector and ward, and above all, allies against a common foe. The changing circumstances determined what their respective rights and obligations were. Such underlying relationships can be used to identify the broad area of the law to apply to a given factual setting.

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Table 12.1 Identifying the relevant area of law

Relationship	General field of law	Special field of law	Remedies	Comment
The parties have or had a contract, agreement, deal, bargain or arrangement.	The law of contract	Sale Lease Loan Services Supply of goods and services Insurance	Performance (payment, delivery etc.) Damages	Each type of contract has its own unique principles which apply in conjunction with the general principles of the law of contract: thus individual textbooks and headings in the library.
The parties were brought together by an unlawful act which caused a loss in respect of property or person.	The law of delict	Damage to property Injury to person Injury or death of person causing loss of support MVA claims for personal injuries or loss of support	Damages Interdict	The concept of property includes movables and immovables, as well as incorporeal property (or intellectual property).
The parties are bound together by a marriage or by children or by a common ancestry.	Family law	Husband and wife Children Succession	Divorce Division of assets Custody or access Maintenance Inheritance	
The parties stand in the relationship of employer and employee.	Labour law		Performance (payment, work) Re-instatement Damages	This branch is kept separate, although it belongs under the law of contract (the contract of service).
An unjust transfer of money or property has taken place between the parties.	Enrichment	Various enrichment actions	Payment Restitution	

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Relationship	General field of law	Special field of law	Remedies	Comment
The parties make adverse claims to property.	The law of property	Movable property Immovable property Intellectual property	Delivery Possession Damages Interdict	These claims can be based on the law of contract, family law, the law partnership or the law of property.
The parties are, or were, engaged in a joint venture or partnership.	The law of contract	Partnership	Contractual remedies Dissolution Contribution	This is another branch of the law of contract that has its own set of principles.
The parties are shareholders, directors or officers of a company.	Company law		Companies Act remedies	Some of these relationships are based on contract.
The parties are principal and agent.	The law of agency	Mandate, brokers, agents	Contractual remedies	Generally a contractual relationship.

The parties are, or were, engaged in a maritime adventure.	Maritime law	Carriage of goods by sea Marine insurance International finance/ letters of credit Admiralty law	Contractual and delictual remedies Action *in rem*	Notwithstanding the confusing terminology and special admiralty procedure, maritime law is about some very ordinary contracts; sale, lease, agency, services, insurance etc.
The parties have rights or obligations arising from a negotiable instrument.	The law of negotiable instruments	Cheques Letters of credit Banking	Contractual Special remedies	Provisional sentence procedure could be used to obtain quick payment.

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In the initial stages of legal research the facts may not be clear and it may not be possible to identify the relevant field of the law to the exclusion of others. It is important to keep your options open at this stage. Explore all potential avenues. Some may be dead ends. Others may lead you to a better understanding of the problem without providing the answer. Eventually one field of the law will emerge as the one most relevant to the particular set of facts.

12.3 Legal research: Using the library

The purpose of legal research is to find the applicable law (and to find it quickly) in order to advise your client on his or her rights and obligations and to enable you, as counsel, to advance your client's case professionally and with a full understanding of the law. Research, in this context, means a systematic investigation to establish the relevant principles of law. The methods you adopt will have to take account of the resources available to you as well as the nature of the problem, the urgency of the matter and the amount of knowledge you start with. You will probably adopt a method with the following phases:

- completing the fact investigation and preliminary legal analysis.
- organising the research.
- identifying the sources.
- recording the results of the research.
- making a permanent note or record of the research.
- applying (or using) the research material.

12.3.1 Completing the fact investigation and preliminary legal analysis

It is essential that the fact investigation be completed as far as possible before you head for the library. Your search for the legal principles could be rather unfocused and unproductive if a proper assessment of the problem has not been made. (What exactly is the problem? What are the available options?) When the facts have been assembled, you need to classify the problem. (What general field or branch of the law is involved here? What does the client want to achieve?) Often the problem

is obvious, for example when the client has been arrested on a charge of murder. But even then the facts need to be investigated fully before the in-depth legal research can be undertaken.

The preliminary legal analysis usually goes no further than to identify the relevant areas of law and perhaps to make some preliminary classification of the problem area. For example: When you take instructions from your client on the allegations in the summons and particulars of claim in a defamation action, you may find that the defendant admits publishing the defamatory material but contends that it is true. You then know that you need to focus on defences to a defamation claim instead. Your further research would then be more specifically directed to the most likely defence, in this example, truth and public interest (justification).

12.3.2 Organising the research

Once you have made a preliminary classification of the case to determine the specific area of law to be researched, you would head off to the library or to your computer with internet access or a CD-ROM with a scheme or plan for the proposed research. What is the question or issue to be researched? Have I made a correct identification of the area of law involved? Is there a single question or issue here or do I need to broaden my research so that I can cover the possibility that the facts are not quite as my client has given them to me? Most important of all, to what depth do I have to conduct this research? Is it enough to look at the law at 'textbook depth' or do I need to go as far as the extreme opposite, namely 'original sources depth'? Textbook depth may be sufficient for the purpose of giving the client some preliminary advice, not to be acted on before it has been confirmed, but original sources depth will be required for an argument on appeal before the Supreme Court of Appeal or Constitutional Court.

12.3.3 Identifying the sources

In some cases you will have a good idea where to start because the case is simple or because you have prior experience of a similar case. In other cases you have no idea where to start. Every lawyer has his or her own preferences and style. Some prefer books to the internet. You may prefer an approach that investigates the historical development of the relevant legal principle and then investigates how that point developed in other jurisdictions; this is called the historical-comparative approach. If one were to need any justification for the historical-comparative approach, the fact that the Supreme Court of Appeal and the Constitutional Court also prefer this style of legal problem solving should be sufficient.

This is a standard scheme for legal research:

***Start with general sources**:* There are many general sources, but four examples will have to suffice here. These general sources are used to identify more specific sources, although they sometimes provide a complete answer for the depth of research required in a particular case.

- *Lawsa*, that is to say, WA Joubert (ed) *The Law of South Africa* LexisNexis (also available online), covering every branch of South African law, arranged in alphabetical order, with annual supplements and monthly current law updates: There is a subject index at the end of each volume where you could narrow down the search within a particular branch of the law. For example: If you want to know if truth is a defence to a defamation claim, you would identify the relevant volume of *Lawsa*, that is to say, *Defamation*, and then 'defences' and 'truth'. The page or paragraph in the text contains relevant material in the nature of an academic discussion. This is not a primary or original source of the law, but the endnotes to each (numbered) paragraph in the book will lead you to old authorities, case law and statutes.

- The *Noter-up*, that is to say, *Butterworths Index and Noter-up to the All South African Reports and the South African Law Reports*, LexisNexis, (also available online): You can consult the subject index in the *Noter-up* and go straight to 'Defamation' and scroll down to 'defences' and 'truth' to find the names and citations of reported cases dealing with the subject of the research.

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Amler, that is to say, LTC Harms *Amler's Precedents of Pleadings* (latest edition) LexisNexis, (also available online), contains a handy discussion of the law on most claims and defences you are likely to encounter in practice. Go to 'Defamation'. There is a short discussion of the law, but defences to a defamation claim are dealt with under a separate heading, 'Defamation: Defences'. 'Truth' appears under the subheading 'Truth and public interest', which is followed by a discussion of the [Page 232] material facts which need to be proved for this to constitute a defence. As with *Lawsa* and the *Noter-up*, there are references to case law you can follow up.

- *Words and Phrases*, that is to say, CJ Claassens *Claassens: Dictionary of Legal Words and Phrases* LexisNexis, (also available online): This loose-leaf dictionary contains, in alphabetical order, words and phrases that have been considered by the courts. It is a particularly handy starting point when you have to research the meaning of a word or a phrase in a statute. For example: The phrase '*in public*' has been the subject of numerous cases which you will find when you look up that phrase.

Identify the specific sources*:* The search at this stage moves to the level of identifying original sources. (Where did the rule or principle originate?)

- *Statutes*, including provincial ordinances, municipal by-laws and various types of regulations, are original sources of the law: Most aspects of South African law are covered by statutes. This should not be surprising; South African law is, after all, based on the civil law and shares, with other civil law countries, an affinity for legislation. But there are lesser-known statutes that still apply today, for example statutes to marine insurance law (with some Spanish and Dutch statutes dating back to the 15th and 16th centuries).

- *Decided cases* are collected in the law reports, of which there are now a large variety in South Africa. The decisions of the judges of the High Court (including the Supreme Court of Appeal), the Labour Court (including the Labour Appeal Court) and the Constitutional Court are binding on lower courts when they decide questions of law. The interpretation (or exposition) of the law by judges therefore becomes a source of the law, and in some cases it could be original in nature. Where a particular principle has not been firmly established in South Africa, foreign law reports may be useful as a source of legal principles. Law reports go back a long way, and there are volumes of law reports containing some fifteenth and sixteenth century decisions of the courts in Rome and Genoa, for example, in some High Court libraries.

- *Textbooks* can be traced through the catalogues of the various law libraries and the High Court's library. The various provincial Law Societies and the Bar often have extensive libraries of their own with full-time librarians.

- *Law Journals* are periodicals compiled by academic and practising lawyers. Individual journals are usually associated with a particular law school or a school of thought within the legal profession. The most important ones are *South African Law Journal*, *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, *Mercantile Law Journal of South Africa*, *Comparative and International Law Journal of South Africa*, *De Jure* and *Tydskrif vir die Suid-Afrikaanse Reg*. Most law faculties have their own law journals. There are now journals specialising in branches of the law that previously may have received limited attention, such as labour law, constitutional law and administrative law. Current legal issues are discussed in these journals and there are often discussions of recent cases and legislation too.

- *Professional journals* are published by the two branches of the profession. Predictably the one published by the General Council of the Bar is called the *Advocate* and the one published by the attorney's profession *De Rebus*. Attorneys and advocates receive the journal of their particular association free of charge. These journals contain more than professional news and practical advice; there are reviews of recent cases and publications and also of new or proposed legislation.

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- *Masters and doctoral theses* on a range of legal topics can be found at the universities where they have been submitted. The universities also have a central index that may help you identify theses which have been submitted at other universities and could be helpful on the topic of your research. Do not underestimate the value of this source of the law; the Supreme Court of Appeal, in particular, often decides cases on the strength of the research contained in theses.

- *Roman-Dutch authorities* cover a very wide range of topics. Statutes, textbooks, decided cases and theses are all represented in the great collection of sources of the Roman-Dutch law. For a general overview of these sources, see JC de Wet *Die Ou Skrywers in Perspektief* Butterworths (1988), HR Hahlo and Ellison Kahn *The South African Legal System and its Background* Juta & Co Limited (1973), and AR Roberts *South African Legal Bibliography* Pretoria (1972). The old Roman-Dutch authorities must be approached with great care; they are not all of equal value and some may not be applicable because they were merely of a local or fiscal nature. (See *R v Harrison and Dryburgh* 1922 AD 320.)

***Narrow down the research**:* While narrowing down the research you may identify more original sources, but the ultimate aim remains finding a statutory provision or decided case that is right in point and authoritative. You may not always find such a provision or decision. That does not mean that the search is over; far from it, it may just need a change in focus. You may have to research an associated area of law or you may try to find an analogous case. You may even return to a more fundamental classification, for example, if you have unsuccessfully searched for guidance in the law of purchase and sale, you may return to the general principles of the law of contract. Perhaps the solution could be found there.

Table 12.2 Narrowing down the research

Specific source	Narrowing it down
Statute (Act of Parliament, provincial ordinance, municipal by-law or regulation)	1 What does the Act *as a whole* have in mind? 2 How have the Act and the section been *interpreted*? 3 How has the section been *applied* in other cases? 4 Check the *Noter-up* for case law.
Decided case	1 What *authorities were relied on* in this judgment? 2 What other judgments *followed* this one, or *departed* from it? (*Noter-up*) 3 Have there been any *legislative changes* to the law?
Textbook	1 Is there a *supplement* to this textbook or a *later edition* of the book? 2 Is there a loose-leaf service or *current service*? 3 Follow footnotes to other sources. 4 Check catchwords and phrases in the subject index.
Journal	1 Check subject index.

	2 What *other sources* are identified by the author? Follow up.

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Specific source	Narrowing it down
Thesis	1 Check subject index for catchwords and phrases. 2 What *other sources* are identified by the author? Follow up.
Roman-Dutch authorities	1 What did *De Groot, Voet, Van Bijnkershoek, Van der Linden and Van der Keessel* have to say on this subject? 2 To what extent have our courts or authors *adopted* their principles? 3 What *sources* do these authors rely on? 4 What do these sources *disclose*?

Is it still current?: This question ought to exercise your mind when you have assembled the authorities on the points you have researched. Statutes are amended and sometimes repealed; new statutes are passed which affect earlier ones, not always deliberately; cases are explained and sometimes overruled; authors change their mind in a later edition or in an article in a journal; and new and amending regulations are published in the *Government Gazette*. (Who reads the *Government Gazette?* If you want your research to be complete and accurate, *you* should. As part of your research determine whether any regulations have been promulgated on the subject of your research and, if so, to what effect, and whether they are still in force.) Electronic sources are particularly useful at this stage of the research because they are updated regularly (daily or weekly, in most cases).

Go to foreign sources for a comparison*:* The higher the court in which you have to conduct the litigation, the greater the need will be to do comparative research. In the Supreme Court of Appeal and the Constitutional Court research into foreign law is virtually indispensable. The methods you will adopt for researching foreign law will be similar to the methods you adopt for South African law. It is suggested that you start with general sources and proceed to the more specific sources before you narrow the research down further. The countries you choose for comparative research will differ from case to case and depend on your familiarity with the legal system and language of a particular country. There are general sources in English law and American law available at the High Court libraries in South Africa. They are

- *Halsbury's Laws of England* 4th edn (Re-issue) Butterworths is a monumental work covering the whole breadth of English law. In this work the material is arranged alphabetically in topics from Administrative law to Wills. There is not only an index for each volume but also a complete subject index in separate index volumes. Annual supplements are published which keep *Halsbury's* (as it is known in practice) current. There are copious references to case law in the endnotes at the end of each numbered paragraph in *Halsbury's*. You could use *Halsbury's* in the same way as *Lawsa*, as a general starting point for your research. The precise answer you may be looking for can often be found in the text but even if it cannot, the footnotes are likely to lead you to a relevant decided case. Remember that the English law reports are also available at the libraries of the High Courts and law faculties.

- *The Corpus Juris Secundum* West Publishing Co is an American equivalent of *Halsbury's* but is written in a different style. The material is arranged alphabetically according to subjects starting with Abandonment and ending with Zoning and Land Planning. It is updated regularly by the addition of annual supplements. There is an almost unbelievable amount of case law referred to in the notes to each paragraph. If you need [Page 235] anything from American

law, you will find it here. American law reports can usually be found in the law libraries of the various universities.

- *The Restatement of the Law – Second* published by the American Law Institute Publishers is a set of commentaries on American law, arranged topically in separate volumes for Contracts, Judgments, Property, Torts and Trusts respectively. The *Restatement of the Law – Third* adds new topics in constitutional law.

There are similar sources for almost every legal system you might want to compare. For historical reasons, a legal system based on Roman law is often directly comparable. French, German and Dutch law fall in this category and can be useful as comparative sources. Keep in mind that LexisNexis is perhaps *the* most dominant publisher and supplier of legal materials in the English-speaking world. It is thus possible to access research materials in, for example, America, Canada, the United Kingdom, Australia and New Zealand via the LexisNexis platforms in those countries.

12.3.4 *Recording the results*

Victor Tunkel (*Legal Research Law-Finding and Problem-Solving* Blackstone Press Limited (1992) chapter 7) suggests the following scheme for recording the results of your research, all of which can now be more readily achieved on a computer:

- Keep a notebook and a storage file. The notebook should preferably be a binder in which you can add and rearrange pages. The storage file can be kept for copies of materials.

- Make a list of the issues or questions to research even *before* you start looking for sources in the library. Use a separate sheet for each issue. Note the issue at the top of the page. You can add more issues as the research process uncovers more questions.

- Note the date, place and time of each research session. (This could be important later when an account has to be rendered or a bill of costs has to be taxed.)

- Note:

  - each stage of the research (for example, *Amler* 'Defamation: Defences', 157–160).

  - each authority checked and rejected.

  - the precise citation of each relevant authority (and where you found it, meaning where on the shelves and where in the general sources) (for example, *Johnson v Rand Daily Mail* 1928 AD 190, referred to in *Amler* 158, own library).

  - the main points made in each relevant authority (for example, *sufficient if substantially true in every material part*).

- Add a note to each authority, including those rejected, setting out your initial views of the value and relevance of the authority concerned (for example, *in point*, *against!*, *obiter*, *distinguished in . . .*).

- Organise the material in a logical order.

- File and keep the research materials. You may only need them much later and they could also be useful in another case many years later.

12.3.5 *Making a permanent note or record*

If necessary, dictate or type a note setting out the main points of the research. File and keep these notes. The products of the research are often recorded in an opinion or written [Page 236] memorandum or even heads of argument. Copies of those documents should be kept in the file for research materials. An index should be kept. If you can keep this system religiously, you will succeed where many others have failed. There can be no valid excuse for not keeping a proper index these days; you can update the index on your computer each time an opinion, memorandum or argument is typed.

12.4 Applying the law to the facts

Once the research has been completed, the knowledge or information you have acquired has to be put to use. How this is done will be determined to a large extent by the purpose of the research. The research is done for practical purposes, to guide you through the various stages of the litigation process covered in this book, for example, in:

- identifying the options, choosing the best option and advising and counselling the client (chapters 1–3).
- drafting pleadings or applications (chapters 5–10).
- preparing for trial, including assembling the evidence, assessing the admissibility and sufficiency of the evidence, developing a theory of the case and trial tactics (chapters 11 and 13).
- conducting the various processes of trial, including opening statements, examination-in-chief, cross-examination and closing address (chapters 16–21).
- handling Motion Court matters (chapter 22).
- conducting reviews and appeals (chapters 24 and 25).

12.5 A collection of resources

There are law libraries in almost every district or town.

- The Magistrates' Court library (there is one in every district) should have a full set of the *South African Law Reports* (*SALR*), the *South African Criminal Law Reports* (*SACR*), the Statutes, some journals and a wide range of textbooks. The textbook section usually includes books on criminal law and procedure, civil procedure and various branches of the law. Most of the titles in the list below can be found in the typical Magistrates' Court library. Access to the Magistrates' Court library is by permission only. Since attorneys and advocates appearing in the Magistrates' Court are also officers of that court and have the duty to assist the Magistrate to find the law and to make correct findings, permission is readily given when requested.

- The Bar and Attorneys' Associations usually have their own libraries in the main provincial centres. The *Provincial Gazettes* and the *Government Gazettes* are kept up to date in these libraries. Members have access as of right. There are computers for online access to sources.

- The High Court libraries at the seats of the various divisions of the High Court are quite extensive. You can expect to find foreign law in the form of law reports and textbooks, mostly English and American law, comparative law texts, journals, old Roman-Dutch authorities, Roman law texts (in Latin and in translations), theses, and much more. Access to these libraries is unfortunately no longer granted to all practitioners.

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- The libraries of the Supreme Court of Appeal and Constitutional Court are even more extensive than those of the High Court, but each has its own emphasis, as could be expected. Generally practitioners have to obtain permission to use these libraries.

- There are libraries attached to the Law Schools of the universities. The collections in these universities range from the barely sufficient to the luxurious. Theses on almost any legal topic imaginable can be found, after a diligent search, in one of these libraries. Access is usually granted to practitioners on request and to graduates of the particular university.

The revolution surrounding Information Technology (IT) has brought many advantages for lawyers. It has changed the way lawyers learn what the law is, do research and prepare for trial. Computers have become part of legal life. Libraries have had to change their approach; there are computer terminals where previously there were rows of cabinets and catalogues. Sources are updated regularly, some as often as daily. The books no longer have to be borrowed nor do you need to copy sections. The researcher can leave the library with everything he or she needs downloaded on a computer disk or USB device. The same changes have occurred in lawyers' offices and chambers.

The following sources are available online:

- At www.saflii.org the South African Legal Information Institute (SAFLII) provides free access to the published and unpublished judgments of, for example, the High Courts, the Supreme Court of Appeal, the Constitutional Court, the Labour Court and the Labour Appeal Court as well as some judgments of the courts of neighbouring countries. The material is updated daily. The cases are published as fast as the judgments are released.

- At www.legalnet.co.za you can find the *All South African Reports*, the *South African Law Reports*, with their respective Indices and Noter-ups, the *Butterworths Procedural Timetable and Prescription Periods* and the *Government Gazettes* (from 1994). This material is updated weekly. Access is by subscription.

- LexisNexis has the following law reports available online: *All England Law Reports; Canadian Rights Reporter Series II; All SA Law Reports 1828–1946; All SA Law Reports 1947 to date; Arbitration Law Reports; Competition Law Reports; Constitutional Law Reports; Labour Law Reports; Pension Law Reports;* and *SA Tax Cases.*

- The *Butterworths Index and Noter-up to the All South African Reports* and the *South African Law Reports* is also available online. These include references to the Rules of Court, Statutes and Words and Phrases considered by the courts, lists of reported cases, a Noter-up section listing cases considered in other cases, an alphabetically arranged subject index with case references, arranged by topic.

- *Lawsa* is available online from LexisNexis, as are textbooks on virtually every branch of the law, loose-leaf services and journals. (Consult their catalogue.)

- The Statutes and other legislative instruments are available in fresh sets each year and also online. LexisNexis, for example, offers *National Legislation (Acts, Regulations & Bills); Provincial Legislation (Acts & Regulations)* and *Local Government Legislation (Bylaws, Notices, Documents).* The University of Pretoria has committed to providing free access to legislation at www.lawsofsouthafrica.up.ac.za.

- Even Voet's *Commentary of the Pandects* (Gane's translation) has been digitised and is available online from LexisNexis.

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Each of these resources has unique features and merits. Navigating around the available material to find exactly what you want is a skill to be acquired with each product. Make sure that you receive the necessary training from the supplier. The emphasis of this book is on other processes, so you are at the mercy of the person who sells you one of these products for training in its use.

One of the greatest advantages of the use of online resources is the *cut-and-paste* function which allows the researcher to copy relevant text into an opinion or memorandum.

Ten suggested *must have* resources for legal practitioners engaged in a litigation practice – always the latest edition – are:

- Zeffertt *The South African Law of Evidence* LexisNexis.

- Harms *Civil Procedure in the Superior Courts* LexisNexis.

- Harms *Amler's Precedents of Pleadings* LexisNexis.

- Claassens *Claassens: Dictionary of Legal Words and Phrases* LexisNexis.

- Christie *The Law of Contract in South Africa* LexisNexis.

- Neethling, Potgieter & Visser *Law of Delict* LexisNexis.

- Klopper *Road Accident Fund Practitioner's Guide* LexisNexis.

- Kruger *Hiemstra's Criminal Procedure* LexisNexis.

- Schäfer *Family Law Service* LexisNexis.

- Neukircher, Fourie & Haupt *High Court Motion Procedure: A Practical Guide* LexisNexis.

In unopposed Motion Court matters counsel must have a photostat copy of the relevant authority or a printout available for the judge as the judge cannot be expected to have the relevant authorities for each of the multitude of different matters on the roll on the bench with him or her. (In opposed matters counsel will have had to prepare heads of argument with bundles of authorities before the court.)

The old Roman-Dutch authorities

Even the old Roman-Dutch authorities can be classified as general or specific, and include statutes, decided cases, academic writings and theses, and opinions. They span about two hundred years (about 1600–1806 AD) although there are older and newer ones which still carry some weight. In commercial matters the underlying *ius commune* (or law merchant, as English lawyers call it) could date back even further. It is not possible to deal with the full breadth of authorities available from this source because there are just too many works of quality, but my own list of preferences runs as follows:

General sources

- The *Lawsa* of its time must be Johannes Voet's *Commentarius ad Pandectas*, published in two parts (1698 and 1704 respectively). It has been translated into English. The translation by Percival Gane (known as *The Selective Voet*) is in use in South Africa. 'If you can't find the answer in the Law Reports, go to *Voet*.' Then follow up because Voet is not an original source of the Roman-Dutch law.

- Next in importance is Hugo de Groot's *Inleidinge tot de Hollandsche Rechtsgeleerdheid* (1631). (Groenewegen supplied the text with footnotes and Schorer published a detailed commentary in the form of notes to each paragraph.)

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- Two other works complete the picture, Johannes van der Linden's *Regtsgeleerd, Practicaal en Koopmans Handboek* (1806) and DG van der Keessel's *Theses Selectae* (1800). Van der Linden's *Koopman's Handboek* is a practical workbook written for practitioners while Van der Keessel's *These Selectae* is a commentary on De Groot's *Inleidinge*, reflecting the changes in the law during the preceding 170 years.

These four works are general and individually and collectively cover the full range of the Roman-Dutch law of the seventeenth and eighteenth centuries.

Specific sources

The range of specific topics dealt with is vast, but the pattern is the same as for modern South African law. These sources are mainly:

- *Statutes*, that is to say, provincial ordinances (*placaeten*) and local or municipal ordinances (*keuren*) of importance and dating from 1658–1796 that you will find in the nine volumes of the *Groot Placaetboek*. Van der Linden supplied an index volume. The statutes can be found in the High Court libraries. Some of these statutes are still in force and relevant, for example, to marine insurance law.

- *Decided cases* that are scattered in various collections, the most important being the *Hollandsche Consultatien*, originally published by Joannes Naeranus from 1645, and the *Observationes Tumultuariae* of Cornelis van Bijnkershoek, first published in 1744 and continued after his death by his son-in-law, Willem Pauw.

- *Textbooks and theses* that cover virtually every aspect of the law. It is impossible to do justice to the richness of this source here. Professor JC de Wet *Die Ou Skrywers in Perspektief* Butterworths (1988) lovingly arranged them in a logical order.

- *Opinions* of practising lawyers that are contained in various collections. Isaac van den Berg *Nederlands Advys-Boek*, which appeared in separate volumes from 1693, and JM Barels *Advysen over den Koophandel* which was similarly published in separate parts from 1780, contain opinions of a variety of subjects.

It is a sobering thought that South African lawyers are now the custodians of this vast source of wisdom and legal learning. The Dutch have codified their law (1838) in keeping with the fashion which swept Europe after Napoleon Bonaparte and nowadays they spend more effort and time on interpreting the code than on the law as it had developed into that code.

12.7 A library for criminal practice

Criminal lawyers (prosecutors and defence counsel) can rightfully be said to be specialist practitioners and while the 'must have' and 'would like to have' lists above are designed to build a library for general practice, that can obviously not work for practice in the criminal courts. The sources a criminal lawyer would need could perhaps be divided into two groups, namely those sources he or she would want to carry to court and those sources that would remain at the office to be consulted at leisure.

There are areas of criminal law that have no civil procedure equivalents, such as bail procedures and sentencing principles and procedures. There are constitutional issues too that don't apply to civil cases. A criminal lawyer's library will reflect that. It is suggested that you create your own library along the following lines:

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Books to carry to court (every time in the latest edition)

- Kruger *Hiemstra's Criminal Procedure* LexisNexis (also online)
- Maharaj *Confident Criminal Litigation* LexisNexis
- Snyman *Criminal Law* LexisNexis
- Terblanche *Guide to Sentencing in SA* LexisNexis
- Van der Berg *Bail: A Practitioner's Guide* Juta Law
- Zeffertt & Paizes *SA Law of Evidence* LexisNexis.

Books to have at the office

- Steytler *Constitutional Criminal Procedure* LexisNexis
- South African Criminal Law Reports.

12.8 Protocol

- Treat books, libraries and librarians with the utmost respect.

- Respect the copyright of the author.
- Use the standard method of citation for every authority.
- Acknowledge your sources.
- Do not refer to or rely on an authority you have not read; if necessary qualify the reference to such an authority by adding 'as quoted by' and then give the citation of the work in which you found the reference.
- Do not follow authorities blindly; submit them to careful analysis. Be ready with a prepared answer when you cite an authority and the judge asks: 'But is that decision right?'
- Always refer to the latest edition of an authority.
- Return books you have borrowed from a colleague as soon as possible.

12.9 Ethics

- Counsel has the duty to bring authorities which are against them to the notice of the judge, even if their opponent does not.
- You are entitled to distinguish adverse authorities on the facts when making submissions to a court, but when giving advice to a client, counsel has to form an objective view.
- Do not misquote any authority.
- Counsel is entitled to distinguish an authority (case law) by arguing that it is wrong, that it is not binding, or that, even if it were correct at the time of the judgment, it is no longer applicable or correct.

Chapter 13
Preparation for trial: Fact analysis and strategy

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13.1 Introduction

When the case is ready to proceed to trial counsel's personal preparation still has to be completed. Conducting the necessary legal research is an important part of that preparation. What remains is for counsel to become completely conversant with the facts of the case and to plan a suitable strategy for the trial. This part of the preparation for trial involves two linked processes namely, *fact analysis* and *strategic planning*. The aim is to achieve such a high degree of understanding of the facts and evidence that counsel will be able to adopt the best possible tactics for the trial and will be able to deal competently with all the processes and incidents of the trial itself.

13.1.1 Fact analysis

Fact analysis is used to determine and test the legal, factual and logical sufficiency of the case. This book uses the proof-making model of fact analysis. The proof-making model is based on logic and legal principles. It can be defined as the process by means of which we harness the evidence to ensure that it is sufficient to support a claim or a defence in legal proceedings.

Fact analysis is a core skill for lawyers. Lawyers rely on fact analysis at every level of practice; it is not unique to the litigation process. It can be used for other legal processes such as drafting a will, registering a patent, applying for a liquor licence and for many other tasks that lawyers perform in their daily practice.

In litigation fact analysis proceeds in stages:

Stage 1 Identify the area of law

Stage 2 Identify the cause of action or defence

Stage 3 Identify the legal elements of the claim, charge or defence

Stage 4 Identify the material facts supporting each of the legal elements

Stage 5 Identify the evidence to prove each of the material facts

Stage 6 Consider whether the evidence is admissible, reliable and sufficient

Stage 7 Develop a theory of the case

Stage 8 Develop a strategy for the trial, arbitration or hearing.

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The basic steps at Stages 3–5 of the proof-making model are represented in the following figure:

Table 13.1 A schematic model for fact analysis

Admissible?	**Reliable?**	**Sufficient?**
Relevant?	Bias?	Onus of proof?
Exclusionary rules?	Interest?	Standard of proof?
Exceptions?	Opportunity to observe?	Quantity of evidence?
	Ability to recall?	Quality of evidence?
	Consistency?	
	Honesty? etc.	

Note:

The model demonstrates that: *First*, the legal element to be established has to be supported by sufficient material facts. *Secondly*, the material facts have to be supported by the evidence. *Thirdly*, the evidence has to be admissible, reliable and sufficient.

The *legal elements* are legal requirements determined by the law and discovered by legal research. For example: If the claim is based on a breach of a contract, the law of contract will determine what the legal elements of the claim are and you will find the relevant principles in a textbook or a case dealing with the law of contract. The *material facts* are the evidential facts of the particular case which are arrived at as logical deductions from the evidence. The *evidence*, in turn, is given by witnesses and consists of oral evidence and exhibits.

Further issues to be taken into account are the admissibility, reliability and sufficiency of the evidence. The law determines what evidence is admissible. The reliability of the evidence is determined by the judge and recorded as findings of fact. The onus and standard of proof (*prima facie*, balance of probability or beyond reasonable doubt) play an important role in determining whether the evidence is sufficient to discharge the onus of proof.

13.1.2 Strategy

Your trial strategy will be based on a careful fact analysis and a resourceful consideration of a persuasive theory of the case and suitable tactics to pursue that theory.

Strictly speaking, only the first five stages involve fact analysis; the last two have to do with strategy and trial tactics. Each of these steps is essential for systematic trial [Page 243] preparation; and each complements the others. The complete process can be represented as follows:

Table 13.2 General scheme for trial preparation based on the Proof-making Model

Stage	What counsel has to do	Skill involved
1	*Determine the area of law involved*	Legal research. Fact analysis.
2	*Determine the cause of action, criminal charge or affirmative defence together with its legal elements*	Legal research. Analysis of legal documents.
3	*Determine the material facts in issue*. 1 In a civil case, compare the Particulars of Claim (the 'Claim') and the Plea. The issues are the allegations in the Claim which are denied (or not admitted) in the Plea. 2 In a criminal case the issues are all the material facts alleged in the Charge Sheet or Indictment put in issue by a plea of 'Not guilty'*. 3 Ascertain the precise legal content or meaning of each material fact in issue.	Legal research. Analysis of legal documents. * The issues may be reduced by admissions by the defence in terms of the CPA s 220.
4	*Ascertain the propositions of fact (evidential facts) to support each material fact in issue*. 1 These facts are arrived at as deductions from the available evidence. 2 Some facts may also be arrived at as valid deductions from other facts.	Fact analysis. Analysis of legal documents.
5	*Determine what evidence is available for each proposition of fact by way of* 1 oral evidence 2 exhibits (including documents) 3 admissions.	Fact analysis. Analysis of legal documents.
6	*Consider the admissibility, reliability and sufficiency of the evidence*. 1 Deal with all admissibility problems. 2 Consider the reliability of the evidence. 3 Consider whether the available evidence is sufficient, having regard to the incidence of the onus of proof and the standard of proof required (*prima facie*, balance of probability or beyond reasonable doubt).	Fact analysis. Legal research.

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Stage	What counsel has to do	Skill involved
7	*Develop a theory of the case*. 1 Identify the central issue in the case. 2 State your position on that issue. 3 State the main facts supporting your position on the central issue. 4 Identify the opposition's theory. 5 Discredit the opposition's theory.	Logic.
8	*Develop appropriate tactics to pursue the theory of the case.* 1 Decide which witnesses to call. 2	Trial tactics.

	Decide which exhibits to prove. 3 Prepare a timeline for each witness. 4 Anticipate who the other side's witnesses will be. 5 Prepare themes for the cross-examination of each opposition witness. 6 Prepare an opening statement. 7 Prepare a closing address (in draft).	

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The steps taken by counsel in his or her preparation for trial should be recorded in counsel's trial notebook. (See paragraph 13.8.) The use of computers makes it easy to do the analysis with the use of columns and tables. You could be faced with thousands of documents, hordes of witnesses, numerous issues and multiple parties. However, for the type of case that comes before the courts every day, a simple plan that is executed diligently will be sufficient. Remember, although personal computers and litigation support software can help you to record, organise and recall the available information, they can't do the *thinking* for you. You still have to analyse the information yourself.

The case of our client, Mrs Smith, can be used as our vehicle of instruction. She has sued for the damage to her car. The pleadings are closed, both sides have completed the discovery process and proper expert notices, summaries and other notices have been served. The brief to counsel contains written statements of potential witnesses as well as the police plan and some photographs of the scene and the plaintiff's car. The case is therefore ready to proceed.

The different steps of the fact analysis and strategic planning can now be undertaken to ensure that counsel is also ready for the trial. We do not have to bother too much with Stages 1 and 2 because we know that we are dealing with a delictual claim for damages based on the *actio legis Aquiliae*, but first of all we need to determine what the issues are.

13.2 Identifying the material facts in issue

The issues to be decided by the court can be identified by an analysis of the pleadings.

The material facts for a claim have to be set out in the statement of claim (summons, particulars of claim, declaration, counterclaim, third-party claim or interpleader claim), as supplemented by the replication. The material facts for any special defence are set out in the plea.

In a criminal case the material facts are set out in the charge sheet or indictment. When the accused pleads not guilty to the charge, every material fact alleged in the charge sheet or indictment is placed in issue, unless the accused makes formal admissions under section 220 of the Criminal Procedure Act 51 of 1977. (The relationship between the legal elements for a claim or defence and the material facts is explained in chapter 5.)

In a civil case and in arbitration proceedings where pleadings are exchanged, the issues can be identified from the opposing pleadings. The two sets have to be read together. You can ascertain what the issues are by determining whether a material fact set out in the claim has been admitted or denied. If a material fact alleged in the claim is denied (or not admitted), it has to be listed as an issue. If any additional material facts are raised in the plea (for example, contributory negligence), those are also listed as issues, unless they are admitted in a replication. Any further particulars supplied by either party have to be taken into account. The process of analysis to determine the issues can be done in tabular form, as follows:

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Table 13.3 Identifying the issues

Particulars of claim (See Table 6.1 in chapter 6)	**Plea** (See Table 7.9 in chapter 7)	**Issues**
1 The plaintiff is Anne Smith, an unemployed widow, who resides at [*street address*].	1 The defendant admits paragraphs 1 and 2 of the particulars of claim ('the claim').	
2 The defendant is Joe Soap, an adult male, carpenter, who resides at [*street address*].		
3 The plaintiff was at all material times the owner of a [*year*] Honda motorcar with registration number NPN 2001 ('the plaintiff's car').	2 The defendant does not admit any of the allegations in paragraph 3 of the claim.	1 Whether the plaintiff at all material times was the owner of motor car NPN 2001, a [*year*] model Honda.
4.1 On [*date*] and at about 09:30 a collision occurred between the plaintiff's car and another car then being driven by the defendant ('the collision'). 4.2 The collision occurred at the intersection of X and Y Streets [*name city or town*], ('the intersection').	3 Save as qualified by paragraph 3 of the plea the defendant admits paragraph 4 of the claim.	
5 The collision was caused by the defendant's negligence. *Particulars of defendant's negligence* 5.1 He entered the intersection against the red traffic light. 5.2 He drove at an excessive speed. 5.3 He failed to keep a proper lookout. 5.4 He failed to take adequate steps to avoid the collision when he could have done so.	4 The defendant denies each allegation in paragraph 5 of the claim.	2 Whether the defendant drove negligently in any of the aspects stipulated.

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Particulars of claim (See Table 6.1 in chapter 6.)	**Plea** (See Table 7.9 in chapter 7.)	**Issues**
6 As a result of the collision and the defendant's negligence the plaintiff's car was damaged and the plaintiff has suffered damages in the sum of R339 000.00. *Particulars of plaintiff's loss*: 6.1 Value of plaintiff's car before the collision R440 000.00 6.2 Value of plaintiff's car after the collision R110 000.00 6.3 SUBTOTAL	5 The defendant admits that motorcar NPN 2001 was damaged in the collision but denies the remaining allegations in paragraphs 6 and 7 of the claim.	3 If it is proved that the defendant drove negligently, as alleged, whether such negligence caused damage to the plaintiff's car. 4 Whether the amount of the damages is R339 000.00, made up as alleged. Note that there are a number of facts to prove in order to succeed on these issues. They follow as a matter of law if the facts are proved.

R330 000.00 6.4 Cost of hiring replacement car for 45 days @ R200.00 a day R9 000.00 TOTAL R339 000.00		
7 In the premises the defendant is liable to pay the sum of R339 000.00 to the plaintiff.	6 In the event of the plaintiff proving the allegations in paragraphs 3, 5 and 6 of the claim, the defendant pleads as follows:	
	(a) The plaintiff was also negligent in that: (i) She drove NPN 2001 at an excessive speed. (ii) She failed to keep a proper lookout. (iii) She entered the intersection against the red traffic light. (b) The plaintiff's negligence was also a cause of the collision and any damages she suffered. (c) The plaintiff's damages therefore fall to be reduced by virtue of section 1 of Act 34 of 1956.	5 Whether the plaintiff has also been negligent. 6 Whether the plaintiff's negligence was a contributory cause of her damages. **Note:** Some of the allegations which have been pleaded in paragraph 6 of the plea are conclusions of law arising from the factual allegations, e.g. paragraph 6(c).
8 Notwithstanding demand, the defendant has failed to pay the sum claimed.	7 The defendant admits paragraph 8 of the claim but denies being liable.	

Note:
Cosmetic changes have been made to the defendant's plea to comply with the style advocated in chapter 7.

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In a criminal case the issues are defined by the charge sheet or indictment, coupled with the accused's plea and section 115 plea explanation. Counsel would first identify the material facts for the crime concerned. For example, an indictment on a charge of murder would introduce the following material facts:

1 the accused

2 on [*date*]

3 at [*place*]

4 unlawfully

5 and intentionally (includes knowledge of unlawfulness)

6 killed (including the act, causation and death.)

7 the deceased.

If the accused pleaded not guilty and made no formal admissions, each of these material facts would have to be proved by the prosecution.

The correct identification of the disputed material facts is crucial because all the subsequent stages of counsel's preparation will be aimed at dealing with the issues. If an issue is overlooked, that aim could not be achieved fully.

After the material facts in issue have been identified, their precise legal content or meaning still has to be determined. The law affects the issues in at least three ways. *Firstly*, it determines the precise meaning of every material fact. For example, what is the legal meaning of negligence? (See *Kruger v Coetzee* 1966 (2) SA 428 (A)) Or what is the precise meaning of possession in the context of a spoliation matter? (See *Yeko v Qana* 1973 (4) SA 735 (A)) And doesn't the element of *killing* in a murder case actually incorporate three distinct elements, namely an act, causation and the death (of a human being)? Each of these elements has a particular legal content or meaning. Consult a good textbook on criminal law for the precise answer. *Secondly*, the law determines which party bears the onus of proof and what the standard of proof is. *Thirdly*, the rules relating to the admissibility of evidence and methods of proving disputed material and evidential facts are matters of law. The purpose of this stage of counsel's preparation is therefore to ascertain precisely what has to be proved, by whom and to what standard that proof has to be provided, and what evidential rules are relevant to the issues.

In the case of our hypothetical client, Mrs Smith, there are five separate legal elements involved in her claim against Mr Joe Soap –

- ownership of the car (vesting in the plaintiff);
- driving a motor vehicle (the *actus reus*) (by the defendant);
- negligence (by the defendant);
- causation; and
- loss (to the plaintiff).

These are the Stage 3 legal elements that have to be individualised to the material facts of *her* case and which will have to be proved for her claim to succeed.

13.3 Stage 4: Propositions of fact supporting each legal element (or material fact)

Each legal element (material fact) in issue has to be established by sufficient facts to support that legal element. That proof can be supplied by admissions of fact or by [Page 249] evidence proving the necessary facts. No further proof is necessary when a material fact has been admitted. The facts are obtained from the statements, exhibits and other documents and are also referred to as evidential facts. The evidential facts are called propositions of fact because they have to be proved; we propose to prove them by admissions obtained from the other side or by way of the evidence placed before the court.

It is important to remember that courts deal with the facts proved by the evidence. This may not accord with the real or objective truth, a fact which might cause members of the public to question the legal process. What they need to understand is that the courts can deal only with the 'truth' as disclosed by the evidence. The most important function of a trial lawyer is therefore to put the necessary evidence before the court in such a manner that the court will be able to make a proper finding on the evidence.

The evidential facts upon which the court will base its decisions are deduced from the available evidence and from other facts. Assume that you have a witness who can give evidence to the effect that he is a fingerprint expert and that he has lifted a fingerprint from the murder weapon found at the scene of a murder and later matched that fingerprint with one of the accused's fingers. The accused denies ever having been to the scene of the murder. The facts one can deduce from this evidence are that:

- the killer left a fingerprint on the murder weapon.
- that fingerprint matches the accused's fingerprint.
- since no two persons have the same fingerprints, the accused must be the person who had left the fingerprint on the murder weapon.
- the accused has no innocent explanation for the presence of his fingerprint on the murder weapon at the scene.
- the accused is therefore the person who killed the deceased.

It is important to note that the facts and the evidence are not the same thing. The evidence proves the facts, but the evidence is not necessarily the same as the facts. Witnesses lie, or are mistaken, or are contradicted by other witnesses. Their evidence is therefore not necessarily the truth. The evidence has to be true for the court to be able to find that the facts a witness places before the court are true facts. This is another reason why the evidential facts are stated to be propositions of fact rather than facts.

The law plays a role in the identification of the propositions of fact. For example, statutory and evidential presumptions could help to prove a particular material fact. Is this perhaps a case of *res ipsa loquitur* where the circumstances are such that an inference of negligence is justified if no explanation were to be given by the defendant? If so, those circumstances would have to be identified as propositions of fact to ensure that you have the necessary evidence to prove them. Similarly, the so-called doctrine of recent possession can help to prove the identity of the thief or murderer where the accused can be linked by recent and unexplained possession of some item used at or taken from the crime scene to the crime. In such a case you should set out to prove the three facts which are necessary to bring this doctrine into operation. They are that –

1 the accused was in possession of an item from the crime scene;

2 shortly after the crime; and

3 the accused does not have a reasonable explanation for his possession of the item at that time.

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If these propositions of fact are proven, the logical deduction may be that the accused is the person who committed the crime concerned. Many a thief or murderer has been convicted on the basis of their recent possession of the stolen item or murder weapon. You can prove the material fact (or legal element) concerned by means of facts that allow you to deduce another fact. There may also be other presumptions relevant to the proof to be given in the case. Certain documents (such as birth and marriage certificates) are *prima facie* evidence of their contents.

Reverting to Mrs Smith's case, the defendant has declined to admit the plaintiff's ownership of the Honda motorcar, NPN 2001. The propositions of fact you can prove in order to establish that the plaintiff was the owner of the car at the time of the collision should be listed. You deduce these propositions from the evidence apparent from your client's statement and from the documents in the brief. The statement reads as follows:

'I went to the Honda dealership in Pinetown. I wanted a car for myself. I bought a [year] Honda from them for cash. We had a short, written contract setting out the terms. I paid by cheque and was given a receipt. The dealer then handed me the keys and the car's registration documents and congratulated me on my purchase.'

The supporting documents have been discovered and there are copies in the brief.

On the face of it, if you can prove the propositions set out in Table 13.4, the court ought to find that the plaintiff's ownership of the car has been established. Similarly, on the issue of negligence, you may propose to prove that the defendant travelled at high speed, failed to keep a proper lookout and entered the intersection against the red light. For every other material fact you would similarly muster the supporting propositions of fact.

By following this process you can ensure that you get a clear view of the available evidence and exactly what it can prove. This can be set out in a table as follows:

Table 13.4 Material fact (legal requirement) and propositions of fact

Material fact to be proved (Legal element identified at Stage 3)	**Propositions of fact to support the material fact in issue** (Evidential facts – Stage 4)
1 The Plaintiff was at all material times the owner of a [*year*] Honda motor car with registration number NPN 2001.	1.1 The plaintiff bought the car, a [*year*] model Honda, from a dealer in motor cars. 1.2 The sale was for cash. 1.3 The purchase price was paid. 1.4 The car was delivered to her by the dealer with the intention of transferring ownership. 1.5 The car was received by her with the intention of acquiring ownership. 1.6 The plaintiff has been in undisturbed possession of the car ever since.

You can work out what facts the evidence can prove by reading and re-reading the statements and documents with the aim of determining how they can help to prove the material fact in issue. This can be demonstrated by using another example from Mrs Smith's case. She says the following in her statement (Appendix 1):

'As I approached the intersection with X Street, I saw the lights turn green in our favour. I intended to go through the intersection on to the freeway. I was doing about 50 kilometres per hour. The speed limit is 60.

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As I entered the intersection, I noticed a car coming at high speed into the intersection from my right. The light must have been red for it. Before I could react, it struck my car on its right hand side. My car spun around and collided with its left hand side against the light pole on the SW corner of the intersection.'

This evidence can support the following propositions of fact, which in turn, support the allegation of negligence, which is the material fact we are trying to prove here:

(i)

The intersection is controlled by traffic lights.

(ii)

The traffic lights were working. (We know (i) and (ii) because Mrs Smith saw the lights change.)

(iii)
The light was green for motorists proceeding in Y Street. (Mrs Smith can give that evidence.)

(iv)
The light was red for motorists proceeding in X Street. (This fact is a deduction from (i), (ii) and (iii).)

(v)
The defendant entered the intersection against the red light. (This is another deduction from prior facts.)

(vi)
The defendant did not keep a proper lookout. (This is a deduction. You can reason that, if the defendant had kept a proper lookout, he would have stopped.)

(vii)
The defendant drove too fast. (Mrs Smith can give this evidence.)

If these facts can be proved, you will be able to establish negligence on the part of the defendant. What you have to do next, is to marshal or organise all the evidence to prove each of the propositions of fact your case relies on.

13.4 Stage 5: The evidence to prove each proposition of fact

Each proposition of fact has to be proved by admissible and credible evidence. This proof generally consists of admissions, oral evidence and exhibits. In civil cases the defendant usually admits a number of the material or evidential facts and no further proof is then required in respect of those facts. In criminal cases the defence usually makes admissions under section 220 of the Criminal Procedure Act 51 of 1977. The section specifically provides that 'such admission shall be sufficient proof of such fact'. The oral evidence that is available will be apparent from the statements of the prospective witnesses. The exhibits will likewise have been identified (and obtained).

The next step in the analysis of the facts is to list the individual items of evidence proving each proposition of fact. Take the first proposition of fact, namely that the plaintiff had bought the car from a dealer (proposition 1.1). On what evidence is that proposition based? You could arrange the evidence in support of proposition 1.1 as follows:

Evidence **Stage 5**
Oral: '*I went to the Honda dealership. I bought the car, a (year) model Honda, from them . . .*' Exhibits: Contract, receipt. Admissions: Nil.

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You should isolate all the available items of evidence to prove the proposition concerned. The idea is to ensure that each proposition is backed up by sufficient evidence. Remember that a witness may let you down so that you may not be able to prove a particular proposition of fact. For that reason you should ensure that you have as much evidence as possible for each proposition.

An item of evidence could also be proof of more than one proposition, for example, the receipt would also be proof for proposition 1.3 (that the purchase price has been paid). The same applies to propositions; in some instances a proposition can support more than one material fact.

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This process of analysis can be set out in a table as follows:

Table 13.5 Identifying the evidence to prove each proposition of fact

Material fact (Material facts identified at Stage 3)	**Propositions of fact** (Evidential facts – Stage 4)	**The evidence to prove each proposition of fact** (Stage 5)
1 The Plaintiff was at all material times the owner of a [*year*] Honda motor car with registration number NPN 2001.	1.1 The plaintiff bought the car, a 2003 Honda, from a dealer in motor cars.	Plaintiff: '*I went to the Honda dealership.* *I bought the car, a [*year*] Honda, from them . . .*' Exhibits: Contract, receipt.
	1.2 The sale was for cash.	Plaintiff: '*I bought the car for cash*.' Exhibits: Contract, receipt.
	1.3 The purchase price was paid.	Plaintiff: '*I paid by cheque . . .*' Exhibits: Receipt, cheque.
	1.4 The dealer delivered the car with the intention of transferring ownership to her.	Plaintiff: '*The dealer then handed me the keys and the car's registration documents . . .*' Exhibits: Registration documents.
	1.5 She received the car with the intention of acquiring ownership.	Plaintiff: '*I wanted a car for myself*.'
2 The defendant drove negligently.	2.1 The intersection is controlled by traffic lights.	Plaintiff: '*As I approached the intersection with X Street, I noticed the lights turn green in our favour*.'
	2.2 The traffic lights were working.	Plaintiff: – as for paragraph 2.1. Constable Smith: . . . City Engineer: . . .

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Material fact (Material facts identified at Stage 3)	**Propositions of fact** (Evidential facts – Stage 4)	**The evidence to prove each proposition of fact** (Stage 5)
	2.3 The light was green for motorists proceeding in Y Street when Mrs Smith entered the intersection from Y Street.	Plaintiff: – as for paragraph 2.1.
	2.4 The light was red for motorists proceeding in X Street.	This is a deduction from paragraphs 2.1–2.3.
	2.5 The defendant entered the intersection from X Street against the red light.	This is a deduction too.
	2.6 The defendant did not keep a proper lookout.	We can deduce this because, if he had been keeping a proper lookout, he would have stopped.
	2.7 The speed limit is 60 kph.	Plaintiff: '*The speed limit is 60*.' Constable Smith: . . .
	2.8 The defendant drove too fast.	Plaintiff: '*I noticed a car coming at high speed . . .*'

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The process continues for each material fact in issue. Propositions of fact are often listed together in clusters. (See propositions of fact 2.7 and fact 2.8 in Table 13.5.) If they cannot be clustered together in some logical groupings, they should be set out in chronological order.

There has to be proof for each proposition of fact. In the absence of an admission, evidence is needed to prove the facts. Special care must be taken with exhibits. Exhibits must be proved by appropriate witnesses unless they are admitted by the other side. In some cases the chain of custody also has to be proved.

In this example a number of documents were used to prove a proposition of fact, for example, the contract, receipt and registration documents. They are relied on as proof of Mrs Smith's ownership of the car. Special skills are required for the analysis of documentary evidence. This art is called analysis of legal documents and, like fact analysis, it is used for many different legal tasks; its use is not confined to the litigation process.

13.4.1 Analysis of legal documents

It is an inescapable fact that documentary evidence plays an important part in trials. Many civil cases are dominated entirely by documentary evidence. Those documents are part of the factual matrix of the case and they need to be analysed just as carefully as any other type of evidence. In the course of the preparation of the case, the documentary evidence ought to have been collected, organised and preserved so that they can be produced as admissible evidence at the trial.

Statutes and contracts are analysed according to two branches of the law, known as interpretation of statutes and interpretation of contracts. The interpretation of statutes and contracts raises questions of law. Ascertaining the true meaning of a statute or a contract is therefore not really an exercise in fact analysis but a matter of law. It is only in rare cases that factual evidence is admissible to assist the court in the interpretation of a contract. In such a case the admissible evidence surrounding the conclusion of the contract may include documentary evidence. Those documents would then be subject to the same type of analysis as set out in Table 13.6.

Keep in mind that the analysis of the documentary evidence is not done in isolation; it is done as part of the general fact analysis. Each document has to be analysed in order to gauge its true meaning and import in the case. What does the document mean? How is it [Page 256] relevant? What weight can be attached to it? This can be determined by using the following scheme:

Table 13.6 Scheme for the analysis of legal documents

Stage	What to do	How to do it: Ask yourself
Analysis of the document	1 Establish the nature of the document.	What is the exact nature of this document? (It could be a contract – of which there are many forms, – a will, patent, licence, letter, fax, cheque, certificate, court order, an email, medical report, invoice, delivery note, mortgage etc. There are many other types of documents. No list will ever be complete.)
	2 Ascertain who executed the document.	1 Who wrote or signed this document? 2 Who is responsible for its contents?
	3 Determine who the other parties to the document are, if it is a bilateral document.	1 To whom was the document addressed? 2 Who is the other party to the arrangements set out in the document?
	4 Analyse the document to determine its precise subject-matter.	What is the main purpose or intention of this document? (To let property, to record the details of a marriage, to set out the terms of a licence, to record the terms of a contract etc.)
	5 Identify the true meaning of the document, having regard to its relevant parts or	1 How does the document seek to achieve its main purpose? 2 Does it actually achieve that purpose?

	clauses, the nature of the subject-matter and the chronological context in which the document was executed.	3 If not, what are the shortcomings of the document?
Proof of the document	1 Determine how the document is to be proved; by witnesses, by admissions or under the provisions of a statute.	1 Who is to be called as a witness to prove this document? 2 Can the document be admitted by way of an admission? 3 Is the document admissible under the provisions of a statute? (Any one of a number of statutes could apply. The principal ones are the Civil Proceedings Evidence Act 25 of 1965, the Law of Evidence Amendment Act 45 of 1988, the Electronic Transmissions and Transactions Act 25 of 2002 and the Criminal Procedure Act 51 of 1977.)

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Stage	What to do	How to do it: Ask yourself
	2 Consider any admissibility issues there may be.	1 Is the admissibility of the document affected by the law of evidence generally? 2 Is the document protected by privilege?
Consistency of the document	1 Check whether the document is internally consistent, whether it contains internal contradictions or shortcomings.	1 Does the document contain clauses that are inconsistent with other clauses? 2 If so, does the inconsistency detract from the true meaning or purpose of the document?
	2 Check whether the document is consistent with the other documents in the case.	1 Are there any inconsistencies between this document and any other document in the case? 2 If so, how can the inconsistency be reconciled with the client's case or be explained?
	3 Check whether the document is consistent with the general facts or probabilities of the case.	1 Is the document consistent with the general or inherent probabilities of the case? 2 Do I need to adjust my theory of the case or is there an acceptable explanation for the inconsistency?
Weight of the document	Weigh the evidence as contained in the document together with all the other evidence in order to determine whether the totality of the evidence on the point is sufficient.	1 How is the document relevant? 2 How important is the document in the general context of the case? 3 Is the document sufficient, when considered together with the other evidence, to swing the balance in the client's favour on the relevant issue?

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13.5 Stage 6: Admissibility, reliability and sufficiency of the evidence

The strengths and weaknesses of the case begin to emerge as you consider the admissibility, reliability and sufficiency of the evidence. During this stage the process of fact analysis crosses over into strategic planning.

13.5.1 Admissibility of the evidence

The court will only receive admissible evidence. However, some inadmissible evidence may later become admissible. In other cases special steps may need to be taken to make the evidence admissible from the outset. Character evidence may become admissible in a criminal trial. Generally the prosecution may not lead evidence of the accused's bad character unless the accused attacks the character of prosecution witnesses or leads evidence of his or her good character. If the prosecution has character evidence available, it must be withheld until it becomes admissible. In some cases special steps are needed to persuade the court to allow the evidence, for example, hearsay evidence which can be made to fit into one of the categories set out in section 3 of the Law of Evidence Amendment Act 45 of 1988. So, you should consider specifically, in respect of each item of evidence to be introduced, whether that evidence is admissible and, if not, what can be done about it.

13.5.2 Reliability of the evidence

You will naturally prefer to lead reliable evidence. To be reliable, the evidence has to be internally and externally consistent and in consonance with the general conduct one would reasonably have expected of the witness under the circumstances he or she was faced with. An *internal* inconsistency arises when there is a contradiction between what the witness proposes to say in court and what the same person has said in a prior statement or correspondence. An *external* inconsistency arises when one witness contradicts another witness on the same side. A more subtle inconsistency arises when the evidence of a witness conflicts with the *inherent* probabilities. The conduct of the witness at the time of the events he or she describes has to be looked at carefully. Is the version given by the witness in accordance with the general probabilities of the case? Did he or she behave in the way you would expect ordinary people to behave under the circumstances prevailing at the time of the relevant incident? If not, the evidence of the witness may clash with the inherent probabilities of the case. The purpose of noting inconsistencies and shortcomings of this nature is to search for explanations that would eliminate inconsistencies. Also, be sure to make an informed decision about which witnesses to call. The reliability of the evidence also depends on the circumstances of the case and features such as the general credibility of the witness who gives the evidence, the opportunity to make an accurate observation, bias and interest in the outcome.

13.5.3 Sufficiency of the evidence

It is necessary at this stage of the preparation to determine whether the evidence is enough (sufficient) to prove or disprove the relevant matter. The evidence of an eye-witness may be disputed by another eye-witness, for example. You then have to consider what other evidence may be available. Whether the available evidence will be sufficient, is a question that can only be answered having regard to the facts of a given case, the [Page 259] standard of proof required and the incidence of the onus. Consider, in respect of each fact you want to prove, what contrary evidence is available and then make an assessment. If any additional evidence is necessary, further enquiries will have to be made to obtain it.

The consideration of the sufficiency of the evidence is a far wider exercise than Table 13.7 below suggests. In the first instance, each item of evidence is considered separately in order to determine whether it is sufficient to prove the proposition of fact it is designed to support. For example: Was your witness in a good position to make the observation he is to give in evidence? Is there any indication of bias or an interest in the outcome of the case? You have to test each item of evidence

just like the judge would. After testing each individual piece of evidence, you also have to weigh the totality of the evidence supporting each material fact in order to ensure that there is enough reliable evidence to discharge the onus of proof or to cast doubt on the other side's case.

Thus you would look at all the evidence relating to the particular material fact, for example negligence, in order to determine whether the evidence, with all its deficiencies and strengths, is sufficient. You first considered whether the evidence that the light was red, was sufficient; now you have to consider whether all the evidence, put together, is sufficient to prove negligence. The answer depends on the quantity as well as the quality of the evidence.

One way of making an assessment whether the evidence is sufficient to establish a particular material fact, is to make a list of strengths and weaknesses. If there are any weaknesses, you should explore ways to obtain further evidence or evidence that would cure the apparent weakness. In short, you can make a reasonably accurate assessment of the sufficiency of the evidence you have available to establish a particular material fact by isolating and considering the so-called good facts and bad facts. For this reason, it is essential that all the known facts, not only the ones supporting your case, should be included in your analysis at Stages 4 and 5.

Table 13.7 Considering the admissibility, reliability and sufficiency of the evidence

Material fact (Stage 3)	**Propositions of fact** (Stage 4)	**The evidence for each proposition of fact** (Stage 5)	**A** (6)	**R** (6)	**S** (6)
1 The Plaintiff was at all material times the owner of motor car NPN 2001, a [*year*] Honda.	1.1 The plaintiff bought the car, a [*year*] Honda, from a dealer in motor cars.	Plaintiff: '*I went to the Honda dealership*. *I bought the car, a [year] model Honda, from them . . .*' Exhibits: Contract, receipt.	**Y** **Y** **Y**	**Y** **Y** **Y**	**Y** **Y** **Y**
	1.2 The sale was for cash.	Plaintiff: '*I bought the car for cash*.' Exhibits: Contract, receipt Admission at rule 37 conference (paragraph 6 of minutes)*.	**Y** **Y**	**Y** **Y**	**Y** **Y**
	1.3 The purchase price was paid.	Plaintiff: '*I paid by cheque . . .*' Exhibits: Receipt, cheque.	**Y** **Y**	**Y** **Y**	**Y** **Y**

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Material fact (Stage 3)	**Propositions of fact** (Stage 4)	**The evidence for each proposition of fact** (Stage 5)	**A** (6)	**R** (6)	**S** (6)
	1.4 The dealer delivered the car to her with the intention of transferring ownership.	Plaintiff: '*The dealer then handed me the keys and the car's registration documents . . .*' Exhibits: Registration documents.	**Y** **Y**	**Y** **Y**	**Y** **Y**
	1.5 She received the car with the intention of acquiring ownership.	Plaintiff: '*I wanted a car for myself*.'	**Y**	**Y**	**Y**

Note: **A** = Admissible? **R** = Reliable? **S** = Sufficient? **Y** = Yes. **N** = No.

*

It has been assumed for the purposes of the exercise that the defendant was prepared to make such an admission at the rule 37 conference.

Admissibility problems, contradictions, weaknesses in the evidence, availability problems, references to the evidence of other witnesses and any other noteworthy matters may be dealt with by way of footnotes instead of columns. It is necessary to consider the admissibility and reliability of each item of evidence separately, but you only need to make a note when there is a potential problem. If there had been additional witnesses for these propositions, they would have been identified as the relevant sources and their evidence inserted at Stage 5. Potential objections to the evidence have to be considered and dealt with. When an objection is made during the trial, you will be ready to deal with it if you have done your analysis properly.

The opposition's case should therefore have been covered during our analysis of our own evidence. There could be more than one defence. The defence to some of the material facts could be such that all we need to do is to lead our own evidence. For example: The defendant is unlikely to have any evidence or witnesses on the first material fact in Mrs Smith's case (ownership of the car). But on the question of negligence, and also on the question of causation, the defendant is likely to have his own version of the facts and may even have a special defence. In fact, he has pleaded contributory negligence. (See his plea in Table 7.9.) You can safely conclude that the defences are as follows:

- The defendant does not admit the plaintiff's ownership of the car. While the defendant may not lead contrary evidence, the plaintiff still has to prove her ownership to the required standard of proof.

- The defendant denies negligence and causation and, in the alternative, pleads contributory negligence.

- The defendant denies the quantum of the damages.

The question is this: Do you need any evidence additional to what you have already in order to meet these defences? If so, that evidence has to be secured and preserved for use at the trial. If not, you should identify potential additional sources and forms of evidence that there may be in the case. In a civil case the search for further evidence should be extended to the other side's witnesses and documents. What contributions could they make? Can that information be obtained by way of a request for further particulars or by way of a request for particulars under rule 37(4)? If so, serve the [Page 261] required notices and force compliance or notify the other side that you intend to interview the witness concerned. If none of these means of obtaining additional evidence is available to you, you might have to plan your cross-examination of the opposing witnesses with the aim of eliciting the required evidence from them.

13.6 Stage 7: Developing a theory of the case

13.6.1 What is a 'theory of the case'?

The theory of the case could be defined as a coherent, comprehensive and credible theory which takes account of all the evidence and provides a persuasive answer (the one desired by the client) to the question or issue before the court. It is 'the basic, underlying idea that explains not only the legal theory and factual background, but also ties as much of the evidence as possible into a coherent and credible whole. Whether it is simple and unadorned or subtle and sophisticated, the theory of the case is the product of the advocate. It is the basic concept around which everything else revolves.' (*McElhaney's Trial Notebook* 3rd edn ABA (1994)) It has to be:

- *comprehensive*, that is to say, it includes every known fact, including the disputed facts.

- *coherent*, in that it provides a consistent and orderly story which is held together by logic and evidence.

- *convincing*, in the sense of being persuasive and credible.

- *legally sufficient* to obtain judgment in your client's favour.

The theory of the case is more than a mere assembling of the evidence or a recounting of the main facts. It tells the story in such a way that it makes sense as an exposition of the facts that satisfies the law as well as common sense. Thus, whether a judge or a stranger should hear our theory of the case, they should both be able to follow it and be persuaded by it. Take this example, in an action for damages for an assault:

1. The issue is whether the defendant acted in self-defence when he stabbed the plaintiff.
2. My position is that the stabbing was unlawful.
3. The parties had been involved in a longstanding dispute over the placement and maintenance of a fence between their properties. One day they met at the fence. They started arguing. The defendant became angry and abusive. Blows were exchanged. Then the defendant pulled out a knife and stabbed the plaintiff, who was unarmed, once in the chest and twice more in the back while the plaintiff was running away.
4. The defendant claims to have acted in self-defence.
5. Even if the stab to the chest could be justified, the stabs to the back when the plaintiff was fleeing could not have been inflicted in self-defence.

13.6.2 The function of the theory of the case

The theory of the case provides the framework or strategy for the whole trial. All the crucial decisions and actions of the trial (and some of the pre-trial procedures) will be based on counsel's theory of the case. Your theory, for example, will guide you in your decisions about which witnesses to call, what evidence to lead, what exhibits to produce, what evidence to attack in cross-examination, what points to raise in argument and so on. In practical terms this theory is an explanation which musters all the available [Page 262] evidence to support the desired conclusion while, at the same time, accommodating or diminishing any unfavourable evidence or fact.

Every step you take in the trial is based on your theory of the case. This requires the fullest understanding of the facts (in the sense of available evidence) and the law which applies to them. It also requires a scrupulous weighing up of all the evidence, determining which items of evidence are favourable to your client and which are not and finding ways to deal with the unfavourable evidence. This depth of understanding can only be acquired by fact analysis according to some logical system like the one dealt with earlier in this chapter.

The theory of the case also shapes your tactics for the trial. You will lead only that evidence which supports your theory and attack only the evidence harming it. You would avoid doing anything inconsistent with that theory, for example, if your client's defence is an alibi you would hardly put it to the prosecution witnesses that your client had acted in self-defence. Such a suggestion (to the witnesses) is not compatible (coherent) with your theory and may even destroy it. It is also no use having an incomplete theory, for example, one that does not explain why the accused's fingerprints were on the murder weapon. Your theory has to accommodate or explain the unfavourable evidence or facts, otherwise it is incomplete and unlikely to be accepted in preference to the prosecution theory.

13.6.3 How to develop and formulate a theory of the case

Opposing sides will have different, usually diametrically opposing theories. The prosecution's theory may be that the accused was the murderer on the basis that all the available evidence, direct and circumstantial, points to that conclusion. The defence theory may be that it is a case of mistaken identity as the accused had been elsewhere at the time of the murder (and therefore has an alibi). In pursuing its theory, the prosecution will seek to prove, by way of direct or eye-witness evidence, circumstantial evidence or admissions (or any combination of these three types of evidence) that the accused was, in fact, the murderer and that the alibi is false. The defence, on the other hand, will concentrate its efforts on casting (reasonable) doubt on the prosecution evidence and on proving the alibi (as a reasonable possibility). Both sides will take into account the onus of proof and the standard required in a criminal case. The prosecution will try to achieve the standard of proof beyond reasonable doubt; the defence will try to create a reasonable doubt. In the end the court will have to decide which of the two competing theories to accept, having regard to the incidence of the onus and the standard of proof required.

While the instinct you soon develop in practice often leads you to a persuasive theory quite quickly, it is always a good idea to test your theory against a set of guidelines:

- Is your theory consistent with all the known facts? If it isn't, can the theory be adapted to accommodate all the known facts?
- Is your theory credible? Will a judge find it acceptable? You may test it on a colleague or even your spouse and children.
- Can any evidence which may be inconsistent with your theory, be accommodated or discredited?
- Does your theory depend on any additional facts or evidence yet to be obtained?
- Does your theory lead you to the desired conclusion? In other words, is it legally sufficient? It is no use having a wonderful theory and all the evidence to prove it if your client is still going to be unsuccessful.

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Each side will rely on some facts that are common to both theories, rely on other facts that are disputed, and dispute certain facts on which the other side relies for its theory. You can also have alternative theories, but they should not be incompatible with each other. For example: In a drunk-driving case, your theory could be that the accused had not been the driver of the car, and in any event that he was not under the influence at the time the car was being driven. Or, in an assault or murder case, the prosecution could contend that the accused had not acted in self-defence, but even if she had, that she had exceeded the bounds of self-defence.

Identify the main issue: The first step towards identifying and formulating your theory of the case is to identify the central issue in the case. In most cases there is a single question to be answered, for example: 'Who is the person who committed the robbery?' Where there is more than one question or issue, the theory of the case should answer each question.

Take a position on the main issue: Once the central issue has been identified, you have to take a position on it. This position is what you are going to try to persuade the court to accept as the legal answer to the question at the heart of the case. For example: '*The accused is the person who robbed the complainant*.'

List the best points in favour of your position: Once you have formulated your answer to the central question, you should be able to state the main facts supporting your position in a paragraph or two. In very complex cases this part of the formulation of your theory of the case could be quite involved or detailed. In most cases, however, a short explanation will do. For example: '*The accused was identified by two eye-witnesses to the robbery. He was found nearby shortly after the robbery with the complainant's watch in his possession and could give no reasonable explanation for such possession*.'

Identify the opposition's likely theory: So far, so good, but a theory of the case which does not answer to opponent's likely answer to the central question in the case, is incomplete and unlikely to succeed. You should therefore identify the likely answer to be given by the other side briefly, for example: '*The accused claims an alibi for the time of the robbery*.'

*Discredit the opposition's theory***:** It is not enough to identify the opposition theory. It must be discredited, for example: '*The alibi is false and his witness is mistaken or untruthful. The witness is biased, in any event*.'

The following five steps provide a solid basis for the development and formulation of a theory of the case:

- Identify the central issue in the case.
- State your position on that issue succinctly.
- State the main points supporting you on that position.
- State the opposition's theory.
- State the main points defeating the opposition's theory.

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Table 13.8 Examples of opposing theories of the case

Type of case	Prosecution or plaintiff's theory	Defence or defendant's theory (*)
Criminal charge of assault	The issue is whether the accused acted in self-defence. The stabbing was unlawful. The accused was not acting in self-defence and, in any event, exceeded the legitimate bounds of self-defence by stabbing the complainant in the back.	The accused acted in self-defence. The wound in the complainant's back was inflicted accidentally when the parties grappled with each other and fell down.
Criminal charge of theft by shoplifting	The issue is whether the accused had the necessary *mens rea* for theft. She did. She concealed the item in her handbag to avoid detection.	The accused did not intend to steal the item. She was distracted and absent-mindedly put it in her bag and then forgot to pay for it. She was arrested before she realised her mistake.
Civil claim for damage to a car	The issue is whether the defendant was negligent. He failed to stop at the intersection when the light was red against him and that caused the collision. His conduct was unreasonable.	The light was green for the defendant, so the plaintiff must have entered the intersection against the red light.
Civil claim for damages against a surgeon arising from a surgical procedure	The issue is whether the defendant exercised that degree of skill required of a surgeon. He was negligent in that he did not exercise the requisite degree of professional skill and care. This is proved by the consequences of the operation on the plaintiff; some of her facial muscles have been damaged and she cannot raise her left eyelid.	There are inherent risks in all surgical processes. These were fully explained to the plaintiff. The consequences she has suffered fall within the recognised and accepted parameters for the surgery performed on her.
Civil claim for defamation	The issue is whether the publication of the defamatory material was justified. The material published by the defendant is *per se* defamatory. It portrays the plaintiff as dishonest. The allegation is false. There was no excuse for publishing it.	The defendant was justified in making that allegation about the plaintiff. He had been dishonest and it was in the public interest that it be published because the plaintiff is a politician currently holding public office.

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Type of case	Prosecution or plaintiff's theory	Defence or defendant's theory (*)
Civil claim for specific performance of a contract	The issue is whether the plaintiff had performed his side of the bargain. He had, but the defendant, without any justification, repudiated the contract. There was nothing wrong with the potato seeds sold.	The defendant has justifiably cancelled the contract as the seeds were unfit for the purpose for which they were bought. The seeds are contaminated by a bacterium rendering them infertile.
Matrimonial claim for primary care of small children	The question before the court is what the best interests of the children demand with regard to their care. The defendant's current circumstances are no good for the children's continued well-being. She has formed a relationship with a known paedophile and there is a real risk that he will abuse the children. It would be far better to place the children with their father, the plaintiff.	It is in the best interests of the children to leave them in the care of the defendant, their natural mother, who has cared quite adequately for them since their birth. While the defendant's partner has a conviction for a sexual offence, he has been rehabilitated and the defendant can protect the children.
Civil claim for assault against a police officer	The issue is whether the shooting was lawful. The plaintiff had done nothing wrong. He was walking around the market when he was accosted by a man wielding a gun. He was frightened and ran away. He did not know that the man, now known to have been the defendant, was a police officer.	The defendant was entitled to arrest the plaintiff without a warrant as he had committed the offence of robbery in the presence of the defendant. The plaintiff sought to avoid arrest and ran away. There were no other reasonable or effective means available to arrest the plaintiff, save by shooting him in the leg.
Civil claim for re-instatement of an employee	The issue is the validity of the plaintiff's dismissal. He was dismissed unlawfully and without notice. The strike was lawful. The plaintiff was entitled to an opportunity to make representations before he was dismissed.	The plaintiff had taken part in an illegal strike and was dismissed after being given a full opportunity to make representations.

(*) **Note:**

The defence or defendant must reformulate the issue if the plaintiff has put an incorrect slant on it.

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A preliminary theory of the case must be developed as soon as possible in order to channel your energies in the right direction and to save costs, but that theory must not be too rigid or specific in the early stages. As new facts, understandings and knowledge become available the preliminary theory may be shaped into a final battle plan. We can call that plan our trial tactics or strategy.

In criminal cases defence counsel is obliged to develop a theory of the case which is consistent with the client's instructions. The 'strengths and weaknesses' exercise weighing up the good and bad facts may reveal a more persuasive theory, but counsel may only advance those if they are not in conflict with the accused's instructions *and* there is a good faith basis for those defences. (See in this regard the discussion of the good faith requirement in chapter 14.)

Prosecutors, on the other hand, may only advance a theory of the case that is permitted by the NPA Code of Conduct clause D.1.(g), namely a theory that is *reasonably believed* to be supported by *reliable* and *admissible* evidence. Thus, while defence counsel is bound to pursue the theory provided by the accused's instructions, a prosecutor has to make an independent assessment of the strengths and weaknesses of the case in order to determine whether the evidence is sufficient to support the charge. The test, it is submitted, is whether a court *could*, not *should* or *must* find the evidence sufficient. (See chapter 14 for a detailed discussion of the prosecutor's role, functions and obligations.)

13.7 Stage 8: Trial tactics

Trial tactics develop logically out of the analysis of the facts and the development of a theory of the case. These prior steps are not taken as an academic exercise in logic but as essential and practical

steps in preparing for trial. They assist you in a number of ways to become fully prepared for any eventuality that may arise at the trial.

First, you are prepared on the law in that you will have identified the material facts and the precise legal requirements of the claim or defence or charge to be proved. In most cases you would also research the law in order to have case law available for the purpose of referring the court to the law at any stage during the trial, should it become necessary. The starting point for preparation on the law remains the proper identification of the material facts of the claim or charge or defence.

Secondly, you will be prepared on the evidence in that you will have identified all the evidence (from witnesses and exhibits) which is available to prove those material facts. In the process of analysing the evidence, you will have become fully acquainted with the strengths and weaknesses of the case. Knowing the strengths and weaknesses of your case will enable you to develop a coherent, comprehensive and persuasive theory that can serve as the framework for the tactics to be employed during the trial.

Thirdly, you can thus prepare a strategy or blueprint for the trial so that it is conducted according to a well-worked out scheme or plan of action. Without such a plan the trial may well run as a haphazard, disjointed and confused production of apparently unconnected witnesses and items of evidence. Since the purpose of advocacy is to persuade, it is essential that a persuasive scheme should be used at all times. The strategies to be employed are developed directly out of the theory of the case and the fact analysis that produced it. You could proceed as follows:

- Complete a full analysis of the facts as suggested in Stages 1 to 6.

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- Define the theory of the case by careful analysis, as suggested in Stage 7.
- Plan your tactics for every stage of the trial by doing the following:
  - Identify the strengths and weaknesses of the evidence on each disputed material fact separately.
  - List the main evidential facts which tend to help you prove (or disprove) the material facts at the heart of the case. Call them the 'good facts' for your side. Then list the facts that would tend to assist the other side. Call them the 'bad facts' against your side. Note that the good facts for the one side are almost invariably bad facts for the other. The emphasis is on 'almost'. Sometimes a fact fits into both theories of the case and in such a case both sides may regard that particular fact as a good fact. The same could apply to a bad fact.
  - Consider and plan carefully
    - who to call
    - the sequence of your witnesses
    - the precise evidence to elicit from each witness, including the exhibits to introduce through each witness
    - who the other side's witnesses may be
    - their likely evidence
    -

your cross-examination for each opposition witness, including whether you need to cross-examine at all and, if so, the themes to be covered in cross-examination and the version to be put to them.

- Ensure that your own witnesses are able to produce the good facts in their evidence-in-chief and are prepared to deal with cross-examination by opposing counsel on the bad facts.

The good facts and bad facts are manipulated throughout the trial according to a simple formula as follows:

- you *emphasise* the good facts in the opening address.
- you *prove* the good facts by leading the evidence of your own witnesses.
- you *support* the good facts, if possible, by eliciting favourable evidence in the cross-examination of the other side's witnesses.
- you *diminish*, if you can, any harm done to any of the good facts by the other side's cross-examination of your witnesses by re-examining your witnesses.
- you *minimise* the impact of the *bad facts* by:
  - asking your own witnesses appropriate questions in their evidence-in-chief or in re-examination, where possible.
  - cross-examining the opposing witnesses appropriately.
- you then *argue* the case by explaining:
  - why the good facts should be accepted as having been proved and why the bad facts should be rejected or ignored.
  - why the court's verdict should be in your client's favour.

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Remember: The same process is followed by the other side, except that the order in which the defence or defendant has the opportunity to deal with the good facts and bad facts differs, with cross-examination preceding their opening address. The defence or defendant will have their own theory of the case and their own view of what the good facts and bad facts respectively are for the defendant.

It is not suggested for a moment that this is all you need to know about tactics. The fact is that the subject, like most of the subjects covered in the individual chapters of this book, is so vast that a whole book would need to be devoted to it. Even then it will not be possible to cover all possible situations. More advanced advocacy skills will develop in time around these basic processes.

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The scheme for trial preparation using the proof-making model of fact analysis is schematically represented as follows:

Table 13.9 Scheme for preparation for trial using the proof-making model of fact analysis

Stage 1	Stage 2	Stage 3	Stage 4	Stage 5	Stage 6	Stage 7	Stage 8
Area of law	**Cause of action**	**Legal elements**	**The facts**	**The evidence**	**Admissible? Reliable? Sufficient?**	**Theory of the case**	**Trial tactics**
							1 Strengths and weaknesses 2 Further investigations 3 Witnesses to call 4 Exhibits to use 5 Timeline for each witness 6 Identify opposition witnesses 7 Themes for cross-examination of each opposing witness 8 Opening statement 9 Closing argument

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13.8 Counsel's trial notebook

There are many good reasons for keeping detailed notes of your preparation. The trial may not proceed, in which event your notes will serve you well the second time around. You may not be available for the trial on the new dates, in which event your successor may have the benefit of your preparation. The client should not have to pay twice for the same work. Most of all, the case may be so complicated that you cannot store all the important things you need to remember on scraps of paper or in the recesses of your (fallible) memory.

A separate trial notebook must therefore be kept for each case. It is best managed as a folder with dividers for different topics. This notebook must also serve as your roadmap through the case, including the pleadings, notices, discovered documents and statements. The trial notebook must contain:

- the results of each of the eight stages outlined earlier.
- an outline of your opening address (see chapter 16).
- a separate section for each witness you intend to call, with a copy of the witness's statement, your timeline for that witness, cross-referenced to relevant material such as statements of other witnesses and documents (see chapter 17).
-

- a separate section for each opposing witness you anticipate, with notes on the themes for cross-examination, cross-referenced to the statements of your own witnesses and to the discovered documents, and with a note of the facts to put to the witness (see chapter 18).

- a draft closing argument in the form of heads of argument (see chapter 19).

- the legal research and authorities relevant to the case.

The trial notebook is not the same as the trial file or folder referred to in chapter 4. That trial folder serves an administrative function, keeping all the documents of the case together so that they could be used for whatever purpose at a moment's notice, including briefing counsel, preparing a bill of costs and so on. The trial notebook serves a narrower function. It is confined to the incidents of the trial itself. It will have lifted or copied everything that is relevant to the trial process itself from the trial folder, but no more.

Another example of the arrangement of the material in counsel's trial notebook is that suggested by *McElhaney's Trial Notebook*:

A. A table of contents and index.

B. Counsel's analysis of the case (similar to the seven steps outlined earlier in this chapter).

C. Counsel's analysis of the opponent's case.

D. A formal proof checklist (an analysis which sets out the elements to be proved, the evidence in support of each and the source of that evidence).

E. The opening statement.

F. A witness section which includes:

1. a list of witnesses (for both sides).
2. a summary explaining where each witness fits into the greater scheme of the case.
3. an outline or timeline for the evidence of each of your own witnesses.
4. a list of topics or themes for the cross-examination of each opposition witness.

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G. A general outline or timeline, dealing with the totality of the events (the 'big picture').

H. The documents or exhibits, in chronological order.

I. Legal research and authorities.

J. Closing argument (in draft).

In time, every advocate develops his or her own methods and style in preparing for trial, exactly as he or she does in the other skills and techniques of the litigation process. No two advocates use

exactly the same model, but every successful advocate has a system that works. Every system that works includes the steps explained in this chapter. Competent and confident advocacy depends on it.

Note:

There is a complete trial-preparation exercise in Appendix 2 at the end of this book.

13.9 Fact analysis in criminal cases

The police and prosecutors work together 'to produce the evidence to support the charge' in a criminal case. The investigating officer gathers the evidence in the form of witness statements and exhibits and makes a preliminary assessment of the charge the evidence can support and the sufficiency of the evidence. The docket is then submitted to the prosecutor, who analyses the evidence and the law before deciding on the precise charge or charges to be put to the accused. If there is insufficient evidence, the charge is withdrawn or the docket returned to the police for further investigation. Fact analysis of this kind is being practised every day across South Africa by hundreds of police officers and prosecutors. Fact analysis is part of everyday life for them. Whether they have a set programme or system for their fact analysis is not known, but I venture to suggest that they would at least have to identify the legal elements of the charge and consider whether they have sufficient evidence to prove them. Whatever system they use, prosecutors do some form of fact analysis to enable them to put a coherent, comprehensive and convincing case before the court.

Defence counsel has a considerable advantage over the prosecutor. The prosecution is obliged to make its statements and other types of relevant information available to the defence while there is no similar burden on the defence (with one or two exceptions, notably when the defence is an alibi). Defence counsel is therefore in a position to do a complete fact analysis of the prosecution's case, which includes anticipating the prosecution's theory of the case and predicting the likely tactics to be adopted by the prosecutor. This allows defence counsel to employ two of the most potent weapons in an advocate's armoury, namely preparation and ambush. Counsel can prepare fully so that there are no surprises in the prosecution's evidence. At the same time, counsel can surprise the prosecution witnesses (and the prosecutor) with the defence evidence and theory at the most opportune moment in order to derive the maximum benefit from the situation. The witness will not have had a chance to prepare a response and the prosecutor will have little time to consider the ramifications of the evidence or to prepare cross-examination, to mention but a few benefits. There are some limits to the extent you can use surprise as a tactic, particularly in civil cases where the rules relating to pleading, discovery and expert evidence require full disclosure to the other side. You are also required, in criminal and civil cases, to put your version to opposing witnesses in cross-examination. In any event, any prosecutor worth his or her salt will anticipate the likely defence and any likely defence witnesses. It is not so easy to catch a competent opponent by surprise.

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Nevertheless, defence counsel can adopt tactics that exploit their knowledge of the prosecution's case and the opportunity to surprise. You can prepare a complete fact analysis of the prosecution's case and then do a second fact analysis for the defence case. The analysis of the prosecution case is done after the relevant documents and particulars have been obtained from the prosecutor. This information can be obtained from the charge sheet or indictment, further particulars, an examination of exhibits and from the following documents:

- The police docket, which has three sections, Part A for the statements of witnesses, Part B for correspondence and Part C for the investigation diary.
- The exhibits register, also known as the SAP 13 register, which contains what exhibits were received and what was done with them.
-

The pocket books or diaries of the officers involved. Commissioned officers use diaries while non-commissioned officers use pocket books to record important events and facts.

o The occurrence book, also known as the OB register, which is kept at the police station as a running log of events and occurrences reported to the police or by the members of the particular police station.

o Other police registers such as the cell register (containing details of prisoners), duty lists (containing details of police officers' duty periods) and the vehicle register and individual vehicles' log books (containing details of the use of police vehicles, including by whom and for what purpose any vehicle was used at a given time).

To be fully prepared means having to inspect these documents with great care and doing a fact analysis as if you were prosecution counsel. Your understanding of the prosecution case should be so good that, hypothetically speaking, you could conduct the prosecution without any further preparation.

The converse applies to the prosecutor. You should be so well prepared that you could conduct the case as defence counsel. Only then will you have a complete understanding of the case. If you are a prosecutor reading this, go to the trial preparation exercise at the end of this book and ask yourself these questions:

(a) What is the central issue here?

(b) What would be my submission to the court? (That the accused is guilty, of course.)

(c) What would I submit to the court as my best points?

(d) What does the accused say? (That he made a mistake, of course.)

(e) Why should the court reject that version? (We've heard that defence before, haven't we? Every second shoplifter uses it.)

Then conduct a complete (8 stages) trial-preparation exercise for the prosecution.

Chapter 14
Ethics

CONTENTS

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14.1 Introduction

Professions usually have rules for the behaviour and conduct of its members and the legal profession is no exception. A second feature of a profession is that it usually acts in a self-regulating capacity when it oversees the activities of its members and in cases of misconduct, disciplines them. This latter aspect is not pursued in this chapter.

In *S v Masoka and Another* 2015 (2) SACR 268 (EC) at para. [8] Alkema J pointed out that the rules of ethics are not dependent on some written code or statute.

> 'Rather, these are mostly unwritten rules having their origin in concepts of justice, fairness, morality and equity. These rules have over many centuries evolved in legal systems almost all over the world, including South Africa, and have been shaped by the legal convictions of the societies in which they are used.'

It would therefore be appropriate to consider not only the written codes of ethics applicable to South African lawyers but also the codes and principles applicable in like-minded jurisdictions.

14.1.1 Definitions of ethics

The rules of ethics of the legal profession are more than a collection of rules or codes of conduct. It is a moral code which does not rely on its legitimacy on any written document or statute or judicial pronouncement. It is much greater than that. It is a discipline which directs every lawyer's behaviour in his or her professional capacity. It defines what a lawyer is and what a lawyer's role is in society.

While ethics is a branch of philosophy concerning itself with what is right or wrong or good or evil in the philosophical sense, the branch of ethics with which lawyers are concerned is *applied ethics*, which is concerned with what a lawyer is permitted to do or, conversely, not permitted to do in a given situation. In other words, the rules of ethics of the legal profession determine what is right and what is wrong in the litigation process. The subject of legal ethics is much wider, of course, but for the purposes of this book we are interested only in those aspects of ethics that have a bearing on the litigation process.

14.1.2 Ethics for counsel: Legal practitioner

Litigation is a narrow but special branch of legal practice. It is the branch of legal practice which receives the bulk of the public's attention and scrutiny, as is evidenced by the [Page 274] number of courtroom dramas that have been broadcast from the very early days of radio, film and television. Nowadays the public's apparently insatiable thirst for that kind of entertainment has even given rise to courts allowing live-screening of sensational trials. In the process, not only the conduct of the litigants but that of the legal practitioners representing them have come under scrutiny, among other reasons, for their adherence to or breaches of the rules of ethics.

Litigation is also the branch of legal practice where the parties and the legal practitioners representing them are pitched against each other in a contest which, like any sporting contest, has to be conducted in accordance with the rules of the game for the outcome to be fair and, moreover, for the outcome to be accepted by the losing contestant and the watching public.

14.2 Sources of ethics for litigators

The rules of ethics pertaining to the litigation process have their origins in substantive or procedural rules of law and in the codes of ethics of the Law Society and the Bar that developed in England. From England those principles spread to countries that, like South Africa, inherited the British-style system of administration of justice. This includes the *adversarial system*, the way the courts and the legal profession are structured and the rules of evidence and procedure. The rules of ethics for litigators are thus in one sense universal but yet specific as each jurisdiction has its own constitutional and legislative framework together with its own codes of ethics.

The boundaries are not clearly delineated between the rules of substantive law, the rules of procedure and the law of evidence, on the one hand, and the relevant codes of ethics and etiquette on the other. Judicial pronouncements also feature in the broad landscape of rules of ethics.

In South Africa the sources of the rules of ethics are the rules of ethics derived from:

- the English Common Law as well as the South African Common Law.
- the Constitution.
- other legislation, such as the Criminal Procedure Act 51 of 1977 (CPA) and several statutes dealing with the law of evidence.
- the rules of procedure and evidence of the court concerned.
- the codes of conduct for members of the legal profession, including the LPA Code of Conduct, the NPA Code of Conduct and the Judicial Code of Conduct as well as the prior codes of conduct of the Law Society of South Africa, the General Council of the Bar and the several provincial societies of advocates.
- judicial pronouncements.
- the rules of ethics in comparable jurisdictions.

It is generally accepted that no code of conduct can be complete, covering every possible situation, but there may be some universal principles that apply to all lawyers that can be used as a starting point, such as that every lawyer must:

- uphold the rule of law and facilitate the administration of justice in South Africa.
- be independent in providing legal services to his or her clients.
- act in accordance with the fiduciary duties and duty of care owed by lawyers to their clients.

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protect the interests of his or her clients, subject to his or her overriding duties as an officer of the court and to his or her duties under any statute.

The Constitution has two provisions that supplement the universal principles referred to in that it provides:

> `**10.**
>
> **Human dignity**
>
> Everyone has inherent dignity and the right to have their dignity respected and protected.
>
> . . .
>
> **35.**
>
> **Arrested, detained and accused persons**
>
> 3.
>
> Every accused person has a right to a fair trial . . .'

Prior to the advent of the Constitution the courts were the guardians and protectors of the individual's right to their dignity: Now it is a constitutional imperative which not only the judges but also the legal practitioners engaged in a trial have to observe.

Similarly, the judges and legal practitioners engaged in the trial, whether civil or criminal, have to engage in the processes of the trial in such a way that the outcome is fair. The Constitution requires that every legal practitioner must work towards achieving the aims of the Constitution, including achieving a fair trial and a just result for litigants. While this is expressly stated to be the case in criminal trials, the underlying principle also applies to civil disputes. There can be no justice if the legal process is not fair, and it is the task of the counsel to ensure that the process and the outcome in their trials are just.

14.3 The overarching principle: The good-faith principle

If there is one overarching principle – whether imposed by law, practice or ethics – that guides the conduct of lawyers in all spheres of legal practice and in their interaction with all others – judges, other lawyers, clients, witnesses and the public – it is the *good-faith* principle. In the litigation context, the good-faith principle has application at every stage of the litigation process covered in the chapters of this book; right from the first interview with the client to the closing of the file after the final appeal.

14.3.1 Origins of the good-faith principle

An expectation of good faith developed over millennia in the mutual dealings of individuals and/or peoples of similar attitude and sense of fair-mindedness. The Dutch jurist Grotius mentioned (*Inleidinge* 3.1.52) that 'the Germans from of old esteemed no virtue above good faith'. The virtue of good faith in dealings with one's fellows includes fairness, openness, mutual respect, empathy and humanity. It is an unspoken code of human attitudes and behaviours in our interactions with others. It is difficult to imagine a virtue of greater importance than good faith in our dealings with each other and it should come as no surprise then that it is also part of the legal fabric of our nation.

The good-faith principle is ubiquitous in the unique make-up of South African law. It has its origins in the Roman law concept of *bona fides*, in the Christian concept of *charity* and in the indigenous African concept of *ubuntu.* It was introduced into Roman legal practice by officials known as *praetores* in order to soften the blows of the harsh application of the *stricti juris* Roman law of the time. It spread through Europe with the spread of Christianity with its own concept of *charity* and it found *ubuntu* here in South Africa when the Roman-Dutch law and Christianity settled here.

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Good faith is now present in many legal principles. For example:

- While the terminology may have changed, an insured is expected to act in good faith towards the insurer when making disclosures of facts known to the insured that are relevant to the risk or the premium – *Certain Underwriters at Lloyds of London v Harrison* 2004 (2) SA 446 (SCA).

- An applicant for rescission of a default judgment has to demonstrate that he or she is *bona fide* (genuine) with regard to the purpose of the application, and has a *bona fide* defence. This requires both a genuine subjective belief and a defence based on objective facts – *Hassim Hardware v Fab Tanks* [2017] ZASCA 145 at para. 12. High Court rule 31(2)(*b*) is based on the common law and requires that good cause be shown by the applicant before a rescission will be granted. Good cause means a *bona fide* state of mind and a *bona fide* defence.

- The failure to comply with a court order may be punished as contempt of court unless the person concerned can show that their failure was not 'wilful' and '*mala fide*' – *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).

- In delictual claims for malicious prosecution the plaintiff has to plead and prove that the defendant acted *without reasonable and probable cause.* This means that it must be proved that the defendant could not have an honest belief (the subjective element) that the information on which the charge was based was good (the objective element) – *Prinsloo v Newman* 1975 (1) SA 481 (A).

What these examples have in common with each other and also with the rules of ethics applicable to the legal process are the dual requirements of the good-faith principle, namely (i) an honest belief (ii) based on objective facts, that is to say, evidence that, when objectively considered, is reliable, admissible and sufficient.

The good-faith principle is part of the very fabric of South African law and, as a consequence, of the litigation process, where it may be expressed as a rule of ethics. Whether it operates with the force of law is not a question which needs to be answered here, although a strong argument may be made to that effect.

14.3.2 The meaning of the good-faith principle

The good-faith principle may be expressed differently depending on the context as the requirement for *genuine behaviour,* or as the *just-cause* requirement or, as the need for *uberrimae fides* (utmost good faith under the English Marine Insurance Act of 1906), or, as pointed out above, as *reasonable and probable cause* in claims for malicious prosecution. Whatever the label, the meaning must be clear to legal practitioners because there is a wealth of legal authority in codes of ethics, case law and other sources of information available to anyone who cares to look.

The good-faith principle is stated as follows in the Model Rules of Professional Conduct of the American Bar Association:

> '***Advocate***
>
> ***Rule 3.1 Meritorious Claims and Contentions***
>
> *A lawyer shall not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.'*

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Three aspects of the good-faith test are alluded to in *Model Rule* 3.1:

- It covers issues of fact.

-

It covers issues of law.

o

And counsel's assertions must not be frivolous. Frivolous in this context means unreasonable, and what is unreasonable is determined by the objective facts and circumstances.

The good-faith principle is based on a two-part standard requiring that counsel should have both a *factual* and a *legal* basis for alluding to, asking about, offering, or relying on particular evidence. As such the good-faith principle resolves all difficulties that may arise between counsel's duty not to mislead the court and counsel's duty to the client. The good-faith principle covers every stage of the trial from the opening statement to the closing argument, and any reviews, appeals or interlocutory proceedings within them. At every stage counsel must have a factual as well as legal basis for whatever counsel places before the court by way of a statement, submission or question.

The *factual basis* of the good-faith principle has two requirements of its own, namely the existence of (i) counsel's *subjective belief* and (ii) *objective evidence* supporting that belief. (As to (i), counsel must in fact hold the belief concerned. As to (ii), that belief must be based on counsel's analysis of the available evidence and witnesses justifying a *reasonable belief* in the *reliability* of the evidence supporting the fact advanced by counsel.) The effect of this two-part requirement of the good-faith principle is as follows:

> 'Under this principle, an ethical advocate will not mention dubious evidence in opening statement, will not attempt to present evidence believed to be inaccurate, will not ask a leading question that includes an unsupported factual suggestion, and will not incorporate into closing argument "surprise" misstatements and overstatements by witnesses that make the case seem more favourable than it is.'
>
> [J Alexander Telford *The Ethics of Evidence* 25 Am. J. Trial Advocacy 487 (2002)]

The *legal basis* of the good-faith principle restricts counsel to a reliance on evidence that is *admissible* according to the rules of evidence and procedure.

The good-faith principle is not a mere rule of ethics but reposes at the heart of the relationship between counsel and the court. When it is said that the court must always be able to rely on counsel's word, or that the court must be able to trust counsel, it is the good-faith principle that gives rise to that reliance and trust.

While the good-faith principle may not have been recognised as such or mentioned expressly in the various codes of conduct applying in South Africa, it has been recognised obliquely in Clause D.1.(d) of the NPA Code of Conduct (for prosecutors):

> '***D.***
>
> ***ROLE IN ADMINISTRATION OF JUSTICE***
>
> *1.*
>
> *Prosecutors should perform their duties fairly, consistently and expeditiously and*
>
> *(d)*
>
> *in the institution of criminal proceedings, proceed when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and not continue a prosecution in the absence of such evidence; . . .*'

This clause incorporates each of the requirements of the good-faith principle, namely, (i) a reasonable belief (ii) actually held by counsel (iii) which is based on reliable and admissible evidence. It is not enough to *subjectively* hold the belief that the evidence is reliable, sufficient and admissible. For the belief to be *reasonable*, it must be reasonable in the objective sense, namely a belief that is justifiable on the evidence and information that is available, reliable and admissible. (The test of *sufficiency* must be implied in that [Page 278] the belief the prosecutor is required to hold cannot be reasonable if the evidence on which it purports to rely is hopelessly outweighed by reliable contrary evidence.)

The good-faith principle therefore sets the boundaries for counsel's conduct during the trial at every stage of the proceedings.

14.4

The primary rule: Duty to the court

Subsumed within the good-faith principle is what many refer to as the primary rule of ethics in litigation, namely that counsel owes a duty of candour to the court. Candour in this context means to be *frank, open,* and *honest*. That duty can be expressed in different ways but it all boils down to the same principle: Counsel's primary duty to the court overrides counsel's secondary duty to the client should a conflict between these two duties arise.

Counsel's duty to the court has two main facets that complement each other. The first is counsel's duty not knowingly to mislead the court. The second is counsel's duty to act in good faith when making statements or submissions, when asking questions of witnesses, and in making objections. Together these constitute the duty of candour.

Lord Reid expressed the principle as follows in *Rondel v Worsley* [1969] 1 AC 191 at 227–228:

> 'Every counsel has a duty to his client fearlessly to raise every issue, every argument, and ask every question, however distasteful, which he thinks will help his client's case. But as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to conflict with his client's wishes or with what the client thinks are his personal interests.
>
> Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of the profession require him to produce.'

Several individual but interrelated principles may be deduced from Lord Reid's speech:

- Counsel's duty to represent the client fearlessly is confirmed (see paragraph 14.5 below).

- However, counsel's overriding duty is to the court, the standards of the legal profession, and the public. While the first two points may be obvious, it may not have been so obvious prior to Lord Reid's speech that the public have an interest in the administration of justice, and to that end, an interest in counsel's conduct. The administration of justice is performed on behalf of and in the interest of the people, and for that reason the general public have the right to expect the participants in the legal process to conduct themselves in accordance with the law and the rules of ethics.

- Counsel's duty to the court cannot be absolute because it would make counsel a guarantor of the facts and evidence provided by the client and the witnesses. The duty not to mislead the court must therefore be defined as a duty *not knowingly to mislead the court*.

- While counsel may in pursuit of the client's interests cast aspersions on the other party or the witnesses, counsel may only do so if justified by a *sufficient basis in the information in his possession*. This is known as the *good-faith* basis which is required for very statement or submission counsel may make, for every question counsel may ask, and for every objection counsel may raise.

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- Counsel has a duty of disclosure of facts and documents that may be adverse to the client's case where the law or the standards of the profession requires disclosure to the court. This is a further manifestation of the primary rule.

- Since one may mislead either by making a false statement or by not disclosing the truth, both situations are covered by the primary rule.

The duty not to mislead the court does not allow counsel to take a passive or supine approach towards any legal principle or fact advanced by counsel. Counsel is obliged to direct his or her mind to the issue and to consider the veracity or accuracy of the information provided to the court,

whether by way of evidence elicited through a witness or by way of a statement or submission made by counsel. Paragraph 57.1 of the LPA Code of Conduct is to that effect:

> *'57.*
>
> ***Disclosures and non-disclosures by legal practitioner***
>
> *57.1*
>
> *A legal practitioner shall take all reasonable steps to avoid, directly or indirectly, misleading a court or a tribunal on any matter of fact or question of law . . .'*

The adversarial system assumes that the parties will produce all the facts and evidence that is required for the court to make an informed and just decision. Where counsel for the plaintiff does not produce evidence that is adverse to the plaintiff's case, defendant's counsel has the opportunity and duty to do so. The converse is also the case. In cases where there is no defendant or respondent, or in *ex parte* proceedings where no notice of the proceedings is given to an interested party, special principles apply. The same principles apply to the law: Counsel is obliged to lead the court on the law, that is to say, to lay before the court all relevant authorities. Following legal precedent, LPA Code of Conduct paragraphs 57.4 and 57.5 provide:

> *'57.4*
>
> *A legal practitioner shall, in any ex parte proceedings, disclose to a court every fact (save those covered by professional privilege or client confidentiality) known to the legal practitioner that might reasonably have a material bearing on the decision the court is required to make.*
>
> *57.5*
>
> *A legal practitioner shall, in all proceedings, disclose to a court or a tribunal all relevant authorities of which the legal practitioner is aware that might reasonably have a material bearing on the decision the court or tribunal is required to make.'*

Counsel may find himself or herself on the horns of a dilemma when they learn that their proposed witness intends to commit perjury or learn during the trial that a witness called by them has told an untruth. Disclosing that information to the court would bring counsel's duty to the court in direct conflict with counsel's duty to the client. While the LPA Code of Conduct is silent on the issue, it is submitted that the Model Rules of Professional Conduct of the American Bar Association may provide the beginnings of an answer:

> ***'Rule 3.3:* Candor *Toward the Tribunal***
>
> (a)
>
> A lawyer shall *not* knowingly:
>
> (1)
>
> make a false statement of fact or law to a tribunal or fail to correct a false statement of material facts or law previously made to the tribunal by the lawyer.
>
> (2)
>
> fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

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> (3)
>
> offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes to be false.
>
> (b)
>
> A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceedings shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.'

There are two points arising from Rule 3.3. *First*, the rule provides that counsel *may* refuse to call a witness whose evidence counsel reasonably believes will be false. In South Africa *may refuse* must be taken to mean *must refuse*, otherwise counsel will become a party to the witness's efforts to

mislead the court. *Secondly*, the rule requires that if counsel should learn during the trial that a witness called by counsel has given false evidence, counsel is obliged to take remedial measures, which may include disclosure to the tribunal. This is where LPA Code of Conduct paragraphs 57.6 and 57.9 come in:

> ***'57.***
> *Disclosures and non-disclosures by legal practitioner*
> *57.6*
> *A legal practitioner shall, if the interests of justice require the disclosure to a court or tribunal of information covered by professional privilege, seek from the instructing attorney (where one is appointed) and the client permission to make the disclosure, and if permission is withheld, the legal practitioner shall scrupulously avoid any insinuation in any remarks made to a court or tribunal that all information that would serve the interests of justice has been disclosed.*
> *57.9*
> *A legal practitioner shall not rely on any statement made in evidence which he or she knows to be incorrect or false.'*

It appears then that in the situation where counsel learns that false evidence has been given (by the client or a witness called in support of the client's case), counsel is obliged to refrain from insinuating that all relevant information has been provided to the court, and should not rely on the evidence counsel knows to be false.

14.5 The secondary rule: Duty to the client

Lord Brougham explained the principle as follows during his defence of Queen Caroline before the House of Lords:

> 'An advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world, that client and none other. To save that client by all expedient means, to protect that client at all hazards and costs, to all others, and amongst others to himself, the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other.'
>
> [Maugham & Webb *Lawyering Skills and the Legal Process* Butterworths (1995) at 93]

The main consequences of this principle are that (i) counsel owes it to the client to inflict as much harm as is legally and ethically allowed on the opponent's case and (ii) in so doing counsel is not to have regard to the age, race, gender, sexual orientation, ethnicity, religion or political persuasion of the opponent or any witness. The *expedient means* mentioned by Lord Brougham are the legal and ethical limits to what an advocate may do in pursuit of a client's interests. *Expedient* means more than merely *advantageous*; it [Page 281] also means *fit, proper or suitable to the circumstances*. The LPA Code of Conduct deals with the subject as follows:

> ***'PART II***
> ***Code of Conduct: general provisions***
> *3.*
> *Legal practitioners, candidate legal practitioners and juristic entities shall –*
> *3.1*
> *maintain the highest standards of honesty and integrity;*
> *3.2*
> *uphold the Constitution of the Republic and the principles and values enshrined in the Constitution, and without limiting the generality of these principles and values, shall not, in the course of his or her or its practice or business activities, discriminate against any person on any grounds prohibited in the Constitution;*
> *3.3*
> *treat the interests of their clients as paramount, provided that their conduct shall be subject always to:*
> *3.3.1*
> *their duty to the court;*

3.3.2
the interests of justice;
3.3.3
observance of the law; and
3.3.4
the maintenance of the ethical standards prescribed by this code, and any ethical standards generally recognised by the profession. . .' -

A number of qualifications may be read into paragraph 3 of the LPA Code of Conduct:

- Counsel's duty to *uphold the principles and values enshrined in the Constitution* includes the duty to work towards a fair trial and to respect the dignity of the parties and witnesses.
- Counsel must fulfil their duties without regard to the age, race, gender, sexual orientation, ethnicity, religion or political persuasion of the opponent or any witness.
- In pursuing the client's interests – as fully and fearlessly as Lord Brougham's words imply – counsel *must*
  - *not* mislead the court
  - act always in the interests of justice
  - act in accordance with the law
  - act ethically.
- The ethical standards with which counsel must comply, include *any ethical standards generally recognised by the profession*. This brings into play the Uniform Rules of Professional Ethics of the General Council of the Bar, the Rules of Professional Conduct and Etiquette of the constituent Bars as well as any rules of conduct of similar societies of advocates or attorneys.
- The obligation to observe the law in the pursuit of their client's interests means that counsel also have to observe the limitations held by judges to apply to, for example, the cross-examination of witnesses.

14.6 The rules of ethics in a trial

Generally the rules of evidence require that there must be a good-faith basis for what counsel says in the opening statement, for counsel's submissions at any stage of the trial, and for any questions put to a witness by counsel. Counsel must therefore avoid improper suggestions and insinuations during any of those processes. At each stage counsel must [Page 282] have a guard on his or her shoulder reminding him or her to ask before speaking, '*What information do I have at my disposal to justify this statement or question? Is that information, looking at the matter objectively, reliable and admissible? If so, is my purpose for making this statement or asking this question a legitimate one?'*

14.6.1 *Opening statement and closing address*

The good-faith principle prohibits the following practices during an opening statement and closing address:

- Overstating the case – because it amounts to misleading the court on the facts.
- Alluding the facts for which there is no reliable and admissible support in the available evidence.
- In an opening statement, alluding to facts or evidence to be provided by witnesses who are not available to testify.
- Counsel must not rely on any statement given in evidence which counsel knows to be false – LPA Code of Conduct paragraph 57.9.

14.6.2 Examination-in-chief and re-examination

The good-faith principle also applies to examination-in-chief. Keep in mind the following area of potential breaches:

- Counsel must not call a witness counsel knows will give false evidence.
- Counsel may be obliged to call the accused if the accused elects to testify, but counsel must refrain from eliciting evidence counsel knows to be untrue having regard to the information provided by the accused to counsel.
- If a witness should give evidence that is false to the knowledge of counsel, counsel must bring that to the notice of the court.
- Counsel must assist the witness to tell the truth, the whole truth and nothing but the truth by asking appropriate questions. This may include, in appropriate circumstances, the duty to elicit adverse facts from the witness in order not to create a misleading impression and further, in order not to protect the reliability and credibility of the witness when the omission of the adverse facts would create a misleading impression.

14.6.3 Cross-examination: General principles

The purpose and limits of cross-examination are discussed in more detail in chapter 18. What is relevant here are the ethical limits of cross-examination. The first and overriding principle is the good-faith principle which was explained in paragraph 14.3 above. The second principle is that cross-examination may not be used as a means to mislead the court on the facts. This is a manifestation of the primary rule relating to counsel's duty not to mislead the court. The rules of evidence and procedure place further limitations on what counsel may not do when cross-examining a witness. While the rules of evidence and procedure are matters of law, breaches of those rules are *ipso facto* breaches of ethics. See also the rules laid down in *S v Gidi and Another* 1984 (4) SA 537 (C) and other cases (discussed in paragraph 14.8.2).

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The LPA Code of Conduct provides as follows:

> *`56.*
> ***The scope and limits of legitimate cross-examination***
> *56.1*
> *A legal practitioner shall cross-examine a witness with due regard to the right to dignity of the witness.*

56.2

A legal practitioner shall guard against being influenced by any person to become a channel for the infliction of gratuitous embarrassment, insult or annoyance of a witness, and shall retain personal control over what is asked or put in cross-examination by exercising personal judgment about the propriety of all and any imputations.

56.3

A legal practitioner shall not put to a witness an allegation of fact if the legal practitioner has no reasonable expectation that admissible evidence, whether oral or otherwise, is available to be adduced to substantiate the allegation of fact.

56.4

A legal practitioner shall not impugn the character of a witness unless he or she has good grounds to do so. In this regard, good grounds are deemed to be present if –

56.4.1

the instructing attorney (if one is appointed) informs the legal practitioner that the attorney is satisfied that the imputation is well-founded and true. However, a mere instruction to put an imputation shall be inadequate;

56.4.2

the source of the imputation is the statement of any person other than the instructing attorney, and the legal practitioner ascertains from that person, or any other source, reliable information or reasons to believe that the statement is well-founded or true.

56.5

Regardless of whether the imputations about the witness are well-founded or true, the legal practitioner shall not put such imputations to a witness unless the answers that might be given could reasonably be believed to be material to the credibility of that witness or to be material to any issue in the case.

56.6

A legal practitioner shall not, in the conduct of a criminal defence, recklessly attribute to, or accuse, a witness or other person of the crime with which the client is being tried. Such an attribution or accusation may be made only if the facts adduced, or to be adduced, in evidence, and the circumstances which the evidence suggest, afford a reasonable basis from which rational inferences may be drawn to justify at least a reasonable suspicion that the crime might have been committed by that witness or other person.'

See also paragraph 18.9.

14.7 The special role of the prosecutor

A prosecutor has a special role in the administration of justice. Prosecutors do not represent ordinary litigants. Contrary to popular belief, prosecutors do not represent the victims of crime or their interests. They represent the administration of justice and are obliged to work towards a just outcome. Prosecutors are bound as much as attorneys and advocates in litigation practice by the good-faith principle and the primary rule not to mislead the court on the facts. However, while legal practitioners in private practice also owe a professional duty to their client, a prosecutor does not owe a similar duty to the victims of crime or their families. This is due to the constitutional position of the office of the prosecutor.

14.7.1 Van der Westhuizen v S 2011 (2) SACR 26 (SCA)

In this seminal judgment Cloete JA referred to several foreign jurisdictions when explaining the special role and functions of a prosecutor. With reference to the Canadian case, *Boucher v The Queen* [1955] SCR 16 at 23–24,

> '[i]t cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before the jury what the Crown considers to be evidence relevant to [Page 284] what is alleged to be a crime . . . The role of prosecutor excludes any notion of "winning or losing"; his function is a matter of public duty which in civil life there can be none charged with greater personal responsibility. It

is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.'

With reference to decisions in Canada, South Africa, England, Australia and Ireland:

'[I]t is the obligation of a prosecutor firmly but fairly and dispassionately to construct and present a case from what appears to be credible evidence, and to challenge the evidence of the accused and defence witnesses with a view to discrediting such evidence, for the very purpose of obtaining a conviction. That is the essence of a prosecutor's function in an adversarial system and it is not peculiar to South Africa.'

With reference to the American case, *Berger v US* [1935] USSC 83; (1935) 295 US 78 at 88:

'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

The following principles can be distilled from *Van der Westhuizen v S*:

- A prosecutor representing the state in its role of dispensing justice has to be impartial.
- A prosecutor must act fairly and dispassionately.
- A prosecutor must construct and present a case from what appears to be credible evidence and, conversely, must not present a case that is not supported by what appears to be credible evidence. (This is the good-faith principle.)
- The role of prosecutor excludes any notion of winning or losing.
- A prosecutor may not strike foul blows.
- A prosecutor may challenge the evidence of the accused and defence witnesses with the view to discredit that evidence and to obtain a conviction.

14.7.2 S v Gidi and Another 1984 (4) SA 537 (C)

Special rules were laid down in *S v Gidi and Another* for the cross-examination by a prosecutor of a witness in a criminal trial, including the accused. Those rules may be organised as ten rules or principles as follows, quoting directly from the judgment:

Rule #1: the Impartiality principle – "Although cross-examination may and often must be thorough, complete and effective, cross-examination of an accused should always be impartial. It should not be biased or prejudiced against him . . ." [at 539F].

Rule #2: the Disclosure principle – ". . . and should never seek to conceal or withhold evidence or facts known to the prosecutor which may favour the accused in his defence or may be of a mitigating nature" [at 539F].

Rule #3: the Justice principle – "This follows from the purpose of cross-examination, and the duty of the prosecutor, which is to assist the court in its inquiry into the facts of the case and hence the proper administration of justice" [at 539F].

Rule #4: the Intimidation principle – "A proper cross-examination does not permit the gratuitous intimidation of the accused. A prosecutor should not bully an accused by insulting [Page 285] him, browbeating him or adopting an overbearing attitude which permits of no contradiction by the accused of what is put to him" [at 539I–540A].

Rule #5: the Ridicule principle – "A prosecutor should not unnecessarily ridicule an accused or taunt him . . . " [at 540A].

Rule #6: the Provocation principle – ". . . or offend his sensibilities to provoke him to anger, or play upon his emotions in order to place him at an unfair disadvantage and incapacitate him from answering questions to the best of his ability" [at 541].

Rule #7: the Interruption principle – "An accused must be given a fair chance to answer the question put to him. His answers must not be interrupted from the bar. The next question must not be put before the previous one has been fully answered" [at 540D].

Rule #8: the Intelligibility principle – "Questions should be in a form understandable to the witness so that he may answer them properly. Multiple questions, that is to say, interrogation which poses a series of questions for simultaneous answer should be avoided. . . " [at 540E].

Rule #9: the Adverse Comment principle – "A prosecutor must reserve adverse comment on the evidence of the accused, his demeanour, unreliability, lack of credibility or dishonesty for his address to the court, and not use it as a weapon for attacking the witness during cross-examination" [at 540G–H].

Rule #10: the Objectivity principle – "A prosecutor should not so identify himself with the case for the State that he loses his objectivity. He must not associate himself personally with an attack upon the accused in cross-examination. He should not. . . express his personal sentiments or emotions of hostility, distaste, repugnance or disbelief by venting them at the accused in cross-examination" [at 540 H–I].

(henceforth referred to as the *Gidi* principles)

The judgment in *Gidi* followed on a long series of similar cases such as *S v Van Lill* 1962 (2) PH H219 (T), *S v Booi and Others* 1964 (1) SA 224 (E), *S v Omar* 1982 (2) SA 537 (N), *S v Azov* 1984 (1) SA 808 (T), *S v Nisani* 1987 (2) SA 671 (O), *S v Nkibane* 1989 (2) SA 421 (NKA), and *Tshona and Others v The Regional Magistrate, Uitenhage and Another* 2001 JDR 0155 (E). All but *Tshona* were decided before the Constitution with its provisions relating to fair trial and the right to dignity came into force. One should therefore expect that the courts will now be even more vigilant in the enforcement of the *Gidi* principles and an accused's right to a fair trial as well as the accused and witnesses' right to have their dignity respected. And one would expect defence counsel to be alert and object every time a breach of a *Gidi* principle occurs.

The rules in the *Gidi* principles #4–10 should be applied, with suitable adjustments, to the cross-examination of prosecution witnesses by defence counsel and should also be applied by counsel for plaintiffs and defendants in civil trials.

14.8 Concluding remarks

The subject of ethics for counsel is far wider in its scope than a single chapter in a book like this can cover. It behoves every legal practitioner involved in dispute resolution in all its forms, but litigation in particular, to study the source documents, which should include, at the very lowest,

- the Constitution
- the CPA
- the rules of court (High Court, Magistrates' Court etc.)
- the LPA Code of Conduct

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- the NPA Code of Conduct
- the Judicial Code of Conduct

- the still applicable codes of conduct of the general Council of the Bar, the Law Society and codes of ethics and etiquette of the constituent Bars
- the Model Rules of Professional Conduct of the American Bar Association
- judicial pronouncements in South Africa as well as comparable jurisdictions – case law
- articles and opinions in legal-technical journals
- textbooks.

Chapter 15
Protocol and etiquette

CONTENTS

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15.1 Introduction

The conduct of counsel (whether an attorney or an advocate) in and around the courtroom is regulated by certain protocols, the ethics of the legal profession and some old customs. To the casual observer, there may appear to be a bewildering array of strange rules according to which the game is played. Some lawyers walk around in robes. Others wear formal suits, even the women. The lawyers on opposing sides talk to each other in muted tones; they even have tea together. They say, '*As it pleases the court*' and, '*With respect*' every now and then. They half get out of their chairs every now and then and bow to the judge, muttering something like, ''*s court pleases*'. They refer to each other as '*My learned friend*', even during heated exchanges. What, one may ask, is going on here?

What is going on is the interplay between good manners and the age-old customs of the legal profession. In the course of representing a client, counsel will encounter a number of persons of varying rank, ranging in social status from the judge to members of the court staff who are seldom acknowledged or recognised for the indispensable contribution they make to the administration of justice.

Paragraphs 61.3–61.12 of the LPA Code of Conduct now have specific provisions with regard to professional etiquette regarding the following matters:

- Introducing oneself to the judge (LPA Code of Conduct paragraph 61.4).
- Seating in court in accordance with seniority (paragraph 61.5).
- Treating judicial officers, court staff and others with civility and respect (paragraph 61.6).
- Remaining in court after completing one's matter (paragraph 61.7).
- Not approaching the judicial officer in the absence of the opponent (paragraph 61.8).
- Not indulging in personal remarks about opposing counsel and others (paragraph 61.10).
- Not placing additional material before the court after the matter has been argued (paragraph 61.11).
- Not setting out to catch opposing counsel off guard (paragraph 61.12).

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15.2 Counsel's relationship with the judge

You will encounter judges in court, in their chambers and in public. You may even play tennis or golf with a judge. How do you behave towards the judge in these different circumstances? How do you address him or her? How do you introduce yourself to the judge?

15.2.1 In court

These are the basic rules for your encounter with a judge in court:

-

Before your first appearance before a judge, you should go to his or her chambers and introduce yourself. There are two requirements: *One*, you should go in the company of your opponent, if it is an opposed matter. *Two*, you should go to the judge's chambers early, not a few minutes before the court is due to start. Then tell the judge who you are. There will probably be some small-talk. The rule that you have to go and introduce yourself to the judge does not apply in the Supreme Court of Appeal. In the Supreme Court of Appeal all the counsel in the case are called to the presiding judge's chambers for introductions and a chat before the appeal is called. Budget for about fifteen minutes to half an hour before the hearing is due to start.

- Men introduce themselves by their surname alone, for example, '*Judge, my name is Mazibuko and I am from the Pietermaritzburg Bar*.' Women are expected to give the judge an indication how they prefer to be called, 'Miss', 'Ms', or 'Mrs', for example, '*I am Mrs Singh and I am a partner in the firm Goodall and Singh, Judge*', and the judge would know how to address them in court.

- When the case is called in court, you will be expected to announce your appearance. This is done differently in various courts. In the Motion Court you would simply get up and say, '*I appear for the applicant M' Lord*.' In some divisions you will be required to state your name for the record. 'I appear for the applicant, M' Lady. My name is Sishuba, initials X E.' Speak clearly. In a trial you should similarly state your name and initials. In the Magistrates' Court it is customary for an advocate to give the name of the instructing attorney too, for example, '*I appear for the accused, Your Worship. My name is Samuels, initials A B, and I am instructed by Mr Paul Smith of Smith and Partners*.'

- Judges are called 'My Lord', 'My Lady' or 'M' Lord', 'M' Lady', as the case may be, and are referred to in some contexts as 'Your Lordship', or 'Her Ladyship' in exchanges between counsel and the judge. You should never address the judge in the second person, saying 'you' or 'yourself'. You should say, for example, '*May I ask your Lordship to look at Exhibit "A"?*' rather than, 'Could you look at Exhibit "A", M' Lord?'

- When referring to another judge, you should use the full title for that judge, for example 'His Lordship, Mr Justice de Villiers' on the first occasion and 'His Lordship' on subsequent occasions when you want to refer to him. Counsel should not refer to a judge as 'M' Lady's Brother (or Sister), De Villiers J'. Only judges are allowed to refer to their colleagues in that fashion.

- There are certain phrases counsel use out of deference to the bench. When they start addressing the court, they would say, '*May it please Your Lordship*' or '*May it please the court*'. This is repeated at the commencement after any adjournment. What you have to do, is to catch the judge's eye, say, 'May it please Your Lordship', and [Page 291] proceed where you had left off before the adjournment. You also use this phrase before every new activity or phase of the trial (or other hearing). For example, when you get up to cross-examine, you would catch the judge's eye, say, 'May it please M' Lady', and then turn your attention to the witness.

- When the judge has made a ruling, counsel usually acknowledge that by rising, if they are not already on their feet, and by saying, '*As the court (or M' Lord or M' Lady) pleases*.' Both counsel should do this. If you are sitting down when the ruling is made, you should half get up and say those words. This is known as the 'semi bum-lift', which explains how far you need to get out of your chair. The emphasis is on understatement rather than a formal bow.

- Be absolutely punctual for your appearance, not only in the morning when the case is due to start, but at every resumption of the hearing.

- When the judge enters court, stand up, face the bench and remain standing until the judge has bowed and sat down. Return the bow. The bow is no more than an acknowledgement that you (judge and counsel) are engaging with each other, or disengaging when you bow upon

leaving the court. Remember, every counsel robed and present during a hearing is at the service of the judge and could be called on for assistance at any time. That is why you have to turn and bow when you leave while the court is in session. If the judge needs you to remain, he or she will tell you.

- If you appear in a court where people come and go, like the Motion Court, enter quietly, face the bench and bow slightly towards the judge. Then take your seat as unobtrusively as you can. Do not, at any time, walk between counsel addressing the court and the judge. When you leave the court while it is still in session, reverse the process and bow in the direction of the judge as you leave. Do not, under any circumstances, turn your back on the judge.

- You should not leave the court before the judge if you are the last counsel in the court. In some divisions you are expected to stay even when there is one other lawyer left. The reason is that there should always be two counsel in court so that the judge can call for any assistance he or she may need from the second counsel present, even if they have nothing to do with the case being heard. Find out what the protocol is in your division and in every other division in which you are due to appear.

15.2.2 In chambers

Some judges remain strictly formal in their chambers while others are far more relaxed than you would expect. It is best to err on the side of formality. Don't call the judge by his or her first name unless you are invited to do so. Here are a few of the unwritten protocols for visits to a judge's chambers:

- Never see a judge in your opponent's absence if the matter is opposed.

- Make an appointment through the judge's registrar first. State your name and the purpose of the visit. Wait outside until you are called into the judge's chambers.

- In chambers a judge is addressed as 'Judge', not as 'M' Lord' or 'M' Lady'.

- If the judge already knows you, greet him or her and state the purpose of your visit. '*Good morning, Judge, I'm sorry but I have to trouble you with an urgent application that can't wait*', ought to do the trick. If you haven't been introduced to the judge [Page 292] previously, introduce yourself and follow the judge's cues. The judge will get to the point by saying something like, 'Well, what brings you here?' or, 'What do you have for me today?'

- Some judges do not allow counsel to discuss anything relating to the case in chambers. They take the view that anything you have to say to the judge should be said in court in full view of the parties and the public. There is merit in this stance. Make sure that the purpose of your visit is legitimate. If in doubt, say what needs to be said in court.

- Do not say anything in the judge's chambers that may compromise your client's case or embarrass you in court. In fact, you should not really discuss anything in the judge's chambers that you cannot discuss openly in court.

15.2.3 Away from court

You could meet judges almost anywhere; at the supermarket or the opera, at the golf course or halfway up Polly Shortts in the Comrades Marathon. How you interact will depend on the situation and how well you know each other. There are only a few guiding principles. The first is to leave your client's cases at the office or chambers. Don't talk to the judge about them. He or she may be allocated the trial. The second is to be unfailingly polite. Remember you may have to face the same

judge on Monday when you have a tricky point to argue. Make an effort to engage them in the activities of the Bar or Law Society and your annual golf day or road relay. Getting to know judges socially is one way of overcoming your natural fear of them. And your efforts will be appreciated. Don't forget the retired judges. There is a wealth of experience there that could be tapped for the Bar and the Law Society's training programmes and for mediation and arbitration procedures.

15.2.4 Dealing with difficult judges

A subject you should not have to read about in a book like this is how to deal with a difficult judge. Unfortunately there are judges who bully counsel, not realising that by doing so they are unlikely to get the best out of counsel. One biographer described a certain American Supreme Court Justice as the '*loudest, most cantankerous, sarcastic, aggressive, intemperate, and reactionary representative*' of a particular grouping within the court. When reading that description, you may quite involuntarily think of judges in your own division of whom that might be said. An appearance before them is often an ordeal, even when the abuse is being heaped on your opponent's head rather than your own.

It should not be like that. There is no easy way to deal with a judge like that. On the one hand you have a case to conduct and the art of persuasion is compromised by an aggressive response to the judge. On the other hand, the bullying may result in your client's case not receiving the attention it deserves. So how do you do your duty without losing the case? There is no easy answer. You may need the wisdom of Solomon, the patience of Job and the fortitude of David, all at once. The circumstances will hopefully point you in the right direction.

No matter how severe the provocation what might feel like a personal attack on counsel, counsel should stand up for their rights with purpose and with dignity. When the judge, after harassing you all day, shouts, 'Don't look at the clock Mr M. Don't you dare look at the clock again!', you may have to take a deep breath and carry on with the case. [Page 293] Try not to look at the clock again. If the judge says, 'I don't like the look on your face, Mr H. In fact, I have never liked the look on your face', you may have to accept the remarks for what they are; meaningless abuse.

If the abuse goes so far that you feel unable to present your client's case, you may have to think of a response which will make it clear to the judge that you are not cowed and that you intend to do your duty. '*This case is difficult enough without the abuse Your Lordship is heaping on my head. I have the right and the duty to argue this case and I intend to do my duty*', may be a suitable response. Saying 'If Your Lordship won't hear my argument, I will have no choice but to deliver it in the Supreme Court of Appeal', while having a nice ring about it and may make for some lively discussion in the advocates' common room, is not quite the right response, for a number of reasons. For one, your client is entitled to have his or her case heard at first instance, and again on appeal, if it comes to that. For another, if you do not argue the point then and there, the bully will have prevailed. You should never allow that to happen.

In a very bad case you may need to enlist the help of the Chairperson of the Society of Advocates, if you are a member, or the Law Society, if you are an attorney. You may even have to go and see the Judge President. One trick that works like a charm is to ask for permission to see the judge in chambers. Take your opponent with you. In the privacy of the judge's chambers you may tell the judge that your client may wonder whether anything you have done in the past or on the day has upset the judge to the extent that your client's case may be prejudiced. Offer to withdraw from the case if something you have done has given the judge a reason to treat you so badly. The judge will get off your back promptly. . One has to hope it doesn't get so bad that you have to have this discussion with the judge in open court, but if it does, you will need a lot of strength of character and an equal measure of tact. When in doubt, ask for an adjournment, calm down, ask a senior colleague for guidance and then do your duty, even if it means asking the judge to withdraw from the case. But before you ask a judge to recuse himself, first take a moment to read the cases in the Law Reports on the subject. An application for recusal is a serious step to take, and you had better be sure of your facts and the law before you venture there. Ask for time. Prepare fully. Do not say anything when you are still angry with the judge. Remove all tone and emotional language from your presentation.

15.3 Counsel's relationship with other legal practitioners

There are some fairly simple rules for your conduct towards other legal practitioners during the court's sittings.

15.3.1 In court

- Play the ball, not the man (or woman). Your opponent is not the enemy. Treat him or her as you expect them to treat you.

- Don't address your opponent directly in court. Don't say, 'Hey, stop leading, will you!' All your remarks have to be addressed to the court. Stand up and say, '*M' Lord, I object. The question is leading*.'

- Do not make *sotto voce* remarks while your opponent is speaking. If your opponent does it to you, say to the judge, '*M' Lady, my learned friend apparently has an objection*', and sit down. Let your opponent explain what he or she has been up to.

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- During the hearing of a matter the lawyers refer to each other as '*my learned friend*', '*my learned friends*' or '*our learned friends*' as the circumstances require. Referring to an opponent by name alone is regarded as a breach of etiquette and may in some cases be taken to be a deliberate slight.

- Lawyers disagree with each other's case or argument all the time. It is what we do. The way you do it should not be offensive and should make your points without snide remarks or allusions against the opponent. 'My learned friend's argument demonstrates a lack of understanding of the basic principles of the law of contract', is not acceptable, no matter how many times you say, 'with respect'. If you said, '*I disagree, with respect, with the construction placed on clause 11 of the contract*', you could still make your point firmly while remaining courteous. Conversely, an attack on the point you have made is not an attack on you. Don't be tempted to retaliate on a personal level. If it is at all possible, deal with the issue without mentioning your opponent and his or her argument while providing the court with your version of the construction of clause 11 of the contract. As a matter of advocacy, an opponent's argument may gain traction when you spend too much time trying to defeat it. You can win the round without referring to the opponent or their argument.

- Try to attack the point without attacking counsel who made it. Phrase the argument subtly so that the point of attack shifts away from the opponent to the issue. 'I object M' Lord, on the ground that my learned friend is leading', concentrates the attack on your opponent. '*I object M' Lady, on the ground that the question is leading*', shifts the attack to the form of the question instead.

- Try to make your points with moderation and without excessive use of adjectives and adverbs. Calling your opponent's points 'catty', 'silly', 'petty' and so on, is catty, silly and petty. Avoid words like 'clearly', 'obviously' and 'without doubt'. Exaggeration won't win the argument for you; on the contrary, it will expose your argument to greater scrutiny.

15.3.2 Outside court

There is another lawyer on the other side of almost every case you are going to handle. That lawyer may be a prosecutor, someone from one of the other firms in town, or a colleague at the Bar. It might even be your brother or your best friend. If you are going to make an enemy of every lawyer

who appears against you, you are going to run out of friends very soon. You should therefore conduct yourself in exemplary fashion when dealing with other lawyers, in and out of court. There are some protocols to help you steer clear of trouble:

- Respect seniority without being overawed by it. Senior advocates rank according to the ranking set out in their Letters Patent. Other advocates have three different ranking regimes, depending on the purpose of the business at hand. They rank generally according to their date of admission as advocates. In practice matters they rank according to the date of their becoming a member of the relevant Society of Advocates. This ranking determines where a rule 37 conference should be held, for instance. With regard to group matters, such as who gets which room, advocates rank according to the date they joined the group. Attorneys generally rank according to their date of admission, but you may find that a partner in a firm reckons that he or she outranks an attorney who is not a partner (or sole practitioner), even though the latter may have been admitted earlier.

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- Preserve confidences. It is an unwritten rule of practice that, when lawyers on opposite sides discuss a case, their discussion is on a 'without prejudice' basis unless otherwise agreed. It may be safer, nevertheless, to remind your opponent that your discussion will be on a without prejudice basis. Make sure that the without prejudice basis of the meeting is established before you start the discussion.

- If an opponent asks for a favour which could be granted without any prejudice to your client, grant it if you can. An extension of time to do something required by the Rules or the removal and re-instatement of a trial or other hearing for a date that suits your opponent better, falls in this class. Ask for the reason for the request and grant the favour unless there is a good reason not to. Don't refuse a *bona fide* request just to be difficult or to settle an old score.

- Treat your opponent with the utmost respect and courtesy, especially if his or her lay client is present. Belittling an opponent in front of his or her client is not acceptable.

- Don't speak badly of other lawyers, especially in the presence of clients or members of the public. They, the other lawyers, are your colleagues. Do you want the world to have a poor opinion of your profession or of the administration of justice generally?

- Avoid sharp practice.

- If you have to deal with a difficult opponent, humour them without crawling. If nothing else works, avoid them. You can run an entire trial without engaging your opponent. You should not allow a bad-tempered opponent affect the quality of your day.

15.3.3 The relationship between senior counsel, junior counsel and the instructing attorney

The instructing attorney is the professional client. He or she is called the 'instructing' attorney because he or she has the right to tell counsel what to do (not how to do it, though). The instructing attorney is in charge of the case and can and should give his or her own input at all stages of the litigation. The attorney is responsible for the administration of the case.

As between counsel, junior counsel is generally responsible for the paperwork, meaning the first drafts of pleadings, opinions and written advice. Senior counsel has to guide junior counsel in this area. Junior counsel also has the duty to assist the attorney in assembling the facts (interviewing witnesses, preparing demonstrative exhibits and so on).

Senior counsel is responsible for the conduct of the trial itself. He or she can call on junior counsel for assistance in the trial preparation and may even require junior counsel to lead or cross-examine

some witnesses and to present part of the argument after giving junior counsel a fair warning. Traditionally junior counsel has to research the law while senior counsel is responsible for the fact analysis. This division of responsibility apparently has its origins in the belief that the law is easy to find but the facts are more difficult to cope with.

These distinctions are often blurred in practice. The lay client is entitled to a dynamic, productive and professional relationship between the attorney and counsel.

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15.3.4 The relationship between defence counsel and the prosecutor

These principles apply with a few small adjustments to the relationship between defence counsel and prosecutors:

- Conferences with prosecutors take place at their offices, not yours.
- In such a conference the investigating officer may have to be present to fulfil a role similar to that of the instructing attorney. Three important rules follow from this:
  - Treat the investigating officer with the degree of courtesy and respect due to his or her office.
  - Remember that the investigating officer may be a witness in the trial and ensure that what you say in his or her presence may be used against the accused.
  - Ensure that the discussion is 'off the record', without prejudice.
- Some disclosures simply cannot be made 'without prejudice'. Certain kinds of knowledge just cannot be ignored or forgotten. Even an otherwise innocent statement could lead to a whole new line of investigation or defence. Put a guard in front of your mouth in these meetings.
- When a plea and sentence agreement is on the table, act with care. Do not make false claims or statements and ensure that you do not mislead the other side. Consider whether you have a duty to make disclosures of certain facts. Remember, a plea and sentence agreement is a contract and it may well be reviewed and set aside on the grounds of fraud or coercion or some other ground that vitiates contracts.
- The atmosphere of a criminal case is more likely to lead to emotional outbursts and a loss of objectivity and composure on the part of the prosecutor or counsel. You need to be especially careful to maintain your objectivity and your composure when dealing with your opponent in a criminal case. Remember that the complainant and the accused may have strong feelings and may express them or behave badly towards defence counsel or the prosecutor, as the case may be. Calm them down when that happens and explain to them that defence counsel or the prosecutor 'is just doing their job'.

15.4 Counsel's relationship with witnesses

All witnesses are to be treated with respect and with due regard to their right to dignity. In some ways witnesses are guests of the legal profession when they come to court to give evidence. Make

your own witnesses comfortable. Be courteous to opposition witnesses. All witnesses should be addressed formally, as 'Mister', 'Mrs' or 'Ms', or as 'Sergeant', 'Professor' or 'Doctor' for people with ranks or titles. Children may be addressed by their first names, but only after permission has been obtained from the judge.

When you question a witness, you are entitled to be firm, but never rude. Rudeness can take many forms, including turning your back on the witness, not making eye contact, and even in the tone of voice you use. Never shout at a witness or point your finger at him or her. If your conscience doesn't stop you, the judge will. This happened in a trial in Durban:

> Judge: '*Don't bully the witness!*'
>
> Counsel: 'M' *Lord should not speak to senior counsel like that*.'
>
> Judge: '*I'll stop speaking to you like that when you stop bullying the witness*.'

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It is hardly ever appropriate (or good advocacy) to call a witness a liar. *First*, if the witness is a liar, he will deny it. If he is not, he will also deny it. *Secondly*, experienced trial lawyers know that you can get away with calling one witness a liar, and in a bad case maybe two. But by the time you call the third witness a liar, the probability is that the court is going to find that your client is the liar and that the other three witnesses were telling the truth. It is also inappropriate and unethical to call a witness a liar to his or her face while they are in the witness box – see in this regard the discussion of the *Gidi* principles in chapter 14.

15.5 Counsel's relationship with court staff

Courts are staffed by a variety of officials without whom the wheels of justice would grind to a halt very fast; the registrar and all his or her staff in the General Office, ushers, security officers, stenographers and the judges' secretaries, also referred to as registrars. Most of the time these people melt into the background. At some stage you are going to need help from the court staff, so it is suggested that you get to know them. Get to know their names, greet them when you encounter them at court and elsewhere, make small-talk. You would be surprised at the returns for such a simple investment.

The court's staff are not your personal lackeys, there to make phone calls or photocopies for you. If you need a favour, they will be sure to help, but approach them with the attitude of one needing a favour, not one giving orders.

15.6 The dress code for different courts

In some courts lawyers wear robes (or gowns) and in others they wear suits. At an inspection *in loco* you may even see a lawyer crawling around in the engine room of a ship wearing overalls. Your dress code is determined by the occasion.

Advocates robe for the High Court, Courts Martial and any other court of similar or higher status than the High Court. In any other court or tribunal, advocates wear suits. The dress code for the High Court is dark trousers or skirt, white shirt or blouse, black shoes, bands, court jacket and robes. The court jacket is worn buttoned up. Senior counsel wear their own distinctive robes and jacket. Suits for appearances where robes are not required are formal, usually dark blue, charcoal or black, and are worn with a tie and with the jacket buttoned up.

Attorneys wear their robes (which are distinct from academic gowns and advocates' robes) in all courts where they appear, but an attorney does not robe for the High Court or any other court when

acting as instructing attorney. Robes are worn over dark suits, buttoned up, white shirts and conservative ties. Women dress in similar style but without the ties. In the lower courts some relaxation is allowed with regard to the colour of the shirt and the style of the tie.

With the demise of the formal robing rooms at the various courts, advocates have fallen into the habit of dressing for court in their chambers. This means that they have to walk through public streets dressed like penguins. To avoid looking completely foolish, they carry their gowns either over their arm or in their red or blue bags. There is a different custom in Cape Town where advocates robed at chambers and walked to court fully robed in protest against segregated robbing rooms for different races. Cape Town advocates still maintain that tradition. You should not put your robes on in court and should not take them off while you are still in the courtroom either. The court is not a robing [Page 298] room. Try to find a place out of the public eye and put your robes on before you enter the courtroom. Return to your private place to take them off after you have left the courtroom.

15.7 Mode of citation of legal authorities

Authorities should be cited in a way that is clear, consistent and accurate. There are five main categories of authorities:

- *Statutes:* Statutes range in status from the Constitution down to municipal ordinances. Every statute is referred to in full the first time and by its title or number after that. For example: The Prescription Act 68 of 1969 may be referred to in your subsequent address or later in your Heads of Argument as 'the Prescription Act' or 'Act 68 of 1969'. Since most people do not remember the numbers you rattle off one after the other, you may well think that it would be more effective to refer to the Act by name rather than number, especially if more than one statute features in your case.

- *Decided cases:* A similar principle applies to case references. The first time you refer to a case you should give its reference in full, for example, *Kent v South African National Life Assurance Company* 1997 (2) SA 808 (D). When you refer to the case again, in your argument or in your heads of argument, you may shorten that to the names of the parties, or one of them. You could say, or write: 'In *Kent v SANLAM* the court decided that . . .', or, '*Kent*'s case is an example of . . .' Unreported cases are referred to by reference to the parties, the court, the case number and the date of judgment, for example, *Shabalala v ABC Limited, Durban and Coast Local Division* Case no 1122/2000, 23 December 2000. If you intend to rely on an unreported judgment, you should provide a copy to your opponent and to the judge. There are, of course, a number of different law reports in South Africa, dating back to the early nineteenth century. A list, with their modes of citation, appears in HR Hahlo and Ellison Khan *The South African Legal System and its Background* Juta (1973) at 293. Since this excellent book was published in 1973, a number of new reports have seen the light, notably the specialist reports for constitutional law, criminal law and labour law. A digital service known as SAFLII (South African Legal Information Institute) which publishes judgments on the internet almost as soon as they are released is now available. Note that they have stipulated terms and conditions for the use of their service. The specialist reports do not all follow the same rules for their own citation. An indication is usually given in the foreword how the cases reported should be cited.

- *Textbooks:* Textbooks are cited by giving the following details: author or authors, full title, edition, publisher and year of publication, for example, LTC Harms *Amler's Precedents of Pleadings* 9th edn LexisNexis (2018). (Some prefer to give the place of publication rather than the name of the publisher.) In subsequent references that could be shortened to the name of the author or the title of the book, for example, *Amler's Precedents of Pleadings*. (This particular book has retained its original identity and is mostly referred to as *Amler*.)

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Old authorities: Old authorities could be statutes, decided cases, textbooks, theses, collections of judgments and opinions and even lecture notes and case notes. There are two invaluable sources that identify these works. The one is AA Roberts *A South African Legal Bibliography* Pretoria (1942) and the other is JC de Wet *Die Ou Skrywers in Perspektief* Butterworths (1988). Roberts may guide you to the collection or library [Page 299] you can find individual items. De Wet, on the other hand, deals with the content and place of each old authority in the great scheme of Roman-Dutch law. There is no universal rule for the citation of these old sources, but in case of doubt I suggest you cite the work by giving details of the author, title, edition, year of publication and publisher, if it is a textbook. Some works have become so well known that they are cited by reference to the name of the author and the chapter and paragraph in the text where the relevant passage appears, for example, *Grotius* 3.24.1 (for H de Groot *Inleidinge tot de Hollandsche Rechts-geleerdheid* The Hague (1631) Book 3 chapter 24 paragraph 1) or *Voet* 2.1.1. (for J Voet *Commentarius ad Pandectas* published in two parts in 1698 and 1704 respectively, Book 2 chapter 1 paragraph 1). If you rely on a translation of the Dutch or the Latin, as the case may be, you should give details of the translation. (It could even be your own.) Remember also that there are often errors in the best translations.

- *Theses and other academic writings:* A thesis can be referred to by citing the author, its title, the university to whom it was submitted, the degree concerned and the year. Articles in law journals should be cited according to the style advised by the journal concerned. The editor usually gives an indication how the journal should be cited in the foreword.

15.8 Practical advice

The things counsel should or should not do are legion. The problem is not learning how to conduct yourself as counsel; the problem is that you learn these things too late, after having made a fool of yourself first. There are many little-known rules and matters of common sense or courtesy you should know before you start practising. Here are some of them:

- *A lawyer should not, under any circumstances, denigrate the legal system, the courts, an opponent or a judgment:* Just think about it: How can you run down the system in which you work without reducing your own status? That does not mean that the system is perfect. Work for its improvement according to the rules. If you don't agree with a judgment, take it on appeal or keep quiet. If the system is deficient in any respect, work for its improvement through your professional society or other formal structures.

- *All lawyers have to be adherents to the discipline of law:* We should therefore always be seen to obey the law, even the little rules everyone else seems to ignore like those irritating 'Don't walk on the grass' signs at the local Magistrates' Court. Some rules are silly and some are positively obnoxious. Nevertheless, a lawyer should not be the one to test the rule by breaking them and then attacking their validity. You can attack the validity of the rules when defending a client accused of a breach.

- *Get used to losing:* Even the best advocates lose about 40% of their cases. The more experienced advocates attract the less worthy and more difficult cases and the toughest opponents.

- *Get used to the idea that you cannot perform miracles:* Some cases cannot be won.

- *Get used to the fact that, in criminal cases, the clients are often rogues:* Even in civil cases the clients are not always nice people.

- *Accept the fact that you are bound to make mistakes, some so critical that it will mean the difference between winning and losing:* Every advocate has a story to tell about [Page 300] how he or she lost a case by making a mistake. Learn from the mistakes you make; don't be consumed by feelings of guilt or inadequacy. Litigation is not an exact science. Like any other human activity, it is less than perfect. Hindsight is not the correct basis for an evaluation of your performance. The proper test is whether you have prepared the case as fully as your instructions allowed and whether you acted with the degree of skill expected of counsel of your standing. Reflection is in order. A guilt trip is not.

- *Ignore abuse:* Brace yourself for the inevitable abuse, even threats, which may be heaped on your brow by a dissatisfied client, the other side or even a bystander. Some threats may have to be taken seriously.

- *Behave soberly when wearing or carrying any part of counsel's uniform in public*.

- *Don't become a cell-phone terrorist:* Leave your cell-phone at chambers, or if you really have to have one available at court, leave it switched off in your bag. Your cell-phone could become a source of irritation to your colleagues and to others. Clients do not take kindly to a lawyer who is always on his or her cell-phone as soon as the court adjourns. Are you not supposed to be conducting that client's case? Who is paying for the time you spend on the phone anyway?

- *Don't fraternise with the opposition at court:* Adopt a formal approach when the clients are present.

15.9 How to deal with mistakes

Everyone makes mistakes; it is a rather endearing and equally enduring human trait. Some deal with mistakes better than others; this is a skill to admire and to acquire, if you can. The mistakes you are likely to make are probably going to be the result of inexperience, inattention, forgetfulness, a lack of language or grammar skills and errors of judgment. There is not much you can do about mistakes of this order except to smile, acknowledge the slip, apologise and then to learn from the experience. When others make similar mistakes, your reaction ought to be similar, smile with them, accept the apology with grace, and learn from the experience.

Counsel's emotions may be overcome. Reading a personal letter in a case charged with personal feelings may well cause your voice to tremble; stop, take a sip of water, then start over. But if you get angry you should stop for a longer time; an angry boxer gets knocked out quickly. There are even cases where counsel fainted in court. There isn't much you can do when it happens to you, but perhaps you should mention that you are feeling unwell as soon as you start feeling a fainting spell approaching.

You could make some serious mistakes too. It isn't easy to state a general rule when that should happen but you could start by trying to avoid them. Here are some examples of more serious mistakes:

- *Double-dating:* This happens when you accept two or more briefs for appearances in different courts. This type of conduct is not only unethical – you make a false promise to one or more of the clients that you will appear for them at the appointed time – but dangerous. You could be convicted of contempt of court and the Bar or Law Society may take disciplinary steps against you. Your client may even sue you for breach of contract.

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Drafting an inadequate pleading: Cure the defect at the earliest opportunity by an amendment.

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- *Failing to put an essential part of your case to an opposing witness:* This error often results in a considerable amount of embarrassment when your own witness or client is criticised by opposing counsel. 'This was never put to my witnesses because this version was a recent fabrication. It was created in the witness box when the defendant realised that he was in trouble', your opponent argues. What can you do? There is no way out that does not leave egg on your face, but you cannot allow your witness or your client's case to be criticised (or rejected in an extreme case) when the mistake was yours. So you have to intervene. The way to do it is to ask for a short adjournment to discuss a matter of importance with your opponent. If your opponent or the court won't allow you that opportunity, you will have to give your explanation in open court. '*I'm afraid my duty to the court requires me to place on record that I have made a mistake. Although my instructions include the version given by my witness (or the defendant), I overlooked that when cross-examining and did not put it to the witness as I should have done. I tender sight of my written instructions (or the witness's statement) to my learned friend and the court*.' This is another reason to have all your witness statements and signed by them.

- *Forgetting about that Motion Court brief:* Try to remember. There aren't many advocates who can say that they have never overlooked a Motion Court appearance. A lot of humble pie may have to be eaten in such a case. The way to avoid embarrassment is to have an infallible system. A digital diary is probably as close to infallible as you can get. But you still have to key in the right information and then consult the diary every morning. It all comes down to your own commitment.

- *Completing heads of argument late:* This is a bad error. If you are briefed too late to enable you to prepare the heads in time, you should tell the instructing attorney (or client) that the heads will be late and assist in making such arrangements with the opposition and the court as may be required. Don't ignore the problem and pretend that nothing has happened. In a bad case, you may be required to make an application for condonation of the late filing of the heads. If your other commitments (professional or personal) are too much for you to cope with so that you simply do not have the time or energy to prepare the heads in time, you are going to have to re-arrange your priorities. It is unprofessional to accept an instruction if you cannot do the work in time.

Chapter 16
Opening statement

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16.1 Introduction

Counsel* for the plaintiff has an opportunity to address the court before leading any evidence, and there is a similar opportunity for counsel for the defendant after the plaintiff's case has been closed and before defendant's counsel leads any evidence for the defendant. The same rights are available in a criminal case to the prosecution and defence.

Rule 39(5) provides:

> 'Where the burden of proof is on the plaintiff, he or one advocate for the plaintiff may briefly outline the facts intended to be proved and the plaintiff may then proceed to the proof thereof.'

In terms of rule 39(6) the defendant's counsel may address the court at the close of the plaintiff's case. Rule 39(9) provides:

> 'If the burden of proof is on the defendant, he or his advocate shall have the same rights as those accorded to the plaintiff or his advocate by sub-rule (5).'

This takes care of the case where the defendant has the burden of adducing evidence first.

In criminal cases sections 150(1) and 151(1) of the Criminal Procedure Act 51 of 1977 (CPA) similarly provide for opening statements by the prosecutor and defence respectively.

The opening statement is a neglected step in the litigation process. Its tactical value is often under-estimated and the opportunity to use an opening statement to begin the process of persuasion is often not exploited fully. Lindquist (*Advocacy in Opening Statements* Litigation Vol 8 No 3) is of the opinion that opening speeches determine the outcome in 50%, and maybe as much as 85%, of cases. The legendary barrister, Sir Norman Birkett ('The Art of Advocacy' *American Bar Association Journal* Vol 34 (1948)) explained the principle as follows: Fact finders are unlikely to forget their first impressions of the case, even if subsequent cross-examination should weaken the evidence.

Lindquist and Birkett were referring to jury trials and their views should be tempered for the fact that judges are trained not to make up their minds before all the evidence and argument has been considered, but there is an important lesson in their remarks. [Page 304] The opening statement can play an important role in the process of persuasion. In fact, it is the beginning of the process of persuasion by means of oral advocacy.

The opening statement is also an important link between the preparation for trial and the production of the evidence. Its importance in the overall context of the trial can be seen as follows:

- The issues are identified by the exchange of pleadings.

- The relevant evidence is identified during the preparation process.
- During the opening address the court is introduced to the issues and the evidence to be led on the issues.
- The evidence is then produced in evidence-in-chief and tested in cross-examination.
- In the closing argument, counsel joins everything together in a comprehensive argument that relies for its success on all the prior stages having been conducted properly.

Footnotes

* 'Counsel' means the prosecutor, attorney or advocate who conducts the trial.

16.2 Purpose of an opening statement

The basic purpose of an opening address is to explain to the judge what the case is about to enable him or her to follow the evidence. You give the court an indication what case you intend to establish and how you intend to do so with the evidence at your disposal. At the stage when counsel has the opportunity to open the case, he or she will be fully informed on the facts to be proved, the evidence available to establish those facts, the theory of the case to pursue and the tactics to employ. You will have done a fact analysis and legal research. You will know where the onus lies and precisely what evidence is available and admissible in respect of each issue. The judge, on the other hand, is ignorant of all of this, except for the issues that appear from the pleadings in the court file.

If the judge's ignorance of the facts and evidence of the case were to be relieved piecemeal – by the introduction of each piece of evidence through the individual witnesses and documents – the judge might get a skewed view of the case. The judge may not follow the evidence at all. The more difficult the case, the less likely the judge is going to be able to follow. If, however, the judge were to have been placed fully in the picture in a brief but well-structured opening address, he or she will have a better grasp of the issues and the importance of each piece of evidence as it is introduced.

The purpose of an opening address is to facilitate the process of persuasion. In order to persuade the judge to return findings of fact favourable to your client, you have to put the judge in the picture, so to speak, so that the significance of each item of evidence will be apparent to the judge when you produce that evidence. The process of persuasion starts with the opening address.

The opening address is not an argument. It is an opportunity to outline the facts *intended to be proved*. The emphasis is on brevity. The opening address may not stray outside of the facts which are made relevant by the pleadings, but must be a brief outline of those facts rather than a detailed discussion. The length and content of the opening address are determined by the exigencies of the particular case.

According to Johannes van der Linden, the purpose of an opening address is to make the judge 'welgezind, opmerksaam of leerzaam', that is to say, 'well-disposed, attentive and informed'. How you achieve these aims, depends on structure and content.

16.3 Structure and content of an opening statement

For an opening address to be informative and persuasive, it has to have a logical structure. To be informative, your opening address needs to tell a plain story in clear language. It must also put all the important parts of the story in their proper context; [Page 305] there must be order and there must be clarity. To be persuasive, your story must be told in such a way that everything is relevant and falls into place naturally, without argument or long explanations. The story must be enticing and create an eager anticipation to hear the evidence. It must give a hint of interesting things to come.

The structure for an opening address for the plaintiff or the prosecution differs from that of the defendant or defence in minor aspects only – the same principles apply to both. At the stage when the opening address begins, counsel for the parties will have announced their appearances and formalities (like the duration of the trial and who has the duty to begin) will have been decided. The following structure can be adopted by counsel for the plaintiff and also by counsel for the defendant where the defendant has the duty to begin:

- At the commencement of the opening address, state what the cause of action is, for example:

  '*M' Lady, this is an action for damages for personal injuries arising from a motor collision.'*

  '*M' Lord, this is an action for a permanent interdict and damages arising from the unlawful use of confidential information by the defendant in breach of a contractual provision, alternatively in breach of the principles of the actio legis Aquiliae.'*

- State the material facts of the claim (or defence, if the defendant is opening in a case where the defendant bears the onus of proof).

- Identify, in summary form, the issues between the parties by reference to the pleadings.

- Indicate the extent to which the issues have been reduced by any subsequent agreement, such as at the rule 37 conference.

- Indicate where the onus of proof lies on the relevant issues and what has been agreed between the parties in this regard. If there is any dispute about where the onus lies, tell the judge. (The parties were supposed to discuss this at the rule 37 conference.)

- Summarise the facts for the plaintiff (or the defendant, if the defendant is opening). During this part of the opening address, the facts which constitute the proof on which the court will ultimately be asked to rule in the plaintiff's favour are given in chronological order. The facts must be stated simply, without adornment, so that they are allowed to speak for themselves. Argument and exaggeration are to be avoided. The tone is moderate, even understated. Arrangement and order are crucial. This is particularly so where the facts and documents of the case are numerous and a chronological arrangement is necessary for a proper understanding of the matter. The time to create this order in the mind of the judge is during the opening address, even if it means that the chronology has to be set out in a written schedule.

- Identify the witnesses you will call and summarise the evidence each will give. Deal with the oral and documentary evidence very briefly.

- Indicate to what extent, if any, the evidence of particular witnesses or the contents of relevant documents are common cause. If necessary, hand in bundles of documents that are to go in by consent. Explain any agreement with regard to the content of the documents.

16.4 Examples of opening statements in a criminal case

The opening address for the prosecution in a criminal case in the Magistrates' Court could be structured as follows:

(Pretend you are the judge and answer the following question at the end of this exercise: 'Do I now have a fair idea what this case is about and how counsel intends to prove the case?')

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Table 16.1 Opening statement for the prosecution (in terms of section 150 of the CPA)

What to do	Comment	How to do it
State the charge.	1 Give the section of the relevant Act precisely, including the subsection. 2 Then give the common term for that offence, e.g., 'driving under the influence' or 'unlawful borrowing'.	*'May it please Your Worship. The accused is charged with one count of theft. The State alleges that he stole a backpack worth R150.00 from Three Rings Sports on 12 December last year.'*
State where the onus of proof lies and what the standard of proof required is.	The onus is usually on the prosecution, and the standard is proof beyond reasonable doubt.	*'The onus of proving his guilt beyond reasonable doubt rests on the State.'*
State the elements (material facts) for the offence charged.	This requires the type of analysis done in preparation for trial. (See chapter 13.)	*'The elements of the offence are that* *1 the accused* *2 on 12 December last year* *3 at Three Rings Sports in* [name of town] *4 unlawfully* *5 and with the intention to steal it* *6 removed a backpack (from Three Rings Sports)* *7 belonging to Three Rings Sports or in its lawful possession.'*
Briefly state the facts.	1 Concentrate on what the accused did. The case is about the accused's actions. 2 Describe the sequence of events. Maintain a chronological sequence. 3 Ensure that the facts which undermine the anticipated defence are given. 4 Understate your case.	*'This is what happened: Three Rings Sports is a self-service store. The accused came into the store carrying a similar backpack to the one stolen. He walked over to the rack where backpacks were displayed. He put his own backpack down on the floor and selected a backpack after handling a number of the backpacks on the rack. He then slung the backpack he had selected over his shoulder and walked around inside the store, looking at other items. This went on for about 7 minutes. Then he walked past the till point at the door and out the store with the backpack still slung over his shoulder. He was stopped by a store detective. The price tag, marked R150,00, attached to the backpack's strap was concealed under the strap. The accused then said that he was sorry and that he had made a mistake. The accused's own backpack was opened in his presence. It contained an old newspaper. The police were called and he was taken away by them. When he was charged at the police station, the accused handed over his possessions and he was found to have only R45,00 in cash on him.'*

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What to do	Comment	How to do it
State the anticipated defence and the facts disproving it or casting doubt on it.	1 Do not over-emphasise the defence. Emphasise the facts undermining it instead. 2 Don't argue the case! You can do that later.	'*The defence appears to be that the accused had accidentally slung the wrong backpack over his shoulder. It is anticipated that the element in issue is going to be* mens rea*, the intent to steal. Evidence will be led to show that the two backpacks are quite dissimilar and that the accused also apologised as soon as he was stopped outside the store.*'
Name the witnesses to be called.	1 Give the names of the witnesses you intend to call in the order you will call them. 2 Stick to an order that will maintain the sequence of events. 3 Try to give the occupation or standing of each witness.	'*I intend to call two witnesses. They are Miss Irene Delamere, a store detective employed by Three Rings Sports, and constable Simon Reddy of the [*name*] Police Station.*'
Briefly summarise the evidence to be given by each witness.	1 Give a brief summary of what each witness will say. 2 Understate. Promise less with the intention of delivering more. 3 Be accurate or your witness will be discredited. 4 Keep it short and sweet.	'*Miss Delamere will say that she was in the store, circulating among customers, keeping an eye out for shoplifters, when she saw the accused entering the store. She watched the accused from beginning to end, and saw the things I have already alluded to. It was to her that the accused apologised. She will further tell the court that the accused offered no further explanation for his conduct.* *Constable Reddy will tell the court that he took the accused into custody and charged him at the police station. As part of the booking procedures the accused's possessions had to be surrendered for safekeeping. The accused had a watch and a small wallet containing R45.00. These were listed and put in the safe with other prisoners' possessions. The two backpacks were marked and entered in the Exhibits Register.*'

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What to do	Comment	How to do it
Tell the court what admissions have been made (or are to be made) under s 220 by the defence.	1 Admissions should preferably be written out and signed by the accused or his or her counsel. 2 Give defence counsel an opportunity to confirm that the relevant facts are admitted.	'*The defence has made certain admissions under s 220 of the Act.* *They have been reduced to writing in the s 115 statement and are that –* *1 the backpack, to be introduced as Exhibit 2 in these proceedings, is the property of Three Rings Sports;* *2 its value is R150.00;* *3 the accused had no right to remove it from the store.*'
Tell the court what exhibits will be produced by consent or through a witness.	If agreement has been reached, make sure that you state accurately what has been agreed. It is not enough to tell the court that a particular exhibit is going in by consent. Describe the exhibit and tell the court on what basis it is going in.	'*There are two exhibits to be produced by consent. The first is the accused's backpack. It is common cause that the accused entered the store with this backpack and left it behind. It is brown, made of polyester fibre, about 45 cm by 30 cm by 20 cm, and has two separate compart-ments which are closed with zippers. The backpack is torn in several places. May it be marked as Exhibit 1? The second is the*

		backpack belonging to Three Rings Sports and which the accused left the store with. It is red, about 45 cm by 30 cm by 20 cm and has two main compartments and two side pockets, all closing with drawstrings. It has the store's price tag attached to one of the shoulder straps. May it be marked as Exhibit 2?'
Call your first witness.		*'May it please Your Worship, I now call my first witness, Miss Irene Delamere.'*

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Is the prosecution case now relatively clear? Do you know what the issues are? Do you know what evidence to expect from the prosecution witnesses? Do you have an idea of the significance of the exhibits? If the answer is 'Yes' to each of these questions, the opening statement will have achieved its aims.

The same principles apply broadly to the accused's opening address, except that, by the time the prosecution closes its case, defence counsel will have had to put the accused's version to witnesses when he or she cross-examined them, and there may even have been a plea explanation under section 115 of the CPA. The defence case will already have been made known. The accused's opening address is therefore likely to be short compared to that of the prosecutor, but that may not always be the case.

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Table 16.2 Opening statement for the defence (in terms of section 151 of Act 51 of 1977)

What to do	Comment	How to do it
Tell the court you intend to call witnesses.	1 You have no right to make an opening statement *unless* you intend to call witnesses. 2 If you have no witnesses to call, you have to close your case and the trial proceeds to the closing argument phase.	*'May it please Your Worship, I intend to call witnesses.'*
Explain what the defence is and isolate the issue(s).	1 The defence has to relate to one or more of the elements of the charge. 2 Isolate the relevant one(s) and tell the court what they are. 3 Use plain language and ordinary terms.	*'Your Worship, this is a case of an unfortunate mistake rather than deliberate wrongdoing. The accused did not intend to steal the backpack; he simply mistook it for his own.'*
Acknowledge the onus and standard of proof.	1 Mention where the onus lies. Remind the court that the prosecution has to prove its case beyond reasonable doubt. 2 Magistrates don't really need or like to be reminded of this.	*'As my learned friend has indicated, the onus is on the prosecution to prove the elements of the offence, including the* mens rea *element, beyond reasonable doubt.'*
Briefly state the facts.	1 Concentrate on the defence version. Make sure you cover the defence. Understate. 2 Don't argue. Let the facts speak for themselves. 3	*'Your Worship, the accused suffers from colour-blindness. His particular type of colour-blindness makes it impossible for him to get a driver's licence because he cannot distinguish between brown and red.* *The accused went to the store to buy a new bag as his old backpack was torn. He had a newspaper in the backpack. He had kept it because it had job advertisements he intended to follow up. In fact, he*

	Keep it simple. 4 Try to make an impact with an important fact that cannot be denied. 5 Make sure that the bad facts are dealt with. A short explanation will suffice.	*wanted a new bag rather than a backpack as he thought a bag might be more in keeping with the position he was seeking. He found the rack with backpacks and handled some of them. He must have put his own backpack on the floor, but cannot recall that. He moved on to the bag counter and found nothing to his liking. He left the store thinking he had his own backpack over his shoulder. He never intended to steal the backpack. The rest the court knows already.'*

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What to do	Comment	How to do it
Name the witnesses to be called.	Try to give an indication of the occupation or standing of each witness.	'*I intend calling the accused and also his family doctor, Dr Ivan Stone.*'
Briefly summarise what each witness will say.	1 Give a brief summary of what each witness will say. Understate. Promise less with the intention of delivering more. 2 Be accurate or your witness will be discredited. 3 Keep it short and sweet.	'*The accused will give evidence in accordance with what I have said earlier. He will also tell the court of instances in the past when his condition has caused him embarrassment. He once had to sit out during an important rugby match when the opposition team arrived and sported brown jerseys which he could not distinguish from his own side's red ones. He will also tell your Worship that the backpack, Exhibit 2, looks the same as Exhibit 1 to him. He had not noticed any difference in weight or texture as the store's backpack was filled with crumpled paper.*' *He had no intention of stealing the backpack and is quite distressed as a result of what has happened. He apologised because he was embarrassed by his mistake. He was told that the store had a policy to prosecute and thought there was no purpose in explaining how the mistake had occurred.'*
		'*Dr Stone will tell the court that he has been the accused's family's doctor since before the accused was born. He actually delivered the accused. He will tell the court that the accused's mother is a carrier of the gene causing colour-blindness and that the accused's condition was diagnosed when he went to school at age six.'*
Call your first witness.	If the accused is to be a witness, he has to be called first.	'*May it please Your Worship, I now call the accused.'*

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16.5 Example of an opening statement in a civil case

In civil cases there is a greater need for an opening statement because the issues are usually more complex and the documentary exhibits are often so plentiful that they have to be bound in large bundles, none of which the judge will have seen before the trial commences. The procedures prescribed for rule 37 conferences may also have to be dealt with as most judges require counsel to demonstrate that the parties have made a serious effort to comply with all facets of rule 37. With the exception of extraordinary cases, the judge will only be allocated to the case after the roll call. The judge will know nothing about the case before the opening statement.

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Table 16.3 An opening statement in a civil case

How to do it	Comment

'May it please the Court. M' Lord, this is an action for damages arising from a motor collision.'	1 Be brief.
'The issues between the parties as they appear from the pleadings are – *(a)* *whether the plaintiff was at the material time the owner of a Honda motorcar with registration number NPN 2001;* *(b)* *whether the collision which occurred on [*date*] at the intersection of X and Y Streets between that motor vehicle and a motorcar driven by the defendant was caused by negligence on the part of the defendant in any of the respects pleaded;* *(c)* *whether the reasonable cost of repair to the plaintiff's car, and consequently the plaintiff's damages, was the sum of R339 000.00, made up as set out in paragraph 6 of the Particulars of Claim;* *(d)* *whether there was contributory negligence on the part of the plaintiff.'*	1 If necessary, refer the judge to the pages and paragraphs in the pleadings where the allegations are set out in detail.
'M' Lord, the other issues on the pleadings were eliminated at the Rule 37 conference. I refer M' Lord to paragraph 5 of the Minute of the Rule 37 conference which is already before M' Lord.'	1 If the issues were reduced at the Rule 37 conference, refer the judge to the paragraphs in the pleadings and in the minute of the conference.
'I intend calling three witnesses on behalf of the plaintiff: *(a)* *The plaintiff on all the issues, but particularly on how the collision occurred;* *(b)* *Mr Z from [*name of garage*], who will give evidence that the car was sold to the plaintiff in January, [*year*] without reservation of ownership and that ownership passed to the plaintiff at the time of the sale; and* *(c)* *Mr Y, a panelbeater who is called as an expert witness, who will give evidence of the reasonable cost of repair and the pre- and post-collision values of the plaintiff's car.'*	1 Identify the witnesses to be called and give an indication of their roles in the case. 2 If necessary, elaborate a little to inform the judge what the witness will say.

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How to do it	Comment
'An aerial photograph has been taken of the intersection where the collision occurred. It has been agreed, in terms of paragraph 5 of the minute of the Rule 37 conference, that the witnesses may refer to that aerial photograph and rely upon it as depicting the scene of the collision correctly as it was at the time. I hand that up as Exhibit "A".'	Deal with exhibits one by one. In complex cases with bundles of documents you may have to take the judge through the bundle step by step to allow the judge to absorb the basic details of the evidence.
'In summary, M' Lord, the plaintiff's evidence will be that she entered the intersection from Y Street moments after the light had changed in her favour. She then saw another car entering the intersection at speed from her left. The defendant, who admits he was the driver of that car, did not stop and collided with the left-hand side of the plaintiff's car. *The details of the scene are apparent from the aerial photograph before M' Lord. I shall point out the relevant details when I lead the plaintiff's evidence.* *It is common cause, M' Lord, that the road from which the defendant entered the intersection is X Street and that the traffic lights were functioning properly. The plaintiff's case is therefore that the defendant was negligent in not stopping at*	1 The evidence of the main witness should be outlined briefly, particularly with regard to the main issue. 2 It is usually helpful to the judge if counsel were to point to relevant features on the exhibits while giving this narrative.

the red light, in failing to keep a proper lookout and in driving too fast for the prevailing circumstances.'	
'If it pleases M' Lord, I now call the plaintiff as my first witness.'	

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This structure deliberately differs from the earlier ones in order to demonstrate that there is no fixed structure for opening statements.

16.6 Technique in opening statements

There are a few simple principles to apply to an opening statement in order to achieve its aims without transgressing the rules:

- Tell a simple, logical story with a clear beginning and end. While an appeal to the emotions is permitted, it should be very subtle.
- Make it interesting. In order to capture the attention of the judge the opening statement has to be interesting in its content and interesting in the way it is delivered. While your closing argument may have to be forceful or pleading, as the case requires, an opening statement must be enticing, teasing the judge along the path you intend to traverse with the evidence and thus to the result you wish to achieve for your client.
- Be accurate. If your witness gives a version that differs from what was said in your opening statement, the witness may be discredited through no fault of theirs.
- Avoid comment and argument. In fact, apart from it being inappropriate, introducing argument before the evidence could be confusing. Allow the facts to speak for themselves. Sometimes the facts, properly marshalled, speak louder than any argument you may be able to muster.
- Avoid complexity. Keep it simple because you want the judge to understand and to be persuaded.
- Avoid prolixity. Slow, sure and short should be your motto. Conciseness, simplicity and moderation must be aimed for.
- Understate your case whenever possible. Understate your case as the witnesses may not come up to your expectations.
- Don't over-elaborate. You don't want the judge to anticipate all of the evidence. He or she may lose interest. You want to keep the judge interested throughout the trial; to achieve that you have to keep giving new information. And your witness may give a slightly different version. Do not tie the witness down in advance with too much detail.
- You have to sound sincere. Making eye contact with the judge is especially important. To be able to do that, you must know precisely what your case is about. Reading from notes will sound wooden and unconvincing.
-

Strong points against your side may be dealt with in your opening statement, but only if you can. Otherwise they should be left alone as you will only flatter them. In some cases it will be necessary to anticipate the defence. The facts nullifying that defence must then be dealt with in the opening statement to soften their impact.

- Judges frequently ask questions during counsel's opening statement, seeking clarification or further detail, sometimes even to express a *prima facie* view or to question the validity of an aspect of counsel's statement. Such questions must be dealt with immediately because they indicate areas of concern that you can then turn in your client's favour by giving a suitable explanation. The judge should be watched carefully during your opening statement as his or her attitude could give a strong indication of how they see the case. But do not let the judge distract you from your overall function, which is to present an opening statement which introduces the case to the judge as fully as the circumstances require.

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- Treat the opening statement as if it were a promise or undertaking you give to the judge about the manner in which you are going to satisfy the burden of proof, if you act for the plaintiff, or the manner in which you are going to cast doubt on the plaintiff's case, if you act for the defendant. You keep the promise by leading the relevant evidence. A discussion of the evidence is therefore an inevitable part, perhaps the most important part, of the opening statement.

- If you act for the defendant, you must pay careful attention to the other side's opening statement as there are potential gains to be made by your own client. For example, the evidence may not come up to what was promised in the opening statement; it might even contradict it. You may also gain a better understanding of the plaintiff's case, enabling you to reconsider your theory of the case, to change your tack in cross-examination or to call additional witnesses. Some cases even settle as soon as the opening statement has been completed because the defendant then, for the first time, gets sufficient detail of the plaintiff's case for counsel to be able to persuade the defendant to settle.

16.7 Protocol

- While some authors advocate the use of peroration, or rhetoric, in an opening statement, that does not mean argument. The furthest you can legitimately go, is to recapitulate the points already made, perhaps with a statement that, '*On these facts it will be submitted that the accused lacked the necessary mens rea for the offence.*' Put this way, the statement does not contain argument but puts the facts in their legal context.

- It is counsel's professional duty to make the most of the opportunity to open the case. Don't waste the opportunity.

16.8 Ethics

The relevant rules of ethics that apply to an opening statement are discussed in general terms in chapter 14.

- Counsel's primary duty is not to knowingly mislead the court on the facts, and counsel must therefore not refer to or promise evidence which he or she knows to be untrue or inadmissible. Counsel should know whether evidence is admissible or not after having completed the analysis of the facts according to the proof-making model explained in chapter 13. When in doubt, promise less but deliver more through the witnesses.

- Counsel must not mention a 'fact' in the opening statement he or she is not in a position to support by proof in the form of a witness to be called or documents to be introduced. This is a consequence of the good faith principle, which extends to promises made during the opening statement. In short, what counsel promises by way of the opening statement must be based on counsel's *reasonable belief* that *reliable and admissible* evidence will be forthcoming to make good on the promise.

- Defendant's counsel must hold a similar *reasonable belief* that the case to be advanced on behalf of the defendant will be supported by *reliable and admissible* evidence casting doubt on the plaintiff's case.

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- It follows that counsel may not under any circumstances allude to 'facts' in the opening statement unless counsel genuinely intends to adduce evidence to prove those facts.

- Overstating the case may amount to misleading the court.

- The same principles apply to the opening statement by defence counsel in a criminal trial.

- As explained in chapter 14, a prosecutor must be objective and impartial, and has the duty to assist the court in its quest to arrive at a just decision: A prosecutor must therefore be especially vigilant to avoid introducing facts or evidence which cannot pass the reliable and admissible requirement in clause D.1.(d) of the NPA Code of Conduct.

16.9 Checklist and assessment guide

If this book were to be used as a teaching guide or prescribed work for advocacy exercises, the following checklist may be used to prepare for the exercises, to serve as an assessment guide, or to serve as a marking guide.

If the checklist were to be used as a marking guide, the best way to go about the matter is to allocate a grade to each student or pupil whose performance is being assessed as follows:

C = Competent (meaning that the performer has attained the desired standard of competency in respect of the skill involved).

NYC = Not yet competent (meaning that the performer has not yet reached the desired standard).

Table 16.4 Checklist for opening statement for plaintiff's counsel

	Skill involved	Competent/ Not Yet Competent
1	Stating the cause of action/charge	
2	Stating the issues (the legal elements of the cause of action/ charge that are disputed)	
3	Referring to any pre-trial agreement affecting the issues (R37 minute etc.)	
4	Dealing with the onus of proof, and if necessary, the duty to begin	
5	Stating the facts briefly, without overstating	
6	Avoiding argument or inadmissible material	
7	Identifying the defence, without flattering it	
8	Advising the court of the witnesses to be called by the plaintiff/prosecutor	
9	Briefly summarising the evidence to be given by each witness	
10	Advising the court of any formal admissions made by either party	

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	Skill involved	Competent/ Not Yet Competent
11	Introducing any exhibits to be admitted by consent, including bundles of documents	
12	Avoiding reading, and speaking at audible level and pace	
13	**Protocol:** o Practising SOLER principles (Shoulders square, Open stance, Leaning slightly forward, making Eye contact, Relaxed posture) o Maintaining eye contact with the judge o Speaking at appropriate volume and pace o Addressing the court with proper deference o Ensuring that only one counsel is standing at any time o Addressing the court from the correct location, not moving about the courtroom	

Table 16.5 Checklist for opening statement for defendant's counsel

	Skill involved	Competent/ Not Yet Competent
1	Telling the court that the defendant/defence will be calling witnesses	
2	Identifying the defence(s)	
3	Isolating the issues in respect of each defence	
4	Reminding the court of the incidence and standard of proof, if necessary	
5	Stating the facts of the defence case briefly, without overstating	

6	Avoiding argument or inadmissible material	
7	Advising the court of the witnesses to be called by the defendant/defence	
8	Briefly summarising the evidence to be given by each witness	
9	Avoiding reading, and speaking at audible level and pace	
10	**Protocol:** o Practising SOLER principles (Shoulders square, Open stance, Leaning slightly forward, making Eye contact, Relaxed posture) o Maintaining eye contact with the witness o Speaking at appropriate volume and pace o Addressing the court with proper deference o Ensuring that only one counsel is standing at any time o Addressing the court from the correct location, not moving about the courtroom	

Chapter 17
Examination-in-chief

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17.10

Checklist and assessment guide

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17.1 Introduction

Every party in a trial has the right to call witnesses to give evidence on the questions before the court. The evidence given by a witness while being questioned by counsel* for the party who has called the witness, is called 'evidence-in-chief' and the process of adducing that evidence, is called 'examination-in-chief'. The purpose of the examination-in-chief is to place the evidence the witness can give on the issues before the court. This is by far the most important phase of the trial. By their examination-in-chief each of the parties can put forward their own version of the facts, answer their opponent's version of the facts, and bolster their witnesses.

The skill of examination-in-chief requires sound knowledge of the rules of evidence, a firm grasp of the facts and the law pertaining to the case and the ability to extract all the material evidence from the witness without asking leading questions.

Footnotes

* The term 'counsel' is used in this chapter to mean the prosecutor, attorney or advocate conducting the trial.

17.2 Restrictions on examination-in-chief

Examination-in-chief is probably the most difficult skill to learn of all the techniques of trial advocacy. The reason is not hard to find. The evidence-in-chief a party may adduce is subject to a number of restrictions. The main restrictions relate to the *content* of the evidence. The evidence has to be relevant in its content, material in its substance and admissible in its form.

The main restriction on the way the evidence is *produced* is the rule that counsel must conduct the examination-in-chief without asking leading questions. Counsel must allow the witness to tell the story, to provide the important details, to give the difficult explanations, all without counsel suggesting the answers. Witnesses are only human. They forget important details, get scared or overwhelmed by the atmosphere of the court, become uncommunicative, become talkative, even change their evidence and make silly mistakes. Counsel must be able to cope with all of this.

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17.2.1 Relevance

The evidence must be relevant to an issue before the court. There are two aspects to this. The *first* is that there must be some issue to be decided or some question to be answered by the court. The *second* is that the evidence must be relevant in the sense of being helpful to the court in deciding that issue or answering that question.

You must therefore analyse the pleadings (or their equivalent in a criminal case) to identify the material facts in issue. (See chapter 13.) You must also analyse the facts of the case to determine which propositions of fact ('evidential facts') can be advanced to prove those material facts. If the evidence can be shown to be helpful to the court to decide a particular issue, it is relevant. If by reason of logic, (a combination of experience and common sense), the evidence supports a particular

inference or conclusion, it is relevant. For example: We know from experience and expert evidence that every person on earth has a unique set of fingerprints. We also know that we leave an imprint of our fingerprints on things we touch. Therefore, if the accused's fingerprints are found on the deceased's dressing table, common sense tells us that the accused must have touched that dressing table at some stage. That piece of evidence, combined with other evidence, may then support the conclusion that the accused had killed the deceased.

Because relevance is based on logic, you must be able to explain why a particular fact or item of evidence is relevant. If you have done a proper fact analysis using the proof-making model when you prepared for the trial, you ought to be in a position to give such an explanation. You must be ready, at every stage of the trial, (and also on appeal, if necessary), to explain why the evidence you are seeking to adduce or have adduced through your witnesses, is relevant. The question you must be able to answer at any stage of the trial is this: '*How does this piece of evidence help the court to answer the question before it?*'

17.2.2 Materiality

For evidence to be material, it has to be relevant and important. Evidence is important if it has a significant role to play to support counsel's theory of the case. Some evidence, although relevant, has so little value that you would not bother to adduce it. Other items, on the other hand, would be so significant that you would regard them as vitally important for your theory of the case to prevail over that of the opposition. Material evidence is not necessarily the same as essential evidence, although there are instances when an item of evidence could be so crucial as to make the difference between winning and losing.

The rules of evidence do not require evidence to be material; it merely has to be relevant and must not be excluded by virtue of some other rule. Counsel will decide what evidence to adduce in support of the claim or defence and in making that decision, decides what items of evidence to discard. The decision is based on one's tactics. The question is often: 'How important is this piece of evidence to my case?' The test for materiality depends on your theory of the case. If the evidence is important enough to support one of the best points supporting your client's case, or to answer the opposition's case, then it is material.

17.2.3 Admissibility

The general rule is that relevant evidence is admissible unless there is a specific rule or basis for its exclusion. It appears that the best evidence rule is at the root of the [Page 321] exclusionary rules relating to hearsay evidence, opinion evidence, character evidence and similar-fact evidence. However, there are exceptions to all the exclusionary rules. Evidence may also be excluded, in the discretion of the court, if its probative value is outweighed by the prejudice its admission might cause. The rules of evidence play a large part in the process of examination-in-chief. It is simply not possible to lead evidence-in-chief without a decent grasp of the rules of evidence. Counsel has to avoid inadmissible evidence. The time to make the necessary assessment is during the preparation for trial, but you may have to re-assess the admissibility of the evidence as events during the trial may affect its admissibility.

The following categories of evidence may not be admissible, depending on the facts:

- Secondary evidence, that is to say, evidence which offends against the best evidence rule, for example, a written document is the best evidence of its contents; a copy is not.
- Hearsay evidence, that is to say, evidence which depends for its cogency on the credibility of a person who is not a witness or a party in the proceeding.
- Character evidence, that is to say, evidence relating to the character of a party or witness, as opposed to evidence of the events in issue.
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Opinion evidence, that is to say, evidence in the nature of an inference of fact drawn by the witness from other facts or circumstances.

- Similar fact evidence, that is to say, evidence to the effect that a person's actions in the past tend to show that he or she behaved in similar fashion on the occasion in issue.

- Highly prejudicial evidence of little probative value, that is to say, evidence that proves little but has the capacity to cause prejudice out of proportion to its weight.

- Improperly obtained evidence, such as a confession obtained by torture.

(See chapter 20 for a more detailed discussion of evidence.)

17.2.4 Leading questions

There are two main reasons why leading questions – questions that suggest their own answer – are disallowed in examination-in-chief. The *first* is that the facts have to be provided by the witnesses, not the lawyers. The *second* is that the value of the evidence depends to a large measure on the way the witness behaves while giving the evidence. If counsel were allowed to suggest the facts to his or her own witnesses, the court would not be in a good position to determine how much the witness really knows or how to gauge the credibility of the witness.

Leading questions are nevertheless permitted:

- to establish a foundation for further evidence.

- to refresh a witness's memory.

- to question hostile witnesses.

- to help children, mentally handicapped witnesses and other witnesses who may have difficulties with understanding or communication.

- to clarify the evidence already given.

- to save time and costs when the questions relate to matters not in issue between the parties.

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17.3 Planning the structure and content of the examination-in-chief

The success of your examination-in-chief depends on systematic preparation and flawless execution. A deficiency in either can have adverse consequences for the client. The examination-in-chief of each witness has to be planned very carefully to ensure that you can elicit all the favourable evidence from the witness with maximum impact. As with the rest of your trial preparation, you must make notes for inclusion in counsel's trial notebook. There must be a separate section for each witness. You must then:

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Identify your goals and objectives for each witness: The main objective of your examination-in-chief must be to enhance your client's case by establishing the important facts on which your theory of the case depends. The test for each witness is therefore, 'What can this witness contribute to support my theory of the case?' The fact analysis you undertook when you prepared for the trial will go a long way towards answering this question.

- *Plan a structure for the examination-in-chief of each witness*: There is more to examination-in-chief than asking the witness to tell his or her story. The story has to be told in such a way that it is complete and convincing. To achieve that, there has to be a logical beginning, a main narrative and an ending. The usual structure for evidence-in-chief is:
  - introduce the witness.
  - qualify the witness.
  - deal with pre-arranged topics.
  - lead the evidence on each topic in chronological order.
  - complete the main evidence of the witness.
  - if necessary, deal with the other side's version.
- *Introduce the witness to the judge by way of a few introductory questions*: What are the full names of the witness? Where does he or she live? What does he or she do for a living? These questions also help to settle the witness down and develop a little confidence. You may prefer to give the witness a chance to speak and to answer some easy questions before getting to the important evidence. You could ease the witness into the process by asking questions that require progressively more input from the witness.
- *Qualify the witness by asking questions to demonstrate that the witness can contribute admissible evidence*: Usually it is enough to put the witness at the scene of the events at issue. Take the witness to the scene or beginning of their narrative by a direct but non-leading question such as, '*Where were you on 15 June last year at nine thirty in the morning?*' This will focus the attention of the witness specifically on the incident you want to explore. You will have briefed the witness and he or she will know what the case is about, why they are at court and what their evidence has to cover. So the answer is likely to be what you want: '*I was in First National Bank at the corner of A and B Streets.*' If the witness is called as an expert in, for example, a personal injuries case, you could ask, after having established his or her expertise: 'Did you examine the plaintiff for the purpose of making an assessment of his injuries and their consequences?' This is not a leading question because it does not suggest the answer. It would fall within the exception relating to the establishment of a foundation for further evidence in any event.

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- *Arrange the subject-matter in separate topics, if possible*: Then exhaust the evidence on a given topic before moving on to the next. In the example given in the previous paragraph, you might proceed by asking the witness precisely what examinations were carried out, when that was done, and what the witness found. That might be your first topic. You may then proceed from topic to topic, for example, from the injuries suffered to the prognosis for recovery in the future, then to the treatment received in the past and their cost and lastly to the treatment required in the future and the anticipated cost of that treatment. Each topic has to be kept in a separate compartment to make the evidence easy to follow and to ensure that you extract all the relevant evidence.

- *Lead the evidence sequentially*: This is done so that the witness is able to tell the story in chronological order. Your preparation will tell you what the important facts are. It is your function to guide the witness by your questions so that each of the important facts is dealt with in sequence. Ensure that the evidence is complete and that the witness tells the whole story. If the witness skips over an important piece of evidence, don't allow the witness to continue on the basis that you can always deal with it later. Bring the witness around to the evidence you want to elicit with an appropriate question. Witnesses often race ahead in the narrative and leave out important details in the process. If you allow this to happen, the evidence will be fragmented and less convincing.

- *Deal with the other side's version, if not yet covered*: Once your witness has completed that part of the evidence-in-chief establishing your client's version of the events at issue, you may want your witness to comment on the other side's version. When you act for the plaintiff, you may have to do this in anticipation of a particular version being given since you will know what to expect from the pleadings, the discovered documents or from what your own witnesses have told you. If you want to take the sting out of the anticipated cross-examination you may ask your witness questions dealing with the other side's version during the examination-in-chief rather than in re-examination. This is a tactical decision to be made according to the merits of the case you have to deal with. You may, for example, anticipate a question in cross-examination and minimise its impact by asking your witness: 'What would you say if it were suggested by my learned friend that the traffic light was red for you and not for the defendant?' Such a question could also remove the element of surprise.

- *Plan your questions so that you will achieve your goals and objectives*: Concentrate on what the witness saw, heard, smelled, felt or tasted at the time of the events under consideration. If necessary, ask the witness what he or she thought at the time. If the robber put a knife to the witness's throat and said, 'Give me your wallet or I'll kill you', your next question may well be, 'And what went through your mind when he said that?'

- *Prepare a timeline for the evidence of each witness*: Incorporate the use of demonstrative exhibits and physical demonstrations in that timeline. A timeline is a chronological outline of the evidence of a witness. You can create a timeline by extracting all the important pieces of evidence a witness can give from the witness's statement and the documentary evidence and arranging them in chronological order. The timeline can also be as a prompt. When a point can be made better by the use of demonstrative exhibits or a physical demonstration, both counsel and the witness need to be fully prepared to deal with these special procedures; otherwise the effort to make the case better, could backfire badly. The witness may point out the wrong position [Page 324] on the police plan or point out a distance that is inherently improbable. Some witnesses need help to mark something as simple as a diagram; others are uncomfortable dealing with photographs. Assuming that the appropriate exhibits have been prepared, the witness still needs to be briefed so that both counsel and the witness are able to produce the relevant evidence effectively and with maximum persuasion.

- *Anticipate the topics of cross-examination and re-examination for the witness*: This will allow you to brief him or her fully. The likely areas of cross-examination should have been identified during your preparation for trial. Those areas must be explored with the witness when the witness is briefed before giving evidence. Whether an explanation is to be given in the course of the evidence-in-chief, rather than in re-examination, depends on counsel's judgment. The other side may not be aware of the weakness. If they raise it, it can always be dealt with in re-examination, you may argue. Whichever way you decide in a given situation, remember that it is generally counter-productive to ask too many questions about the topic because that would tend to exaggerate the difficulty. The topics for cross-examination should be the topics on which you are most likely going to be required to re-examine the witness. In some cases a telling reply can be prepared for re-examination, when you and your witness will have the last word, but that telling reply may never be made if the opposition does not cross-examine on the point. You may therefore have to consider leading that telling evidence in your examination-in-chief instead.

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Anticipate objections: Stage 6 of your fact analysis (see chapter 13) should have alerted you to any possible objections. Once a potential objection has been identified, you can plan your questions to avoid the objection by, for example, laying the proper foundation for the evidence. If there is a good response to be made, you may be able to respond to the objection promptly. (See chapter 20.)

17.4 Style of questions in examination-in-chief

The basic style for examination-in-chief is that of an interrogative dialogue. There is a discussion between counsel and the witness in which counsel plays the role of questioner and the witness is allowed to tell his or her own story. Counsel enquires and the witness gives the facts. To ensure that the story is truly that of the witness and not counsel's, counsel is not allowed to ask leading questions. A leading question is one that suggests the answer. Another reason why the evidence must be led without leading questions is that leading questions make it more difficult for the judge to make an assessment of the character and credibility of the witness and the reliability of the evidence. You need to give the judge a reasonable opportunity to hear your witness speak and tell his or her story in his or her own words. This cannot be done very well if the witness merely says yes or no to all your questions.

The questions in examination-in-chief will mainly be open questions and closed but non-leading questions. An open question leaves it to the witness to decide what information to supply with the answer, even to choose the subject. For example: Asking the witness, '*What happened on 15 June last year?*' does not confine the witness to any particular subject or even to a place and exact time. Such a question is usually of little help to the witness or the court. Closed questions specifically direct the attention of the witness to the subject, such as '*Where were you on 15 June last year at 09h30? Who else was there? What did you see?*' None of these questions suggests the answer so they are closed, non-leading questions. It doesn't take much to turn them into closed, leading questions. [Page 325] '*On 15 June last year at 09h30, were you not in First National Bank at the corner of A and B Streets, [*town or city*]? Wasn't your brother, Peter, with you? Didn't you see three men rob the teller?*' Each of these questions contains the answer or suggests the answer to the witness.

A good way to keep questions specific but non-leading is to start the question with an interrogative word. We start our question with words we usually associate with a question, such as 'where', 'when', 'what', 'who', 'which', 'how', and 'why'. These words allow you to ask simple, closed, non-leading questions. Conversely, questions which start with a verb are often leading: 'Did you . . . ?', 'Was . . . ?', and 'Could you see . . . ?'.

The funnelling technique (see chapter 1) is quite useful in examination-in-chief. You start with an open question and then direct the witness by way of closed questions to more specific topics. You may lead your witness as follows in a collision case:

Q.
What happened while you were travelling along?

A.
I saw a car approaching from our left just as we were about to enter the intersection of Y and X Streets.

Q.
What was the colour of the car?

A.
. . .

Q.
What make of car was it?

A.

. . .

Q.

How many people were there in it, as far as you could see?

A.

. . .

The first question is an open question; the last three questions are closed but non-leading questions, each directing the witness to a specific topic.

17.5 Briefing the witness

The preparation for the examination-in-chief involves both counsel and the witness. The one must know what to expect from the other. The successful execution of the process depends as much, if not more, on the skills of counsel than the ability of the witness to convey what he or she has witnessed. You must prepare carefully for the briefing in advance but keep in mind that the process is dynamic. You must not be too rigid in the programme that you set.

Witnesses have to be prepared for the task, or ordeal, of giving evidence. Prospective witnesses are justifiably apprehensive about what is going to happen in court. They know they are going to be asked questions but they do not know by whom and what type of questions. They usually don't understand fully what the case is about or where their evidence fits in. They might know to expect cross-examination but they may see it as some clever lawyer trying to trip them up. They also do not know what they should do if they don't understand the question or don't know the answer. Unless you are a prosecutor in a busy magistrates' court, you will have an opportunity to remove these concerns when you prepare your witnesses for the trial. It is unfair to witnesses to expect them to give evidence without having been properly briefed. It is also unfair to the client, who is entitled to have his or her case presented in the best possible light.

Briefing, or preparing, a witness is not the same as telling the witness what to say. Briefing the witness means telling the witness what to expect when he or she is in the witness box and helping the witness to prepare for the questioning. The briefing session [Page 326] must take place in calm, unhurried circumstances, preferably your office or counsel's chambers. The following matters may legitimately be discussed with your witnesses during the briefing session:

- Some people have objections to the taking of the oath and may take an affirmation instead. This option must be explained to the witness. When you call a witness who has expressed the preference to take the affirmation, you must tell the judge of the witness's election as soon as the witness is called.

- The consequences of taking the oath or affirmation must be explained to the witness without unduly worrying the witness. It is enough to tell the witness that the evidence has to be under oath (to ensure that people tell the truth) and that perjury is usually punished quite heavily.

- You must tell the witness what to do when called into court and later at court show them where the witness box is so that they do not come into court bewildered by the strange setting. Show the witness where to go and tell him or her that the oath will be administered first and to wait for the questions.

- Witnesses don't know who to look at and what to call the judge. Tell your witness to look at you when you are asking a question but to look up at the judge when answering. The judge is addressed as 'M' Lord' or 'M' Lady'. A magistrate is addressed as 'Your Worship.'

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The sequence of the questioning by counsel must be explained to the witness. You will ask questions first, then your opponent may cross-examine before you may ask some questions in re-examination. The judge may ask questions at any stage.

- You must take your witness through his or her evidence-in-chief. There must be a structure to it (which was dealt with earlier). It may be a good idea to give the witness at taste of things to come by asking the questions as you would in court. Have a trial run. That means non-leading questions, slow pace and strict sequencing. All documents and exhibits the witness has to deal with in their evidence have to be shown to the witness so that he or she is familiar with them. Care must be taken that the witness knows what questions you intend to ask about those facts you have previously identified as good facts and also those you have marked as bad facts. If the witness is likely to need help to refresh his or her memory from contemporaneous notes or statements, ensure that they know the procedure and that the relevant documents are at hand during their evidence.

- You are entitled to tell the witness what line you expect will be taken in cross-examination without telling the witness how to respond to it. It is appropriate to ask the witness, 'If they ask you . . . what will you say?' It may be a good idea to explain to your witness that the style of questioning in cross-examination differs from that of examination-in-chief; that the questions may be suggestive and that he or she must listen carefully to what is being suggested before responding.

- Witnesses often do not know what to say when they do not understand the question, or don't know the answer or have forgotten something. Explain that it is quite in order to ask for the question to be repeated. Tell them that they must not guess or speculate when they don't know the answer and that they are quite entitled to say that they have forgotten something or don't know.

- Tell the witness not to argue with the judge or your opponent.

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- The witness must answer the question as briefly as possible. Explanations must only be given when asked for. A common failing on the part of witnesses is to try and answer what they perceive to be the point behind the question. Warn the witness not to fall into this trap.

- Tell the witness that you will object if improper questions are asked by opposing counsel.

- So far as demeanour and dress are concerned, advise your witness to be conservative in both.

- Before the witness leaves, ensure that the witness knows the trial date and exactly where and at what time you will meet at court on the day their evidence is to be taken.

17.6 Technique in examination-in-chief

The main difficulty in leading the evidence-in-chief is to maintain control of the witness and the flow of information. Even the best advocates may stumble when they have to lead the evidence of a particularly difficult witness. Here are a few guidelines to help you to maintain control:

-

Control and guide the witness by signposting. Signposts on the road tell us where the road is leading us to, how far we have to go and so on. The signposting used as a technique in advocacy serves a similar purpose; it signals to the witness where we want him or her to go. There are various ways to give this kind of signal to the witness. You may say, when you want to introduce a new topic, '*I now want to ask you some questions about what happened after the robbers left the bank*.' The more difficult aspect is to control the witness from question to question during the main narrative of the events. This is best done through a simple technique called piggybacking or 'looping back', as it is called by American lawyers. How it works, is described in detail in the demonstration of the technique of examination-in-chief which appears later in this chapter. In essence it means that each question is grafted onto the previous answer. You are thus able to guide the witness directly to the precise evidence you want from him or her without suggesting the answer.

- Maintain control of the witness by not asking loose or vague questions which would allow the witness to ramble on or to digress. '*What happened next?*' is a loose question which may allow the witness to digress or miss the point. Concentrate instead on action. Asking, '*How did you react?*' or '*What did he do when you said that?*' is more specific and more likely to elicit the answer you want.

- Listen attentively to the answer, then frame the next question on the basis of that answer. The process of question and answer is dynamic, like a game of tennis. You have to play the ball returned to you; each ball has to be played on its own merits. A common complaint from judges is that lawyers ask questions but don't react appropriately to the answers. You should be able to justify each question when you ask yourself: 'Why am I asking *this* question of *this* witness at *this* time?'

- Be firm with the witness without being overbearing. If the witness goes beyond what you have asked, stop the witness, firmly but politely, and tell the witness that you want to go a little slower or that you want more detail.

- Use simple, everyday language. Don't use clichés, colloquialisms or slang. Ask, '*Where did you go from there?*' rather than, 'Where did you proceed to from that [Page 328] point?' Ask, 'What did you see?' rather than, 'What did you observe?' Avoid big words. Use language the witness can understand.

- Speak slowly and clearly. Set the tone and pace you want the witness to adopt by example. Watch the judge too. Is he or she taking notes? Make sure the judge has time to note all the important evidence. Aim to control the flow of information from the witness to the judge. If you go too fast for either of them, you will have failed in the most important function of the examination-in-chief.

- Avoid questions that are likely to elicit inadmissible evidence, for example, inadmissible hearsay, character, speculative or opinion evidence.

- Ask simple, short questions which elicit only one fact at a time. The answer to the question must be a sentence or a short paragraph, not an essay. The question must therefore be so specific that it invites a short, direct answer.

- The person in the hot seat is the witness. It is surprising how few lawyers are aware of the fact that people don't enjoy giving evidence. Witnesses are uncomfortable in the strange surroundings of the courtroom. It may be home to the lawyer but to the witnesses it is foreign territory. Add to that the formidable power and imposing figure of the judge in full regalia and counsel in their robes and the picture becomes clear. So you must go out of your way to make the ordeal easier for your witnesses. This can be achieved by adopting a few simple, but effective techniques such as those set out below:

  –

Avoid asking multiple or compound questions (two or more questions rolled into one, or a question asking for more than one fact). Object if your opponent confuses your witness by asking such questions.

–

Don't interrupt the witness unless it is absolutely necessary, for example, when it is clear that the witness has misunderstood the question.

–

Avoid asking a question in such a way that it signals to the witness, and the judge, that you don't believe the witness or doubts the evidence. ('*How certain are you?*' '*What makes you so sure?*' '*Really?*')

–

Do not comment on the answers or repeat the answers. ('*That's right. OK, Fine, Yes, I see. Sure. Thank you. Yeah, right!*')

–

Make eye contact with the witness. Watch what the witness is doing. You may find that the witness is looking at the wrong document or exhibit. Help the witness.

–

Use visual aids and demonstrations to make things easier for the witness. Instead of asking the witness to describe the scene, show the witness the agreed diagram or plan and then ask: '*Please look at the plan and describe what you can see of the intersection from your front veranda*.' This should help the witness to focus on the scene and to give an accurate description.

–

Don't ask questions with your nose buried in the brief or the witness's statement. Do not read questions from a prepared list. Use a timeline and the piggyback method instead and focus on the key points to be covered by the witness. Adopt a stance and attitude with your shoulders square, an open stance, leaning slightly forward, making eye contact and being generally relaxed.

17.7 Demonstration exercise

The technique and principles of examination-in-chief are demonstrated in the following exercise. The facts are apparent from the statements of two witnesses, the victim of a [Page 329] robbery and a police officer. Let's pretend we are prosecuting counsel in the criminal trial. (You can run the same exercise as counsel for the plaintiff in the civil action, claiming damages for assault.)

The victim's statement reads as follows:

Statement of James Donald Weir

My full names are James Donald Weir. I live at [*street address*] and work at [*employer*] at [*street address*] as a shift manager. We make shoes for the local and export markets.

On 30 November [*year*] I came on shift at 7 o'clock in the morning. I parked my car in the employees' parking lot in front of the factory. I came off duty at 5 o'clock in the afternoon and went to my car. It was early summer and the sun was still shining. As I approached my car there were no other people in sight. I took my keys out of my pocket when I was next to my car at the driver's door. I bent down to put the key in the lock. The next moment I felt someone grab me from behind. I immediately started struggling and tried to throw him off, but he held me quite firmly, pinning my arms against my sides. I twisted and turned and tried to bash my attacker against the side of my car, but he tripped me and we fell over. I landed face down on the ground with my attacker on top of me. I continued to struggle, but he suddenly said: 'Watch it, I've got a knife and I'll use it if I have to.' I felt something sharp against my back, just above my waist. I immediately stopped struggling. He then said: 'All I want is your money and credit cards. Don't get hurt for nothing. Give it to me.' He then took my wallet from my back pocket. I tried to get a look at his face but he said, 'Don't look at me. Keep your face down.' I again

tried to look up but the next moment I felt a sharp pain in my back on the left hand side. He then said, 'Look what you've made me do now. Don't be stupid.' I then did what I was told and lay still, face down. He then let go of me and I heard him run off in the direction of [*street*].

I got up and saw a man running away from me. It was a white man, about 1,70 metres tall and I estimate his weight at about 75 kilograms. He was wearing blue denim jeans and a white T-shirt. His hair was brown and long in the back. He spoke English but I got the impression from his accent that he might be Afrikaans speaking. I think I'll be able to recognise his voice if I heard him speak again.

I tried to run after him and screamed for help, but I collapsed in the car park. Some of my co-employees then came to my assistance and one of them called the police. The police wanted to know if anything had been taken from me and I said my wallet, a photo of my wife and children, my driver's licence, my Visa credit card and R350 in cash. This was conveyed to the police in my presence. I was told to go to the police station to make a statement. This statement was later taken in hospital. I was taken to the factory's emergency room first and from there to hospital for emergency surgery as it turned out that I had been stabbed and that my left lung had been punctured. I was in hospital for a week and off work for a month.

The day after I was released from hospital, I was called to the police station for a voice identification parade. Ten men were behind a screen. I could not see them. Each one was asked to read the words my attacker had spoken and which I have set out earlier in this statement. I was asked to indicate if I recognised the voice of my attacker. The Inspector in charge first told me that my attacker might not be on the parade and that I should listen to all the voices first and be careful that I am certain before I identified anyone. I listened to all the voices but as soon as I heard number seven I recognised the voice of my attacker. After listening to the rest of the voices, I told the Inspector that number seven was definitely the voice of my attacker. The police then brought number seven out from behind the screen. It was a young white man with long brown hair, about 1,70 metres tall and about 75 kilograms. He was wearing blue denim jeans and a whitish T-shirt and a denim jacket. I don't know his name.

I identified my wallet with all its contents intact at the police station the same day and they were given back to me.

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The police officer's statement reads as follows:

Statement of Alson Khuzwayo

My full names are Alson Khuzwayo. I am a Detective Inspector in the South African Police Service, stationed at [*police station*].

On 30 November [year] at about 17h10 I was driving an unmarked police car along [*street*] in [*suburb*] towards [*suburb*]. I was on duty, having been to [*suburb*] to trace a suspect in another matter. As I drove past the Clermont Shoe Company's factory, I saw a gathering in the parking area in front of the building. I saw a man being assisted towards the building. I drove on towards [*suburb*]. About three hundred metres further towards [*suburb*], I came across a young man running on the left side of the road with his back to me. At the same time I heard a report on my police radio to the effect that a man had been robbed a few minutes earlier in [*suburb*] and that the attacker had last been seen running up [*street*] in the direction of [*suburb*], and was a white man wearing blue jeans and a white T-shirt.

I then caught up with the running man and as he matched the description I had heard, I stopped ahead of him, got out of the car and stood in front of him. When he came closer I shouted, 'Stop! Police!' He then ducked into a vacant lot and ran off. I chased after him and shouted to some workers further on to stop him. They grabbed him and held on to him until I got there. I asked him why he was running away. He swore at me and called me a pig. I told him that I was a police officer, that I had information that he had committed a robbery at the Shoe Company and that I was placing him under arrest. I took his arm. He did not resist. I warned him in terms of the Judges Rules. He kept silent. I patted him down to ensure that he didn't have any weapons and found two bulky items in his pockets. The first was an Okapi clasp knife with a brown handle and single blade of about 6 centimetres. The other was a brown leather wallet. I inspected the knife. There was some sticky, reddish stuff on it. I thought it could be blood. I opened the wallet and found a driver's licence issued to James Donald Weir, a Visa credit card with the same name, a photograph and some cash which I later counted. It was R350.

I put the suspect in my car, drove to the police station and charged him with robbery. The substance on the knife was analysed by a technician in the laboratories of the Department of Health. It was human blood. The technician's affidavit is filed as A4.

I later traced the complainant to the hospital. He identified his wallet, Visa card and the photograph of his family. After the complainant had been released from hospital, I arranged a voice ID parade. The complainant identified the voice of the suspect I had arrested (the accused) as the voice of the man who had robbed and stabbed him. I then charged the accused.

With these two statements you can now prepare the examination-in-chief of our main witness, Mr Weir. You must cover the material facts relating to the incident itself as well as the anticipated defence, namely that the accused was not the attacker and had been identified by mistake. Your theory of the case is that the accused was the robber. You have direct evidence – voice identification – as well as circumstantial evidence – he fits the description of the attacker, was in the vicinity of the attack shortly after the attack, had possession of the stolen items, had a knife with human blood on it and did not deny his involvement. The material facts (legal requirements) for the crime of robbery are that

1
the accused

2
on [*date*]

3
at [*place*]

4
unlawfully

5
and intentionally

[Page 331]

6
and by means of an assault (the application of force to the person)

7
upon Mr Weir

8
stole – a wallet and its contents (the taking of a movable, corporeal thing owned or possessed by another with the intention to deprive him permanently of it) –

9
from Mr Weir.

There could be a debate about whether 'assault' and 'stole' shouldn't be broken down into lesser components, but it is enough for your purposes to leave them as they are. Some of the material facts can be proved directly, with your witness dealing with them specifically, but unlawfulness and intention are proved as inferences from the main facts.

The first step in preparing the evidence-in-chief is to create a timeline or outline which lists the important facts we want the witness to cover in order to establish the material facts, with some emphasis on the identification of the robber. (The events which form part of this timeline are *material* in the sense of being important items of evidence needed to make the prosecution version persuasive.) You can list or highlight the key words or phrases in the margin of the statement as

- date, time and place (factory parking lot)
- grabbed from behind
- struggled
- arms pinned to sides
- tripped, fell down

- face down, attacker on top
- continued struggling
- attacker spoke, said had a knife (accent?)
- felt something sharp against his back
- stopped struggling (why?)
- attacker spoke again, said wanted money and credit cards
- took wallet (description and contents?)
- tried to look at attacker
- was stabbed
- attacker spoke again
- ran away towards [*street*]
- saw white, 1,7 m, 75 kg's, brown hair, long at the back, denim jeans and white T-shirt
- hospital
- date, time and place (police station)
- identified wallet and contents
- voice identification
- injuries.

After having briefed Mr Weir, you will probably call him as your first witness at the trial. The accused has pleaded not guilty and made no admissions and no statement under section 115 of the Criminal Procedure Act 1977 (explaining his plea).

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Table 17.1 Example of examination-in-chief

Questions and answers	Comment
Q. *Mr Weir, where do you live?* A. *[*address*].* Q. *And where do you work?*	1 These questions introduce the witness to the judge, to enable him or her to make a general assessment of Mr Weir's station in life. 2 The questions also give Mr Weir an opportunity to get used to answering questions.

A. *I work at Clermont Shoe Company in [*address*].* Q. *What sort of work do you do?* A. *I am a shift manager.*	
Q. *What does that entail?* A. *I am in charge of all the operations in the factory during my shift.* Q. *I assume you manufacture shoes?* A. *Yes, for export and for the local market.* Q. *What hours do you work?* A. *I work the day shift, which is from seven in the morning till five in the afternoon.* Q. *How do you get to work in the morning?* A. *I drive my car.* Q. *Where is it parked while you're at work?* A. *In the employees' parking lot in front of the factory.*	1 The questions move from the general introduction towards the scene of the incident naturally and without leading questions. 2 All of this evidence could probably be adduced without objection by way of leading questions, but the advantages mentioned at 1 and 2 in the previous section would be lost.
Q. *Was the 30th November [*year*] a working day for you?* A. *Yes.* Q. *Did you go to work that day?* A. *Yes.* Q. *At what time did you go to work?* A. *I was there at ten to seven.* Q. *How did you get there?* A. *I went by car as usual*. Q. *What did you do with your car when you got there?* A. *I parked it in the employees' parking lot and locked it.* Q. *What did you do after you had locked the car?* A.	These may sound like leading questions but they are not because they do not suggest the answer. The fact that a yes or no answer can be given does not necessarily mean that the question is a leading one.

I went to my office and started working. Q. *Until what time did you work that day?*	

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Questions and answers	Comment
A. *I **knocked off** at five in the afternoon.* Q. *Where did you go when you **knocked off**?* A. *I went to **my car** in the parking lot.* Q. *What did you do **when you got to your car**?* A. *I took my keys from my pocket and **bent down to insert the key** in the lock on the driver's door.* Q. *What happened when you **bent down to insert the key**?* A. *I was **grabbed from behind** by someone.* Q. *How did you react when **you were grabbed from behind**?* A. *I started **struggling** with him to throw him off.*	1 We employ the technique called 'piggybacking' here. The previous answer is used to *create* the next question. The question is *grafted* onto the answer. 2 The answer and question are kept together (with the answer first) for demonstrative purposes. 3 The words borrowed from the answer are in bold print.
Q. *What happened during the **struggle**?* A. *He pinned my arms against my sides. **I tried to shake him off** and to bash him against my car but he tripped me and we **fell down**.* Q. *How did you try to **shake him off**?* A. *I twisted and turned.* Q. *In what position did you land when you **fell down**?* A. *I was **face down** with the guy who attacked my **on top of me**.*	1 The second question is put to ensure that the witness gives a *complete* account. Compare what he said in his statement. 2 The third question is grafted onto a prior answer, not necessarily the one immediately preceding the question. This is quite permissible.
Q. *What did you do when you were **in that position**?* A. *I continued to struggle with him.* Q. *What happened during that time?* A. ***He said**: 'Watch it, I've got a knife and I'll use it if I have to.'* Q. *Did you notice anything when **he said** that?* A. *I felt something sharp against my back, **just here**.*	1 It is not necessary to use the exact words of the witness. What is important is that you should use the *fact* the witness has given. 2 When the witness gives a demonstration, you must ensure that it is recorded. Get the witness to confirm what you have recorded.
Q. *You **indicate** on your back, just above the waist, on the left side?*	The first question is grafted onto a number of prior answers.

A. *Yes.* Q. *How did you react when he said he had a knife, and would use it if he had to and you felt something sharp against your back?* A. *I immediately **stopped struggling**.* Q. *What did he do when you **stopped struggling**?*	

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Questions and answers	Comment
A. ***He said** that all he wanted was my money and credit cards.* Q. *Did he **say anything else** at that time?* A. *Yes, **he said** something like: 'Don't get hurt for nothing. Give it to me.'* Q. *How did you react to what **he had said**?* A. *I lay completely still.*	1 The witness did not give the full statement made by the attacker. You have to elicit the missing piece before you continue with the narrative. 2 *'Did he say anything else at that time?'* is not a leading question because it does not suggest the answer.
Q. *What did your attacker do next?* A. *He **took my wallet** from my back pocket.* Q. *Did you resist in any way when he **took your wallet**?* A. *No.*	
Q. *Why did you not resist?* A. *I was afraid that he would stab me.* Q. *Could you describe your wallet and its contents?* A. *It is brown leather wallet, folding type, and it had my driver's licence, credit card, a photograph of my family and R350 in cash at the time.* Q. *What did you do after he **had taken your wallet**?* A. *I **tried to get a look at him**.*	1 You therefore have to lead the witness carefully to establish that he gave up the struggle 'as a result of' the threat made by his attacker. 2 This evidence is important for the purpose of matching it to the evidence to be given by the next witness.
Q. *How did he react when **you tried to look at him**?* A. ***He said**: 'Don't look at me. Keep your face down.'* Q. *What did you do when **he said** that?* A. *I still **tried to get a look at his face**.* Q.	1 The witness is 'controlled' very strictly, one of the main advantages of the piggybacking method. It also makes it clear to the witness that counsel is actively listening to the evidence. 2 Other advantages of this method are that it avoids leading questions and allows counsel to maintain eye contact with the witness. 3 Witnesses quickly warm to this process and often begin to add some relevant material on their own.

*How did your effort to get a **look at his face** turn out?* A. *He must have **stabbed me** because I felt a sharp pain in my back and I later had to have an operation. He'd punctured my lung.* Q. *Was anything said by either of you after you were **stabbed**?* A. *Yes, **he said**: 'Look what you've made me do now. Are you stupid?'*	
Q. *How did you react to **that statement**?* A. *I just **lay still**, face down. I was in a lot of pain.* Q. *What did he do as you were **lying there**?* A. *I heard him **run away** towards Shepstone Road.* Q. *What did you do when you heard him **run away**?*	Note that his evidence (of what his attacker said) does not match his statement word for word. The discrepancy is slight and not worth clearing up.

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Questions and answers	Comment
A. *I **looked** up.* Q. *What did you see when you **looked** up?* A. *I saw a man **running away**.* Q. *Please describe the man you saw running away.* A. *It was a white guy, about 1,75 metres tall and about 70 kilograms. He was wearing denim jeans and a white T-shirt. Blue denims.*	If you want to take the witness out of the strict sequence of events, you should signal your intention to the witness and the judge. **Note**: You can mark the piggyback phrases from here on as an exercise.
Q. *What happened after he'd run away?* A. *I tried to run after him but I collapsed and some of my workmates came to help me. They took me to first aid and I was then taken to hospital by ambulance.* Q. *Mr Weir, I'll return to your injuries and what happened at the hospital later. I want to ask a few questions about your attacker and your wallet first.* A. *OK.*	1 It is permissible to follow a course which concentrates on your theory of the case, in this instance that the accused was the robber, in preference to a strict chronological sequence which includes relevant but less important material. 2 You may prefer to deal with the identification of the accused before dealing with the complainant's injuries and their consequences.
Q. *Did you ever see your wallet again?* A. *Yes, at the police station.*	The question starting with '*Did you . . .*' is not a leading question because it does not suggest the answer.
Q. *How did that come about?* A. *When I came out of the hospital a week later I was called to the police station and the*	By now, the witness is clearly anticipating the next question. He should have said '*Yes*', but he anticipated the next question, '*How . . .*'

Inspector who is sitting outside showed it to me. Q. *Did you recognise it?* A. *Yes. I've had that wallet for a long time. Plus my driver's licence, credit card and a photograph of my wife and children were still in it. Even the money was still all there.*	
Q. *What became of the wallet?* A. *The Inspector gave it back to me.*	
Q. *Did you ever see the person again who had taken your wallet from you in the parking lot and stabbed you?* A. *Yes.* Q. *When and where did you see him again?* A. *At the police station when I went to fetch my wallet.* Q. *Under what circumstances did you see him at the police station?* A. *When the police came to see me in hospital, they asked if I thought I would recognise his voice and I said yes. They then set up a voice identification parade where I recognised his voice. They then brought him out from behind the screen.* Q. *Please describe how the identification parade was conducted.*	1 Identification evidence has to be handled with care. Where the identity of the criminal is in issue, there may be evidence of his or her identification at the scene, at an identity parade or other later occasion and in court. (You may call these three stages Scene ID, Secondary ID and Dock ID.) 2 Identification evidence must be produced with the utmost care to ensure that all three stages of identification, if applicable, are established.

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Questions and answers	Comment
A. *I stood on one side of a screen. They said there were ten guys on the other side and each of them would speak the words I heard my attacker speak. I would then have to try and identify the voice of my attacker, if he was on the parade. He was, he was number seven. When they had all finished speaking, I told the police it was number seven.* Q. *Did you know the man who was number seven in the parade?* A. *No, but he matched the description I had given the police, white, with brown hair, longish in the back, about 1,7 metres tall, about 75 kilograms and he was even wearing blue denims and a white T-shirt.*	1 The circumstances under which the Scene ID and the Secondary ID were made must be established too in order to prove the correctness of the identification. 2 Generally speaking, identification evidence could be direct evidence, circumstantial evidence or an admission or confession. In some cases all three types of evidence will be available.
Q. *Do you see that person here today?* A. *Yes.* Q. *Could you please point him out?* A. *Yes, it's him over there, in that box, the accused.* Q.	This identification process is essential for every criminal trial where the identity of the perpetrator of the crime is in issue. The evidence of criminal activity has to be linked to the accused appearing before the court. A Dock ID is therefore essential.

Your Worship, may it be noted that the witness identified the accused? By the Court: *Yes, carry on.*	
Q. *Mr Weir, I'd like to return to the injuries you suffered. What injuries did you suffer?* A. . . . Q. *You said earlier that you were taken to hospital. What treatment did you receive?* A. . . .	1 Signposting is used to indicate a change of direction. 2 The complainant's injuries and their consequences are relevant to sentence.
Q. *Thank you, Mr Weir, I have no further questions. Please remain where you are to answer any questions my learned friend or His Lordship may have.*	When you say, '*I have no further questions*', your witness often leaves the witness box, no doubt relieved that the ordeal is over. Then they feel foolish when they are called back. It may therefore be helpful to them if you were to indicate what they are expected to do.

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The witness in this example gave evidence of a simple event, all too common you might say, without having to look at documents or other exhibits. The witness was also well educated, composed and prepared. You will not always have witnesses of this calibre. You may have cases with difficult witnesses, hostile witnesses, children, witnesses who can't remember essential details which are set out in their statements, witnesses who just can't remember, witnesses who have to refer to large numbers of documents or exhibits and expert witnesses whose evidence you can hardly follow yourself. The basic techniques for examination-in-chief are the same for all these scenarios, but you would obviously prepare to overcome the anticipated difficulties. You may also have to contend with an opponent who interferes with the flow of your examination-in-chief by making one objection after the other, sometimes to the form of the question and sometimes to the answer that is given. The special techniques for these difficulties are dealt with in chapter 20.

All too often counsel lead their witnesses from a statement. They look at the statement and try to find the next question there. The statement of the witness, of course, does not present you with the questions you can ask in order to elicit the relevant evidence. The questions must be worked out by you, as counsel, and they have to be good questions. They can only be good questions if they elicit all the material evidence sequentially and without asking leading questions. The examination-in-chief can be made a lot easier if you use a timeline that can act as a prompt for your questions.

This can be done as follows, using the statement of Detective Inspector Alson Khuzwayo:

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Table 17.2 Example of the use of a timeline in examination-in-chief

Statement of the witness	Timeline	Examination-in-chief
On 30 November [*year*] at about 17:10 I was driving an unmarked police car along [*street*] in [*suburb*] towards [*suburb*]. I was on duty, having been to [*suburb*] to trace a suspect in another matter. As I drove past the Clermont Shoe Company's factory, I saw a gathering in the parking area in front of the building. I saw a man being assisted towards the building.	**30/11/[*year*] 17:30** **[*street*] driving** **Clermont shoe gathering** **man assisted**	Q. *Where were you at about 17:30 on 30/11/*[year*]?* A. *[*street*], [*suburb*].* Q. *What were you doing?* A. *Driving past Clermont Shoe Co.* Q. *What happened when you were driving past Clermont Shoe Co?* A. *I saw a gathering in the parking area and a man*

		being assisted towards the building.
I drove on towards [*suburb*]. About three hundred metres further towards [*suburb*] I came across a young man running on the left side of the road with his back to me. At the same time I heard a report on the police radio to the effect that a man had been robbed a few minutes earlier in [*suburb*] and that the attacker had last been seen running up [*street*] in the direction of [*suburb*], and it was a white man wearing blue jeans and a white T-shirt.	**drove on** **running man** **police report** **robbery [*suburb*]** **suspect in [*street*]** **white/blue jeans/T-shirt**	Q. *Where did you go from there?* A. *I drove on towards [*suburb*].* Q. *What did you see as you were driving?* A. *A man running on the left side.* Q. *What else happened at that time?* A. *I heard a report on the police radio that there had been a robbery and that the suspect had run up [*street*] towards [*suburb*].* Q. *Was there any description of the suspect?* A. *Yes, they said it was a white man wearing blue jeans and a white T-shirt.*

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The technique used here is to phrase each question in such a way that the piggyback method is employed but in such a way that the important evidence previously identified during the preparation phase and highlighted in the timeline is elicited from the witness. As the witness gives the evidence, items covered can be marked off in the timeline. Any item in the timeline not covered by the witness has to be elicited by an appropriate question before you move on to the next item in the timeline. It is of the utmost importance that the evidence is complete *and* chronological.

17.8 Protocol

- Allow the witnesses to tell their own story, both in consultation when you brief them and in court when you lead their evidence.
- Don’t show any impatience or disappointment when the witness is unhelpful or slow. Patience and empathy are required when dealing with people.
- Ensure that the evidence is given in such a way that it can (and is) recorded accurately. This may mean slowing down in a court where the proceedings are recorded manually. Demonstrations and descriptions given by your witnesses have to be translated into spoken words for the record: ‘*The witness has indicated about ten paces, M’ Lord*.’
-

Your witness must remain at court unless excused by the judge. Ask witnesses in advance if they want to be excused and then ask the judge for permission when the re-examination has been completed (and the judge does not have any questions).

17.9 Ethics

The two most important rules of ethics are at play during the examination-in-chief of a witness, namely (i) counsel's duty not to knowingly mislead the court, and (ii) counsel's duty to apply the good faith principle. The former is in the nature of a negative duty, that is to say, to refrain from doing something. The latter requires counsel to make an active and professional effort to ensure that the evidence that is produced by means of the examination-in-chief is, objectively speaking, *reliable and admissible*. For a general discussion of the relevant principles, see chapter 14 and the LPA Code of Conduct paragraph 57.1.

When a 'good facts/bad facts' exercise is performed by counsel and it appears that there are 'good facts' as well as 'bad facts' in the version of the witness, counsel is faced with a dilemma. Should counsel lead the evidence of the adverse facts or leave it for opposing counsel to elicit that evidence through cross-examination? There is no easy answer to this question that can satisfy every possible scenario. The following general approach may be adopted:

- Due to the particular constitutional role and duties of a prosecutor (which were explained in chapter 14) a prosecutor is legally and ethically obliged to extract also the adverse evidence or 'bad facts' from the prosecution witness. This follows from the prosecutor's duty to assist the court in coming to a just decision.

- Counsel for plaintiffs and defendants in civil trials and defence counsel in a criminal trial may consider that they have the same ethical duty to elicit the adverse facts from the witness. It is submitted that this is so for the following reasons:

  - The witness will have taken the oath or affirmation to tell the *whole truth* and it is counsel's duty to help the witness to give effect to that solemn undertaking.

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  - If counsel were not to elicit the adverse evidence and that evidence were then to be extracted during cross-examination, the reliability and credibility of the witness may be affected to the detriment of the client's case.

  - Similarly, if the adverse evidence should only be revealed during cross-examination the witness may be asked why he or she did not produce that evidence during the evidence-in-chief. The witness may well answer truthfully, '*I told counsel this but he did not ask me about it when he questioned me.*' Counsel's own credibility and ethics will then come under the spotlight, again to the detriment of the client.

  - If the adverse evidence were not to come to light during the opponent's cross-examination of the witness, the situation becomes dire because counsel will then have become a party to placing a false or incomplete version before the court. This may well be regarded as a contravention of LPA Code of Conduct paragraph 57.1:

> 57. **Disclosures and non-disclosures by legal practitioner**
> 57.1

A legal practitioner shall take all reasonable steps to avoid, directly or indirectly, misleading a court or a tribunal on any matter of fact or question of law.

It is submitted that counsel's duty to the court – not to mislead – takes precedence over counsel's duty to the client in the situation postulated.

The following additional principles apply to the examination-in-chief:

- Counsel must avoid any suggestion, in court and in briefing the witness, which is calculated to induce the witness to suppress evidence or to deviate from the truth.

- Counsel must avoid introducing evidence that is inadmissible or amount to a breach of the rules of evidence and procedure or a rule of ethics.

- After the witness had been sworn in and before the witness has completed his or her evidence, counsel may not interview the witness except as provided by the LPA Code of Conduct paragraph 55.5.

55. **Interviewing of Witnesses** **General** 55.5 Once a legal practitioner has called a witness to testify, the legal practitioner shall not again interview that witness until after cross examination and re-examination, if any, have been completed, unless circumstances arise that make such an interview necessary. When a proper case for such a necessary interview exists, the legal practitioner shall prior to any interview inform the opposing legal practitioner of such need and unless the opposing legal practitioner consents, no such interview shall be held unless the court or tribunal grants permission to do so.

17.10 Checklist and assessment guide

If this book were to be used as a teaching guide or prescribed work for advocacy exercises, the following checklist may be used to prepare for the exercises, to serve as an assessment guide, or to serve as a marking guide.

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If the checklist were to be used as a marking guide, the best way to go about the matter is to allocate a grade to each student or pupil whose performance is being assessed as follows:

C = Competent (meaning that the performer has attained the desired standard of competency in respect of the skill involved).

NYC = Not yet competent (meaning that the performer has not yet reached the desired standard).

Table 17.3 Checklist for examination-in-chief

	Skill involved	**Competent/ Not Yet Competent**

1	Preparing a timeline for each witness	
2	Ensuring that the witness has been briefed properly	
3	Introducing the witness	
4	Qualifying the witness	
5	Controlling the witness by signposting and piggybacking	
6	Asking clear questions	
7	Asking non-leading questions	
8	Asking simple questions eliciting one fact at a time (as opposed to compound questions)	
9	Ensuring that all gestures and demonstrations are recorded	
10	Listening to the answers and responding appropriately	
11	Avoiding inadmissible evidence	
12	Eliciting the evidence in a logical order	
13	Eliciting all the relevant evidence	
14	Handling exhibits appropriately	
15	**Protocol**: o Practising SOLER principles (Shoulders square, Open stance, Leaning slightly forward, making Eye contact, Relaxed posture) o Maintaining eye contact with the witness o Speaking at appropriate volume and pace o Addressing the court with proper deference o Ensuring that only one counsel is standing at any time o Addressing the court from the correct location, not moving about the courtroom o Responding appropriately to objections	

Chapter 18
Cross-examination

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18.1 Introduction

Every party to a trial has the right to question witnesses called by any other party, and, in the case of a witness called by the judge, may question the court's witness, subject to the permission of the court. This type of questioning is almost invariably adversarial in nature because the witness would not have been called unless he or she had something to contribute against the interests of the party cross-examining. This does not mean that it is open season on the witness. Treating the witness with courtesy is not inconsistent with skilful, powerful and penetrative cross-examination.

There are two main types of cross-examination. The one is constructive; you strengthen your own case by eliciting evidence which is favourable to your client's case from the opposing witnesses. The other is destructive; you attack the reliability of the evidence given by or the credibility of the opposing witness.

18.2 Aims of cross-examination

Cross-examination is done for 'gain' and for 'duty'. You cross-examine opposing witnesses in order to make your own case better; this is cross-examination for gain. You also have to put your own version of disputed facts to opposition witnesses so that they may comment on them; this is cross-examination for duty. The aims of cross-examination are pursued through questions which:

- elicit favourable evidence for your side.
- test or discredit the reliability of the evidence-in-chief of the opposing witness.

- destroy or undermine the credibility of the opposing witness who is giving evidence.
- destroy or undermine the reliability of evidence given by a witness other than the one being cross-examined or the credibility of a witness other than the one being cross-examined.
- put your version of disputed facts to the other side's witnesses who can comment on those facts.
- 'parade' your case.

Cross-examination is thus a tool of persuasion; it is used in an effort to have your own side's theory of the case accepted and the other side's theory rejected. While it is a useful tool to discover the truth, the value of cross-examination should not be over-estimated. [Page 344] Often your cross-examination will show very little gain for the effort you have put in. Cases are not always decided on what happened during cross-examination. The important evidence for both sides will have been given in evidence-in-chief. Don't bet the family farm on what you may gain in cross-examination. Ensure that your side's case is presented fully in the evidence-in-chief and regard what you may gain in cross-examination as a bonus.

18.2.1 *Constructive cross-examination: Eliciting favourable evidence*

Opposing witnesses are often able to confirm parts of your own case or to fill gaps in it. There are further advantages for your client if you should succeed in eliciting favourable evidence from opposing witnesses. You may even be able to cultivate the notion that there is no real dispute between what your witnesses will say, or have said, and what the witness under cross-examination says. So your first priority in cross-examination must be to elicit favourable evidence from the opposing witnesses.

However, eliciting favourable evidence from an opposing witness is a delicate operation. Your planning should have been done thoroughly so that you have an accurate idea of what you can reasonably expect the witness to concede. You must also know what the risks are. You must apply a little psychology and a lot of tact. You must:

- be courteous to the witnesses.
- lead the witness gently to the answers you want by asking leading questions.
- bank the good answers. Many an effort to obtain favourable evidence have been unsuccessful because the cross-examiner asked a question too many.

When you have elicited the favourable evidence you want from the witness, you reach the stage where you have to consider your next move. Is there anything else to gain from questioning the witness further? Will further cross-examination devalue the benefits gained so far? Whether you will proceed to destructive cross-examination will depend on your on-the-spot assessment of the situation. Sometimes the value of the gains you have made thus far is so high that you will bank those answers and sit down. Sometimes you are going to conclude that you have received so little from the witness that there is nothing of substance to lose by attacking the evidence and the witness. Proceed with caution. A bird in the hand is worth two in the bush.

18.2.2 *Destructive cross-examination: Discrediting the evidence*

There is an important difference between discrediting a witness and discrediting the evidence given by a witness. Discrediting the evidence does not require an attack on the person giving it. You don't always have to attack the veracity, character or integrity of the witness in order to cast suspicion on his or her evidence. People perceive events differently and from different vantage points; they

remember things differently, have differing views of what is important, and have varying skills in communicating what they have witnessed. The result is that there are often discrepancies in the evidence unrelated to any attempt to mislead. Attacking the personal integrity of a witness in these circumstances is not only unlikely to achieve results but may even be unethical.

That does not mean that you cannot impeach the reliability of the evidence. You can still diminish the value of the evidence by clever and subtle questioning that highlights the facts and circumstances which make the evidence unreliable or less reliable, even if the witness were to be regarded as honest. He or she could be 'honestly mistaken'. The [Page 345] witness is far more likely to concede that than that he or she had been dishonest. And the court is far more likely to make a similar finding. So you have to think of ways to demonstrate to the court that the evidence is unreliable. Witnesses may only give evidence of what they observed, what they can remember, and what they can recount in their own words. You may therefore ask questions which test observation, memory and ability to recount what they have observed and remember:

- *Observation:* What were the circumstances under which the witness saw, heard or experienced what he or she has recounted to the court? Were those circumstances conducive to an accurate perception or recollection? Is what the witness experienced the complete story or just part of it? Could someone else, from a different vantage position, have experienced things differently?

- *Memory:* Did the witness have any particular reason to take notice of the events at the time? Was there any reason to remember what happened? Did the witness make any note or statement when the events were still fresh in his or her mind? How long after the event was the witness first asked to recall the events? How good is the witness's memory? Has the recollection of the events by the witness been tampered with by someone who suggested facts to him or her?

- *Recounting:* Is the witness telling the story in his or her own words? Did the witness perhaps hear another witness recount what they had seen? Worse still, did the witness perhaps sit in while other witnesses were interviewed or briefed by the opposing advocate or attorney?

At the end of this stage of the cross-examination you must make a value judgment on the proceedings thus far to decide whether it is necessary to attack the credibility of the witness. It may not be necessary if the evidence the witness has given has been discredited thoroughly or has little impact on the case as a whole. An attack on the witness has to be seen as the last resort.

18.2.3 Destructive cross-examination: Discrediting the witness

Cross-examination for the purpose of discrediting the witness is destructive; it attacks the witness directly and personally. It places the cross-examiner and the witness at odds with each other. That does not mean the cross-examination has to be aggressive or unpleasant. The more subtly you can do this, the better. The questions asked in this phase would suggest or pursue the notion that the witness is not worthy of credence for reasons like the following:

- *Bias*: Bias means that the witness has an irrational predisposition in favour of one side. The witness may have shown, or may show, as a result of subtle cross-examination, that he or she has a bias against your client or side or a motive to be untruthful. Suggestive questions may explore or expose this bias or motive, with the ultimate aim of showing that the witness should not be believed or that less weight must be attached to their evidence.

- *Prejudice*: A witness is said to be prejudiced against one side in the litigation if he or she has an irrational predisposition against that side.

- *Interest:* If the witness has an interest in the outcome of the trial, their evidence may well be accorded less weight.

-

Corruption: If a witness has accepted a bribe or some other advantage for giving evidence, you must expose that. You must be careful though, because you may not make allegations of fraud or corruption without just cause, meaning that you have some evidential basis to support your suggestion of corruption.

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- *Prior convictions:* If the witness has a prior conviction for an offence involving dishonesty, you may cross-examine to that effect. If the witness denies having been convicted, you may lead evidence to prove the prior conviction.

- *Bad character demonstrated by prior bad acts:* It is not necessary for the witness to have been convicted of a crime for his or her past acts to be relevant to their credibility. For example: A witness who has rendered a false income tax return may be cross-examined on that subject.

- *Prior inconsistent statements:* A prior inconsistent statement may have been made by the witness in a document which is available to you, for example, in a statement taken by the police, in a letter written to your client, and even in the pleadings or in an affidavit made in the course of interlocutory proceedings between the parties. An inconsistent statement may also have been made orally, out of court, or even in the witness box. You may cross-examine the witness of such inconsistencies. The technique for dealing with prior inconsistent statements is explained in paragraph 20.4.

- *Discrepancies:* A common but not infallible indication that a witness is untruthful, is that the witness contradicts himself or herself, or contradicts another witness. The theory is that a witness who is telling the truth will be consistent in the version he or she gives, while an untruthful witness has to make up a story, remember it and repeat it accurately. This is not always so easy. So your cross-examination may be designed to elicit discrepancies or to expose and exploit discrepancies. Once a discrepancy has been exposed, you have to decide whether you are going to leave it there and raise it in argument later, or whether you are going to confront the witness with it. If you bank the answers for use in argument, an explanation may be elicited in re-examination. If, on the other hand, you choose to confront the witness directly with the discrepancy, the witness may give a perfectly acceptable explanation. Each case will have its own answer. When in doubt, leave the point for argument. You should be able to argue better than the witness can explain.

- *Inherent improbability:* Sometimes the evidence given by a witness is free of internal discrepancies and does not contradict what other witnesses have said, but the version given is generally inconsistent with documents produced as exhibits or with the inherent probabilities of the case or even with the witness's own conduct. When cross-examining a witness in such a situation, you should try to elicit or highlight such an inconsistency without giving the witness an opportunity to explain or elaborate.

- *Reputation:* The witness may have a reputation for dishonesty. If you intend to lead evidence to that effect, you have a duty to put it to the witness.

18.2.4 ***Discrediting evidence given by another witness and discrediting another witness***

You could employ some subtle cross-examination to discredit evidence given by another opposition witness or to discredit a witness other than the one being cross-examined. The questions you would ask would tend to expose or suggest bias, an interest in the outcome, discrepancies involving the other witness, an inappropriate attitude to the oath or truth or a reputation for untruthfulness on the part of the other witness. You could also undermine the evidence of another witness by exposing or suggesting that he or she did not have a good opportunity to observe or was forgetful. Ask yourself how believable the evidence of another opposition witness is in the light of what this witness says.

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18.2.5 *The duty to put your version*

One of the fundamental rules of trial is that you have to put as much of your case to individual opposing witnesses as they can reasonably be expected to be able to answer. This rule emanates from *Browne v Dunn* (1893) 6 R 67 (HL) where Lord Herschell said:

> 'My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him, and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential for fair play and fair dealing with the witness.'

There are three qualifications to this rule. The *first* is that you have to put to the witness only that part of your version on which the witness is able to comment. The *second* is that you only have to put that part of your own witnesses' version that conflicts with the evidence of the witness under cross-examination. The *third* is that you do not have to put any version to the witness if you are not going to call witnesses to dispute the version given by the witness.

The rule also applies to prosecutors. They have to put to the witness what in the evidence of the witness is disputed or qualified by the prosecution.

18.2.6 *Parading your case*

When nothing else is to be gained from a witness, you may in some instances be able to make your own case look better by putting those parts of it that the witness is likely to agree with to an opposition witness. If you have a very strong case, you may make the tactical decision to parade your case to the first opposition witness to whom it can logically be put for comment. If the witness agrees with the salient points of your case, the other side may capitulate, and even if they don't, the details of your case will have been fixed in the mind of the judge at an early stage. You parade your case for impact and you must therefore ensure that the witness agrees with every fact you put to him or her; otherwise the impact may be negative, emphasising that the witness disagrees with your version rather than the opposite.

18.3 Restrictions on cross-examination

There are legal and ethical limits to cross-examination. Those principles are discussed in chapter 14 and in paragraph 18.10 below.

Generally speaking: Questions may be allowed in cross-examination if they serve any of the purposes discussed earlier, subject to a number of provisos. Keep in mind that the court has an overriding discretion to disallow questions even if they are otherwise in order. A general distinction is drawn between cross-examination on the merits (testing the reliability of the evidence) and cross-examination testing the credibility of the witness, or cross-examination to credit, as it is sometimes called.

18.3.1 *Cross-examination on the merits*

Questions are allowed on all matters in issue before the court; whether the accused was the one who had stabbed the deceased, whether the light was red when the defendant entered the intersection and so on. The cross-examiner may also ask questions that elicit favourable evidence for his or her side, even if the witness has given no evidence on the subject-matter of the question in their evidence-in-chief. The merits include the precise [Page 348] circumstances of the event or incident in question, and questions that paint the incident in a different light are not only permissible, they are an example of good technique.

Favourable evidence the cross-examiner elicits for his or her side must be admissible. Inadmissible evidence does not become admissible merely because it is given by a witness called by the other side. Conversely, however, if the question elicits inadmissible evidence, which is adverse to the cross-examiner, that evidence will stand (subject to its value being assessed by the court in reaching its decision) unless the answer is not a proper response to the question that had been asked. Inadmissible hearsay and confessions or admissions often become admissible as a result of a careless question put by a cross-examiner. So be aware of this risk.

The merits include the reliability of the evidence, as opposed to the credibility of the witnesses. The reliability of the evidence is tested by questions testing the ability of the witness to observe accurately, to remember, and to recount accurately and dispassionately what he or she has seen or experienced. For example: Where the identity of the person who committed a crime (or other act) is in issue, the cross-examiner may ask questions to test the accuracy of the identification by the witness. Topics that would typically be covered in such a case (and be allowed) include:

- whether the witness had known the person identified previously.
- the circumstances under which the identification was made, including the state of lighting, the duration of the observation, the distance the witness was from the scene, the amount of stress or fear involved, the accuracy of any description of the person identified given by the witness after the event, any subsequent identification of that person by the witness under controlled circumstances such as a police identification parade and so on.
- whether the witness has been influenced in his or her identification.
- the distinguishing features of the person identified.

18.3.2 Cross-examination to credit

Questions that attack or cast doubt on the credibility of the witness are allowed in cross-examination. Wide latitude is allowed when the questions relate to the honesty and integrity of the witness. Often the cross-examiner is the only one who has any idea where the questions are going. The following areas may be explored to test the credibility of the witness:

- The conduct of the witness may contradict his or her evidence.
- The witness is prejudiced or has a bias or interest adverse to the cross-examining side, or has a motive to be untruthful.
- The witness has previous convictions for offences involving dishonesty.
- The witness has previously been guilty of dishonesty, although not of the kind involving a conviction.
- The witness has made a prior inconsistent statement.
- The witness has a reputation for untruthfulness.

18.3.3 Provisos

There are many risks involved in cross-examination. The witness may give damaging answers; the witness may withstand cross-examination so well that the evidence gains in [Page 349] credibility

or you may find that you simply have no material to question the honesty of the witness. These problems are compounded by the following circumstances:

- The LPA Code of Conduct as well as the Rules of Ethics of the Bar and the Law Society superseded by it prohibit attacks on the character and integrity of a witness unless you have express instructions and reasonable grounds for doing so. This is an example of the good-faith principle at work.

- If you attack the character of an opposition witness or cross-examine them about their previous convictions, your own client's character and previous convictions may be explored by the other side.

- While you will be allowed to repeat questions, even questions that had been asked in the evidence-in-chief, the court will stop you if you go too far. Repeating questions or evidence is allowed only up to a point, determined by the disposition of the judge.

- Oppressive, insulting, abusive, sneering and unduly sarcastic cross-examination will not be allowed. Insisting that the witness must answer the question with a 'yes' or a 'no' when the witness wants to add something or answer differently is oppressive and is not allowed. The oath taken by witnesses requires them to tell the truth, 'the whole truth', and nothing but the truth. A simple yes or no answer doesn't always tell the whole truth. The witness should therefore be entitled to explain by answering 'Yes, but . . .' or 'No, and . . .' You may even be able to use the explanation that is offered to expose bias or to elicit a contradiction or improbability in the evidence.

- The answers given to questions relating to credit are final. You are not allowed to lead evidence to dispute the evidence given by the witness in this regard. There are two exceptions where evidence in rebuttal may be led to disprove the evidence of the witness. The *first* is evidence of bias, interest, prejudice or corruption, and the *second* is evidence of previous convictions.

18.4 Failure to cross-examine

If you intend to lead evidence to contradict the witness or intend to argue that the witness's evidence should not be accepted, you must cross-examine the witness on the disputed facts. The idea is to give the witness an opportunity to explain or to answer your side's version of the facts. There is a grave risk in not cross-examining an opposing witness; the court may accept their evidence, especially *because* their evidence was not disputed in cross-examination.

Sometimes the evidence given by a witness is so obviously false or so far-fetched that it is beyond credence; it may not be necessary to cross-examine the witness in such a case. But make sure the judge shares your view that the evidence is beyond credence; don't run unnecessary risks. When in doubt, put your version to the witness and say that you have no further questions.

18.5 Structure of cross-examination

The structure or approach of your cross-examination will be determined by the tactics or strategy you have planned for the case or for the particular witness. At the preparation stage, your planning will be provisional only, because you have to listen to the evidence the witness actually gives when

being examined-in-chief before you can decide on your [Page 350] approach. The evidence has to be evaluated as it is given, from moment to moment, and you can only finally plan your approach when you have considered the impact of the overall evidence the witness has given. If your preparation has been thorough, you should be in a good position to make this assessment quickly and accurately. You may then come to the conclusion, for example, that the witness has not hurt your case as badly as you originally anticipated. You may then even decide that there is nothing to gain by cross-examining the witness. Or you may decide to elicit favourable evidence without discrediting the witness in any way.

Anticipate who the other side will call as their witnesses and think of possible themes for their cross-examination. You need themes for each witness. The following themes may be applicable:

- Constructive cross-examination:
  - favourable facts.
- Destructive cross-examination:
  - observation.
  - memory.
  - recounting.
  - bias, interest, prejudice, corruption.
  - prior convictions.
  - prior bad acts.
  - prior inconsistent statements.
  - bad reputation.

The following structure for your cross-examination may be helpful:

- Cross-examination is selective and covers only those topics chosen by counsel. Evidence-in-chief, on the other hand, has to be complete, with the witness telling the whole story from beginning to end. You therefore determine the topics or themes for cross-examination and the order in which to raise them.
- The general sequence would be:
  - first, to attempt to elicit favourable evidence (including evidence that discredits another witness).
  - then, to consider whether there is anything to be gained by testing the reliability or correctness of the other evidence the witness has given.
  -

if there is still a need to discredit the witness after that, to proceed with caution in your attempt to discredit the witness.

– last, to put your side's version of those disputed facts on which the witness should be able to comment.

o Counsel has to make an assessment of the situation continuously, from question to question, depending on how successful the cross-examination has been. The approach to further cross-examination and the need for it are determined by answers to questions such as:

– How much have I got from the witness?

– How badly do I need what I've got already from this witness for my case?

– What are the risks if I were to carry on? What can go wrong?

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– How important is this witness in the grand scheme of the case anyway?

– What are the chances of my actually gaining more by carrying on?

18.6 Technique in cross-examination

Your technique in cross-examination has to be adapted not only for the particular case, but also for the particular witness. In short, your theory of the case and the evidence already given by the witness will determine what line of cross-examination you follow and what style you adopt. Your purpose is to enhance your client's case by achieving one or more of the purposes of cross-examination explained earlier.

Professor Irving Younger (*The Advocate's Deskbook: The essentials of trying a Case* Prentice Hall (1988)) listed ten precepts to be applied by the novice cross-examiner:

1 Be brief.

2 Ask short questions using plain words.

3 Ask only leading questions.

4 Do not ask a question if you do not know the answer.

5 Listen to the answer.

6 Do not argue with the witness.

7 Do not allow the witness to repeat adverse evidence against your side.

8

Do not allow the witness to explain (never ask *why*).

9

Avoid asking a question too many.

10

Save your explanations for the closing argument.

Patrick Malone ('Burying the Ten Commandments of Cross-Examination' in *The Fearless Cross-Examination, Win the Witness, Win the Case Trial Guides 2016*) has reshaped Younger's 'Ten Commandments' into a more practical eight principles:

(i)

Be brief but be proportional to the harm to your case.

(ii)

Ask simple, plain questions with narrow answers.

(iii)

Ask only questions whose answers you can deal with.

(iv)

Listen to the answer, and follow up.

(v)

Don't argue with the witness, except where it's obvious the witness deserves it

(vi)

Avoid giving the witness a chance to explain or repeat the witness' core message.

(vii)

Don't chase cheap points that the witness or opposing counsel can easily crush.

(viii)

Make sure the court understands every important point before the witness leaves the witness box.

There is general consensus about these principles; therefore don't try to reinvent the art and science of cross-examination.

Individual styles of cross-examination could be characterised as 'scornful', 'stern', 'formal', 'informal', 'familiar' or even 'mischievous' cross-examination. Whatever style suits you, remember that it has to be employed with subtlety. Throughout the cross-examination, counsel will introduce fresh themes without clear links giving away the purpose behind the questions.

There are various ways to pursue these goals. Munkman (*The Technique of Advocacy* (1991)) is of the view that there are four main techniques to be adopted by a [Page 352] cross-examiner. They are 'confrontation', 'probing', 'insinuation' (or 'suggestion') and 'undermining'. Munkman is quick to point out that these techniques go hand in hand, and that undermining may even be subsumed in the others. Others treat the subject differently, preferring to illustrate cross-examination techniques by way of anecdotal examples. Nevertheless, Munkman's classification is useful when planning and executing your cross-examination.

18.6.1 *Confrontation*

The technique of confrontation is used when the cross-examiner has the ammunition to demonstrate that the evidence given by the witness is incorrect (discrediting the evidence) or untrue (discrediting the witness). The witness is therefore confronted with all the contrary evidence, piece by piece, with the aim of discrediting the evidence-in-chief or the witness. The idea is that the witness should be confronted with facts he or she cannot deny. For obvious reasons, this approach can only work where you have strong evidence to support the facts put to the witness.

The facts have to be put one by one so that each question suggests only one fact. The cumulative impact of the facts is important, so you need to put all the relevant facts to the witness. The idea is

to put the questions in such a way that the witness has to answer in the affirmative or disclose bias or dishonesty. It is common to find, when this style of cross-examination is used, that the witness starts giving 'explanations' instead of straight answers to the questions. This is because the witness soon catches on to what the cross-examiner is trying to achieve and tries to prevent that. Therefore, if a fact suggested by you is denied by the witness, you may have to resort to 'probing' questions to discredit the answer and then continue putting the other facts with which to confront the witness with.

Table 18.1 Confrontation as a technique in cross-examination

The facts: A ballistics expert gives evidence in a criminal trial. The accused is charged with murder and the issue is whether he had fired the shots deliberately. Altogether 10 shots were fired. In the expert's opinion, the accused had moved around the room while firing the shots. This opinion is based on the places where the individual shell casings were found after the shootings. The defence version is that the accused had fired all the shots from one position while in a state of sane automatism.
The aim of the cross-examination: To discredit the expert's opinion and the prosecution theory (that the accused 'deliberately' moved around while mowing down the victims) by showing that the shell casings are more likely to finish up in random positions when ejected from the pistol.
Q. *You based your opinion on the positions of the various shell casings?* A. *Yes.* Q. *The floor of the room was tiled, as we can see in the photograph, Exhibit B?* A. *Yes.* Q. *The walls of the room were bare?* A. *Yes.* Q. *There were various items of furniture in the room, as we can also see from that photograph?* A. *Yes.*

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Q. *The shell casings would have been ejected at a speed of 3 metres a second, your tests have shown?* A. *Yes.* Q. *They could have hit one or more of the walls and one or more of the items of furniture before coming to rest on the floor?* A. *Yes.* Q. *The bounce of these objects could not be predicted with any degree of accuracy, could it?* A. *I don't entirely agree with that.* Q. *Where an individual shell casing finally came to rest under those circumstances is entirely random, isn't it?* A. *I don't think so.* Leave the rest for argument.

There are three separate steps in this sequence

- the expert is 'committed' to the reasons for his opinion
- he is 'confronted' with facts he cannot deny
- when he resists the conclusion counsel seeks, counsel leaves the point for the closing argument. At that point you may conduct an experiment, dropping the shell casings from the hand, to show that they scatter when they hit the floor.

18.6.2 Probing

Probing questions inquire into the details of the version given by the witness in order to test its truth or to expose it as wrong or to cast doubt on it. The aim is to discover and expose weaknesses in that version. These weaknesses may consist of discrepancies, improbabilities and other flaws in the evidence.

Probing questions are often open questions, or closed but non-leading questions. This contrasts with the conventional wisdom that questions in cross-examination should always be leading questions. However, the witness has to be given some rope to hang himself. Probing questions may even invite explanations, which would usually also be avoided, but in this instance the explanations are sought in order to expose weaknesses. For the same reason, you may ask probing questions when you don't know what the answer will be – a danger generally to be avoided in cross-examination. The risks inherent in this situation must be carefully considered before asking a series of probing questions Do the risks (of eliciting unfavourable answers and evidence) outweigh the possible gains (discrediting the evidence or witness)?

Probing questions asked in quick succession – not really much of a prospect when you have to speak through an interpreter – may be used to keep the witness off balance and to ensure that, if the witness is making things up, there is insufficient time to be too successful at it. It isn't always possible to prepare probing questions in advance, and you must ready to seize the opportunity to ask probing questions when it becomes necessary. To be ready for this, you must know your case very well, listen carefully and critically to the evidence of each witness, and have sound judgment. If you have prepared a proper fact analysis using the proof-making model, you should be well prepared.

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Table 18.2 Probing as a technique in cross-examination

The facts: The accused has been charged with a housebreaking and theft that occurred on 12 August [*year*] at 04:00. His defence is an alibi and he has given notice that he intends to call his mother to support the alibi. He gave evidence-in-chief to the effect that he was asleep in his bed at home at the relevant time.
The aim of the cross-examination: To probe into the details of the alibi in order to discredit it and to obtain material to undermine the alibi witness.
Prosecutor. *You first heard that the police were looking for you on 31 August [*year*]?* A. *Yes.* Q. *You heard that they were looking for you in connection with a burglary on 12 August [*year*]?* A. *Yes.* Q. *And you then went to the police station three days later with your mother?* A. *Yes.* Q. *You must have told your mother why the police were looking for you?* A. *Yes.*

Q.
And you then must have discussed where you had been on the night of the 12th?
A.
Yes.
Q.
At what time did you go to bed that night?
A.
. . .
Q.
Who else was at home at the time?
A.
. . .
Q.
What did you do before you went to bed, say from about 7pm onwards?
A.
. . .
Q.
Let's go through that slowly, step by step. I want to know what you did, what time it was when you did each of these things, who was present at each stage and what they did.
A.
Okay.
Q.
What did you have for dinner?
A.
. . .
Q.
Did you have anything to drink?
A.
. . .
Q.
Who else was at the dinner table?
A.
. . .
Q.
At what time did dinner finish?
A.
. . .

The first few questions may undermine the accused and his witness. The remaining questions are designed to find details to compare with the evidence of the next witness.

18.6.3 Suggestion (insinuation)

Facts may be suggested to the witness in such a way that the events are put in a different light. The purpose is to establish a version that is more favourable to the cross-examiner's side. You put a different 'spin' on the facts. This technique relies heavily on leading questions that suggest additional facts or circumstances putting a slightly different spin on the events. Suggestion as a technique for cross-examination does not work well when the evidence of the witness is diametrically opposed to what is suggested. In such a case confrontation would be a more suitable technique to use.

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Suggestion would therefore be used where

- there are only slight differences between the evidence and what you want to suggest is the truth
- you can make small, incremental gains by suggesting one fact at a time to the witness, preferably including (or repeating) two or more facts the witness has already given for every

new fact suggested, so that the cumulative effect of all the evidence puts a different slant on the matter.

Suggestive questions can be asked forcefully or gently. The stronger the underlying material (on which the suggestive questions are based), the firmer you can be in suggesting them as facts. However, where your material is sketchy or doubtful, you may have to be more diffident in your suggestions and lead the witness along gently. Subtlety, rather than aggression, may be the style to adopt in such a case.

Table 18.3 Suggestion as a technique in cross-examination

The facts: The facts are given in chapter 15 in the opening addresses of the prosecutor and defence counsel. The store detective has given evidence to the effect set out in the prosecution's opening statement. The prosecution theory is that the accused 'exchanged' his old backpack for a new one, and implemented a deliberate plan to steal by nonchalantly walking out the door without paying, and when confronted by the detective, apologised for his actions.
The aim of the cross-examination: To suggest additional facts that may put a slightly different slant on the store detective's evidence, namely that the conduct of the accused is also consistent with a honest mistake having been made.
Defence counsel. *The accused took the backpack off the rack in full view of the store's staff, including yourself?* A. *Yes.* Q. *His own backpack was on the floor at his feet, wasn't it?* A. *Yes.* Q. *He then examined the store's backpack thoroughly, didn't he?* A. *Well, uhm.* Q. *What I mean is that he held it up, opened its various pouches and looked inside its separate compartments.* A. *Yes, he did.* Q. *He had to use both hands for that, didn't he?* A. *Yes.* Q. *Then, still in full view of everyone, he walked over to the rack where briefcases were displayed?* A. *Yes.* Q. *And then, after slinging the store's backpack over his shoulder, he examined a few of those too?* A. *Yes.* Q. *And then he put them all back on the rack and walked to the door of the store?* A. *Yes.* Q. *And he still had the store's backpack over his shoulder?* A. *Yes.* Q. *He walked straight past you and the cashier at the till point?* A. *Yes.* Q.

And out the door?

A.

Yes.

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Q.

From what you have said so far, he did all of this quite openly?

A.

Yes, but that was part of his plan, I think.

Q.

And when you confronted him outside, you said: 'Pardon me, but you haven't paid for that backpack.'

A.

Yes.

Q.

And he said: 'I'm sorry, it's a mistake.'

A.

Yes.

Q.

That was all he said, wasn't it?

A.

Yes.

Q.

So you cannot deny that he meant he had made a mistake in thinking that he was carrying his own bag, can you?

What has been suggested here is that the accused had slung the backpack over his shoulder when he needed both his hands to examine the briefcases. This fact, coupled with others, could be used in argument to contend that the accused had slung the backpack over his shoulder thinking it was his own, had not noticed any difference in colour, texture or weight, and that his mind was on the briefcases when he did so. Another useful fact elicited (suggested) in this exchange is that the accused acted openly. The last question is an example of a risky question, the 'question too many' against which Professor Younger has cautioned.

18.6.4 Undermining

Undermining questions would, typically, be aimed at the aspects discussed earlier in this chapter, such as:

- the opportunity, or lack of opportunity, to observe.
- the accuracy of the recollection of the events by the witness.
- the accuracy of the recounting of the events by the witness.
- bias, prejudice, interest or corruption.
- the presence of discrepancies and inconsistencies in the evidence of the witness, as apparent from prior inconsistent statements, the evidence of other witnesses, and any documentary evidence.
- the general (or inherent) probabilities of the case.
- the character of the witness, as apparent from prior convictions, other prior bad acts or his or her reputation.

Using confrontation, probing and suggestion, the cross-examiner would attempt to undermine the impact of the evidence or the witness.

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Table 18.4 Undermining the witness

The facts: The facts are given in the opening addresses of counsel for the prosecution and defence in chapter 16. The accused is alleged to have stolen a backpack. Consider his defence, as put by his counsel in the defence opening statement.
The aim of the cross-examination: To 'parade' the prosecution case in order to undermine the defence case.
Prosecutor. *So you put your own backpack on the floor?* A. *Yes.* Q. *And you then took a similar backpack from the rack?* A. *Yes.* Q. *One you were not going to buy because you actually wanted a different type of bag?* A. *Yes.* Q. *And then you slung the store's backpack over your shoulder?* A. *Yes.* Q. *And you left your own, tattered backpack on the floor?* *A.* *Yes.* Q. *The two bags are quite different, aren't they?* A. *Yes, but I did not notice that at the time. I thought I was carrying my own.* Q. *And you went to the rack where other types of bags were displayed?* A. *Yes.* Q. *But you did not select any of them?* A. *Yes.* Q. *You then walked out of the store without buying anything at all?* A. *Yes.* Q. *You did not have enough money on you to pay for the backpack, did you?* A. *No.* Q. *You've been embarrassed previously by your colour-blindness?* A. *Often, and for a long time.* Q. *You must have learnt, over the years, to be extra careful then in order to avoid such embarrassment?* A. *I've tried.* Q. *You didn't, on this occasion, take any particular care to ensure that you did not make a mistake?*

A.

No.

The prosecution's case is that the defendant's conduct is suspicious. The first part of the cross-examination is designed to undermine the defendant's version by parading the facts which make that version appear suspicious. The last three questions are designed to undermine it further by raising additional facts which may reduce any sympathy the judge might feel towards the accused. The very last question may be the question that allows the witness to give a convincing explanation.

18.6.5 *Special techniques*

Cross-examining difficult witnesses can test the skills of an Edward Carson and the patience of a saint. Some witnesses lie. Others are obtuse and evasive. Some tell the truth and your cross-examination doesn't make a dent in their evidence or credibility. An expert may be too clever for your best efforts. (On the cross-examination of experts, see chapter 20.) The court may be unsympathetic to counsel saddled with the unenviable task of having to cross-examine the witnesses in an unpopular case, for example, to cross-examine the complainant in a rape case or a small child in almost any case. Your cross-examination in these (and similar) cases must be planned very carefully.

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Perhaps a few pointers can help:

- Cross-examine only for gain or for duty. If there is nothing to gain and nothing to put to the witness, don't ask any questions. Ask yourself: 'Did the witness hurt my theory of the case?' If not, say, '*I have no questions, thank you*', and sit down.

- A great deal of planning, patience and subtlety is usually required to expose an untruthful witness. The facts need to be investigated and analysed carefully in advance to find weaknesses in the evidence of the witness or angles for attack to diminish the credibility of the witness. A carefully constructed sequence of questions, based on sound underlying materials, must be implemented without any haste. You may have to use a clever mix of confrontation, probing and suggestion. Comparing what the witness has said in his or her statement (if available to you), or in evidence-in-chief or in a document or what another witness has said with their evidence is essential, as untruthful witnesses are seldom entirely consistent. Do a detailed fact analysis. Prepare themes for the cross-examination of the witness.

- If the witness doesn't answer or insists on giving a long explanation, not asked for by you, put the question again, if necessary. Use the same words and the same tone of voice for impact. If the witness eventually answers, you may ask why that answer had not been given the first time you asked the question. Perhaps the witness was playing for time while thinking of an answer? Or perhaps the witness is eager to find an explanation? Probe these possibilities with suitable questions.

- Adjust your style of questioning for the particular witness. Remember the saying that a timid witness may be terrorised, a fool outwitted, an irascible man provoked and a vain man flattered. None of these styles should be apparent. For example: Neither flattery nor provocation is likely to be successful if it is obvious. And you won't be allowed to terrorise the witness, so you must find another way to deal with the timid witness.

- Cross-examination is part of the process of persuasion. It is generally counterproductive to adopt an unsympathetic or hard line when cross-examining victims of crime or children.

- Don't flatter the witness by continuing an unrewarding cross-examination. You cannot cross-examine bullet-holes out of a corpse, entries out of books or fingerprints off a dressing table.

- Stop when you have made sufficient gains. Bank the good answers. Many a good cross-examination has been ruined by a question too many, often a 'Why . . .' question. Do not cross-examine on a favourable answer; the witness may retract it or reduce its value. Don't ask for explanations. Asking, 'Why . . . ?' is just looking for trouble.

- Keep the questions short, asking for or suggesting one fact at a time.

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Table 18.5 A question too many

The facts: The issue was whether a tow truck operator had disconnected the drive-shaft of a Volvo truck before towing it after a breakdown. The driver of the Volvo and his assistant gave evidence to the effect that the tow operator started towing the Volvo and about 2 or 3 kilometres later stopped at the side of the road and disconnected the drive-shaft. By that time the gearbox of the Volvo had been damaged. The assistant gave evidence that the drive-shaft had been removed next to a sugar cane field. The defendant's version was that the drive-shaft had been disconnected at the commencement of the towing operation, not when the tow truck stopped next to the sugarcane and that the purpose of that stop had been to conduct a routine check to see if the tow was secure.
The aim of the cross-examination: To discredit the witness or his evidence.
Defendant's counsel. *When the tow truck stopped you saw the driver and his assistant come to the Volvo?* A. *Yes.* Q. *You then went into the sugarcane field?* A. *Yes.* Q. *And you spent some time there?* A. *Yes.* Q. *You did not actually see them take the drive-shaft off, isn't that so?* A. *No, I did not.* Q. *Why did you say then in your evidence-in-chief that they took the drive-shaft off while you were in the sugarcane field?* A. *Well, when I came back from the sugarcane, I saw them packing up their tools in the tool box and pick up the drive-shaft from under our truck. Then they put the tool box and the drive-shaft on their truck.*

The last question undid all the good results the prior cross-examination had achieved.

- If your cross-examination does not achieve any gains for your side, terminate it quickly. If your case is not getting any better, you have no business continuing asking questions that are more likely to make it worse. Your opponent may argue, to good effect, that, 'The witness was subjected to lengthy, searching cross-examination by experienced counsel and did not deviate from his evidence, contradict himself or disclose any bias towards the accused.'

- Don't argue with the witness and don't give explanations. If the witness raises argumentative matter, ask the witness to restrict his or her answers to the facts. Ask your questions in such a way that you invite facts rather than argument or explanations.

- The fact that the witness has been disbelieved in another case, is of little or no value to discredit the witness. Some judges may allow a question to that effect, but there are too many

imponderables to be sure that the previous finding was correct. This kind of cross-examination may even be inadmissible.

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It is a good tactic to end the cross-examination on a high note. The high note may be agreement by the witness with a number of your side's facts, put as propositions to the witness, or it could be the exposure of a glaring discrepancy, or raging bias against your side. The high note is best achieved when you can parade your side's facts that the witness can, and will, confirm. When you have hit the high note, sit down.

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18.7 Examination-in-chief and cross-examination compared

Table 18.6 Examination-in-chief and cross-examination compared

Examination-in-chief	Cross-examination
Inquisitive questions are used, with the answers known or expected by the questioner.	Insinuating (suggestive) questions are used, with the answers not necessarily known to the cross-examiner.
Questions may not be leading and are aimed at getting the witness to give his or her own version.	Mostly leading questions, designed to elicit the desired answer, are asked.
Interrogative words are used to introduce questions: '*Who*', '*what*', '*where*', '*how*', '*which*', '*why*' and '*Please describe . . .*'.	The tone is suggestive and accusatory: '*You went to the house, didn't you?*' or '*Didn't you . . .?*'
There is a chronological arrangement, except when a particular topic needs to be dealt with out of turn.	The arrangement is topical, with chronological sequencing within themes or topics.
Strict sequencing allows the witness to be at ease.	A mixed approach is followed to keep the witness off balance.
The aim is to keep the case simple.	The aim is to sow suspicion and confusion.
Comprehensive, covering all the material facts on which the witness can contribute evidence.	Selective, covering only the material fact or facts in issue, and attacking selected items of evidence.
It is not required to put the opponent's version, but you may do so in anticipation.	You are required to put your side's version of disputed facts to appropriate witnesses.
Questions progress from open questions to closed but non-leading questions.	Questions progress from open questions introducing the topic, to closed, leading questions.

18.8 Examples of cross-examination to a theme

There has to be a purpose to your cross-examination. There can be a meaningful purpose only if you have identified the correct theme or themes to pursue, and then adopt the correct technique. It could be done as follows.

18.8.1 Cross-examining to Observation

The witness gave evidence identifying the accused, who is charged on a count of robbery. The incident had taken place at night.

Q.
You were looking at the scene through your window on the first floor?

A.
Yes.

Q.
It was dark outside, except for one street light?

A.
Yes.

Q.
That street light was behind the two men you saw in the alley?

A.
Yes.

Q.
Their faces must have been in the shadow?

A.
. . .

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18.8.2 *Cross-examining to Memory*

The witness is called as an alibi witness.

Q.
You were not interviewed by the police after the incident?

A.
No.

Q.
The incident happened more than a year ago?

A.
Yes.

Q.
And you were told for the first time that you were needed as a witness last week, when the accused's attorney called you and asked you if you could remember the events of that weekend more than a year ago?

A.
Yes.

Q.
And you then had to try to remember precisely what weekend that was, and what you could remember of it?

A.
. . .

18.8.3 *Cross-examining to Recounting*

The witness was provided with information by the police.

Q.

You were told by the police that they had caught the culprit?

A.

Yes.

Q.

And they told you they had caught an Indian man with bushy hair?

A.

Yes.

Q.

So you went to the identity parade expecting there to be an Indian man with bushy hair in the line-up?

A.

. . .

18.8.4 *Cross-examining to Bias*

The witness was a passenger in the same car as the plaintiff when they were stopped by the police.

Q.

You told the court that the police were harassing the accused?

A.

Yes.

Q

And they had harassed you too, on a prior occasion, hadn't they?

A.

Yes.

Q.

You don't like the police, do you?

A.

. . .

18.8.5 *Cross-examining to Interest*

The witness has a claim against the same defendant arising from the same collision.

Q.

You were also injured in the collision?

A.

Yes.

Q.

You also have a pending claim against the Road Accident Fund?

A.

Yes.

Q.

And if the RAF were found liable in this action, your prospects of obtaining a favourable settlement would improve, would they not?

A.

. . .

18.8.6 *Cross-examining to Prejudice*

The witness has suffered at the hands of criminals before. Now she gives identification evidence in a housebreaking matter.

Q.
Your own flat has been burgled a few times, hasn't it?

A.
Yes.

Q.
You are sick and tired of these people breaking into people's homes and getting away with it, aren't you?

A.
Who isn't?

Q.
So you would like to see this accused being brought to book?

A.
. . .

18.8.7 *Cross-examining to Corruption*

The witness has been paid to give evidence.

Q.
You insisted on being paid to come and give evidence?

A.
Yes.

Q.
And the plaintiff readily agreed to pay?

A.
No, he first said he would send me a subpoena, but later he agreed to pay me.

Q.
Yes, but that was only after your response that your evidence would be very unhelpful if he did not pay, wasn't it?

A.
. . .

18.8.8 *Cross-examining to Prior convictions*

The witness has prior convictions.

Q.
*You were convicted of theft by shoplifting on [*date*] in the Magistrates' Court in [*town*], were you not?*

A.
. . .

18.8.9 *Cross-examining to Prior bad acts*

The witness has submitted false VAT returns to the South African Revenue Service.

Q.
When you sold the business you represented the turnover during the preceding year to have been R50 000 per month?

A.
Yes, I said so.

Q.
But your VAT returns reflect a turnover of only R25 000 per month during that year, is that not so?

A.
. . .

Q.
You either rendered false returns to SARS or you deceived the plaintiff, not so?

A.
. . .

18.8.10 *Cross-examining to Prior inconsistent statement*

See paragraph 20.4.

18.8.11 *Cross-examining to Reputation*

You intend calling a witness who will say that the witness under cross-examination has a reputation for untruthfulness.

Q.
You have lived in the X community all your life?

A.
Yes.

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Q.
And the people of that community must know you well?

A.
I suppose so.

Q.
What would you say if a member of that community were to give evidence to the effect that you have a reputation for being untruthful in your interactions with members of that community?

A.
. . .

18.8.12 *Cross-examining to Put your case*

Your case is that the witness had not been present during the events concerned.

Q.
I suggest that you were not living in that community at the time.

A.
No, that is not true.

Q.

*In fact, you were living in [*town*] at the time the deceased was killed here in [*town*]. Is that not the truth?*

A.

No.

18.9

Protocol

- Good manners require that you should face the witness and make eye contact when cross-examining him or her, just as you would do when conducting the examination-in-chief of your own witness or when you address the judge.

- Cross-examination is not to be conducted with theatrics or histrionics. Be on your best behaviour. You are engaged in the process of persuasion, which requires subtlety and guile, not a bull-at-the-gate approach.

- Keep in mind the imbalances in status and power between officers of the court (the judge and legal practitioners) on the one side and the witness as a member of the public on the other. An experienced and astute judge may stop you when you ask '*I put it to you . . .*' type questions. There are communities within which it is regarded as inappropriate for a person to openly disagree with their elders or superiors. Think of a different way to put the question, for example, '*How would you respond if another witness were to say . . .?*'

- Keep sarcasm and sneering in check.

18.10

Ethics

Due to the confrontational nature of cross-examination, this is the phase during which counsel is most likely to breach the limits of cross-examination and the applicable rules of ethics. The general principles are discussed in chapter 14. Note that in what follows that the rules of ethics and the substantive law of evidence and the rules of procedure correspond and that a breach of a rule of evidence or procedure may *ipso facto* be unethical:

- There must be a good-faith basis for every question suggesting or proposing a fact – the good-faith principle. A prosecutor's adherence to the good-faith principle, coupled with Justice Cloete's statement in *Van der Westhuizen v S* 2011 (2) SACR 26 (SCA), that a prosecutor may 'challenge the evidence of the accused and defence witnesses with a view to discrediting such evidence' may give rise to difficult decisions having to be made by the prosecutor while on their feet. Consider the case of Sarah Thornton (*R v Thornton* [1992] 1 All ER 306 (CA)). Thornton was convicted by a jury of the murder of her abusive husband and sentenced to life imprisonment. In [Page 364] order to diminish her credibility as a witness and thus the weight of her evidence, the prosecutor raised her reputation (i) for liking male company; (ii) for being a heavy drinker; (iii) for dressing provocatively; and (iv) for often not wearing knickers. This line of questioning served no purpose other than to damage Thornton's character. The question which arises is this: Was this line of questioning fair, considering the good-faith principle? Was it ethical? (As a matter of interest, Thornton's appeal was dismissed by the Court of Appeal, but after a retrial, she was convicted of manslaughter – to which she had

originally pleaded guilty in any event – and sentenced to five years imprisonment. (See Maugham & Webb *Lawyering Skills and the Legal Process* Butterworths 1995 at 95–96).

The answer may lie in the following dictum from *R v Little* [2–4] 1 SCR 193 para. 48:

'The purpose of the question must be consistent with the lawyer's role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; to assert or to imply in a manner that is calculated to mislead is in our view improper and prohibited.'

It may well be argued that Thornton's character was relevant neither to her conduct during the underlying events, nor to her credibility, and consequently, the weight of her evidence.

- Counsel must have regard to the right to dignity of the witness, including the accused – LPA Code of Conduct paragraph 56.1 and the Constitution.

- Counsel should not misstate the facts or prior evidence. (If prior evidence needs to be referred to, it should be quoted *verbatim* rather than being paraphrased.)

- Counsel must not ask questions that elicit inadmissible evidence such as privileged communications or inadmissible confessions.

- Counsel must not put to a witness a statement of fact for which counsel does not have a good-faith basis – LPA Code of Conduct paragraph 56.3 and the common law.

- Counsel may not impugn the character of the witness without good grounds – LPA Code of Conduct paragraph 56.4, and without a good-faith basis – LPA Code of Conduct paragraph 56.5.

- Counsel may not gratuitously intimidate or bully the witness by insulting him or her, browbeating the witness, or adopting a overbearing attitude that permits no contradiction by the witness – *Gidi* principles Rule #4.

- Counsel may not ridicule or taunt the witness – *Gidi* principles Rule #5.

- Counsel may not provoke the witness to anger, offend his or her sensibilities or play upon his or her emotions in order to gain an unfair advantage – *Gidi* principles Rule #6.

- Counsel may not interrupt the witness thereby preventing the witness from giving a complete answer – *Gidi* principles Rule #7.

- Counsel may not ask multiple questions – or a series of questions – but must (i) ask one question at a time, and (ii) ask questions that are intelligible to the witness – *Gidi* principles Rule #8.

- Counsel may not comment adversely on the evidence given by the witness, nor on his or her demeanour, unreliability, lack of credibility or dishonesty – *Gidi* principles Rule #9: The following types of question are improper and unethical:

  –

  You lie! You are lying! You are a liar. This type of question breaches several of the *Gidi* principles, for example, Rules #4, 5, 6, and 9. *First*, *Gidi* principles Rule #9 [Page 365] expressly forbids such a question; *secondly*, counsel's statement may itself be a lie if the facts were not to support it; *thirdly*,: determining who is lying and who is not is the exclusive domain of the court; *fourthly*, calling the witness a liar to his or her face pitches counsel's own credibility against that of the witness, and it may well

be that it is counsel who is misstating or misinterpreting the underlying facts or evidence; and *lastly*, while counsel may argue – subject to a good-faith basis for such an argument, that the witness is a liar, or lied, the time for the submission is during the closing address, not while the witness is in the witness box.

–

You are making this up. You are tailoring your evidence. This type of question is but a variation of the types of statements referred to above and is improper and unethical for the same reasons.

o

Counsel should not argue with the witness; the time for argument is during the closing address. This principle forbids the following practices:

–

Asking the witness to comment on the reliability or credibility of another witness: This is the exclusive domain of the court.

–

Inviting the witness to engage in an argument about the reliability, meaning or import of the evidence: The time for a debate about these matters is during closing argument, and the person to engage is opposing counsel, not the witness. It is not the function of the witness to argue the merits of the case, the reliability of evidence or the credibility of witnesses. Witnesses are generally restricted to telling the court what they saw or heard during the relevant events.

–

It is inherently unfair to require of a witness to argue the case or the issues since the witness almost invariably lacks the skills in logic and knowledge of the law and rules of evidence that counsel has.

–

Debating a matter of law with the witness.

o

Prosecutors should not lose their objectivity, associate themselves with a personal attack on the accused, or express their personal sentiments or emotions of hostility, distaste, repugnance or disbelief by venting them at the accused – *Gidi* principles Rule #10.

o

Counsel should not subject the witness to an unduly lengthy cross-examination in order to fatigue the witness or wear down his or her resistance in the hope of eliciting discrepancies or other contradictions. The cross-examination of a witness over a period of days while revisiting themes and questions that have been asked and answered on a number of occasions previously amounts to intimidation and bullying.

o

Counsel should not ask, and the court will stop, questions in cross-examination where they are

–

irrelevant, tedious, harassing or repetitive

–

attempts to elicit inadmissible evidence

–

discourteous to the witness

–

unfair

–

vexatious, frivolous, abusive, insulting, degrading, defamatory, offensive, intimidating etc. (Maharaj *Confident Criminal Litigation* LexisNexis (2010) at 29)

o

It is opposing counsel's professional and ethical duty to object – as frequently as may be necessary – to questions that introduce inadmissible evidence, or breach a rule of evidence or procedure, or a principle of ethics.

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18.11 Checklist and assessment guide

If this book were to be used as a teaching guide or prescribed work for advocacy exercises, the following checklist may be used to prepare for the exercises, to serve as an assessment guide, or to serve as a marking guide.

If the checklist were to be used as a marking guide, the best way to go about the matter is to allocate a grade to each student or pupil whose performance is being assessed as follows:

C = Competent (meaning that the performer has attained the desired standard of competency in respect of the skill involved).

NYC = Not yet competent (meaning that the performer has not yet reached the desired standard).

Table 18.7 Checklist for cross-examination

	Skill involved	Competent/ Not Yet Competent
1	Preparing themes for the cross-examination of each witness	
2	Asking short, leading questions	
3	Asking clear questions	
4	Asking one question at a time and allowing the witness to answer	
5	Avoiding arguing with the witness	
6	Avoiding questions resulting in inadmissible evidence	
7	Asking simple as opposed to compound or multiple questions	
8	Ensuring that all gestures and demonstrations out are recorded	
9	Listening to the answers and responding appropriately	
10	Avoiding commenting on the answers	
11	Exploring one theme at a time	
12	Eliciting favourable evidence where appropriate	
13	Following the correct procedure for putting a prior inconsistent statement	
14	Avoiding repeating adverse evidence	
15	Questioning only on topics relevant to the cross-examiner's theory of the case	
16	Challenging the witness on all disputed facts within the witness's knowledge	

17	Putting the cross-examiner's case to the appropriate witnesses	

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	Skill involved	Competent/ Not Yet Competent
18	**Protocol:** o Practising SOLER principles (Shoulders square, Open stance, Leaning slightly forward, making Eye contact, Relaxed posture) o Maintaining eye contact with the witness o Speaking at appropriate volume and pace o Addressing the court with proper deference o Ensuring that only one counsel is standing at any time o Addressing the court from the correct location, not moving about the courtroom o Responding appropriately to objections	

Chapter 19
Re-examination

CONTENTS

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19.1 Introduction

Parties are entitled to re-examine their own witnesses after the completion of cross-examination. Re-examination is done:

- to repair damage inflicted on your case during cross-examination of your witness.
- to rehabilitate a witness whose integrity or credibility has been adversely affected by cross-examination.
- to clarify evidence that has been muddled by cross-examination.
- to answer new evidence elicited during cross-examination.

It follows that there is no need for re-examination if none of these purposes will be served by re-examining the witness.

19.2 Restrictions on re-examination

There are three restrictions on the right to re-examine:

1 The witness may only be re-examined on matters arising from the cross-examination.

2 Leading questions are not allowed; you are subject to the same rules with regard to the form of the questions as you are when leading the evidence-in-chief.

3 The re-examination is not to be a mere repetition of the evidence-in-chief.

19.3 Purpose of re-examination

19.3.1 Repairing damage to the evidence-in-chief

If the evidence-in-chief of your witness has been undermined in cross-examination, you may be able to repair the damage in re-examination. However, this situation is pregnant with risk. An unsuccessful attempt to repair the damage is likely to remind the judge of the success of the cross-examination. It is therefore important to weigh up the risks against the possible benefits before you embark on this course.

The need to repair damage could arise in a variety of circumstances. New evidence elicited in cross-examination could damage your case. Inadmissible evidence may also become admissible as a result of cross-examination, allowing you to lead evidence you [Page 370] could not produce as evidence-in-chief. For example: If your witness is cross-examined on part of a document that would otherwise have been privileged, the whole document becomes admissible. In such a case, your witness may be re-examined on those parts of the document that are favourable to your case.

Table 19.1 Eliciting a favourable explanation

The facts: The facts are set out in Table 18.5, where it is demonstrated how a question too many could undo the good results of prior cross-examination. Counsel should have refrained from asking the last question, which allowed the witness to give a convincing explanation. Assume that opposing counsel had refrained from asking that question. You now have the opportunity to elicit the same evidence.
The aim of the re-examination: To elicit the explanation from the witness, whose evidence would otherwise be totally discredited.
Q. *You said in your evidence that the tow-truck driver and his assistant disconnected the drive shaft there next to the sugarcane field. What makes you think they did that?* A. *When I came from the sugarcane, I saw them pack up their tools in the tool box, pick up the drive shaft from under our truck and put the tool box and drive shaft on their truck.*

19.3.2 *Rehabilitating the witness whose credibility has been impeached*

It may be necessary, but not always possible, to rehabilitate your witness when his or her credibility has been damaged by the cross-examination. An explanation may be given for an apparent discrepancy or other inconsistency or improbability. The situation is also fraught with risk; you do not want to remind the judge of the discrepancy, inconsistency or improbability only to demonstrate that you have no explanation for it. Some witnesses simply cannot be rehabilitated, especially those who have been caught lying or exhibiting strong bias. In such a case it is best to feign indifference and to pass on the opportunity to re-examine. Remember:

> *'All the King's horses and all the King's men,*
>
> Couldn't put Humpty Dumpty together again!'

Table19.2: Rehabilitating a witness with previous convictions

The facts: The witness's previous convictions, including previous convictions for fraud and theft, are exposed by cross-examination.
The aim of the re-examination: To rehabilitate the witness.
Q. *You have admitted to various previous convictions.* A. *Yes.* Q. *How old were you when you committed these offences?* A. *I was in my twenties.* Q. *How long ago was your last conviction?* A. *Twelve years.* Q. *How long were you in prison?* A. *Eighteen months.*

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Q. *What have you done with your life since then?* A. *I started studying while in prison and completed my matric just before my release. I got a job, with the help of the Prisons Department. I'm still working for the same company. I also got married and I have two children.* Q. *Have you been in trouble with the law since your release from prison twelve years ago?*

A. *No.*

19.3.3
Clarifying evidence which has been obscured by cross-examination

Cross-examination often deliberately sows confusion. If there is a way to remove the confusion, you must do so in re-examination. There may be gaps in the narrative or some document may have been left out so that the story told by the witness is disjointed and incomplete. Ambiguous answers may also need to be clarified. Say the witness is asked how many persons were present at a given place and the answer is, '*A couple*'. While the cross-examiner may choose to leave the matter there, you may want to know precisely what the witness means by 'a couple'. Does the witness mean 'two' or 'a few'?

Table 19.3 Clarifying the evidence

The facts: The plaintiff has been cross-examined on two letters written by him on the same day but to different provincial government officials: the first to a low ranking official and the second, written an hour later, to a member of the Executive Council. The letters contain conflicting proposals for the development of a property. The cross-examiner suggested that the plaintiff had deliberately tried to deceive the provincial officials.
The aim of the re-examination: To clarify the evidence by showing the context in which the two letters were written and to explain why they contain conflicting proposals.
Q. *You've admitted that the two letters contain conflicting proposals for the development of your property and that they were written the same morning.* A. *Yes.* Q. *Can you explain why the proposals you made differ?* A. *Yes. What happened was this. When I wrote the first letter, I was angry. I faxed it off to Province immediately after my secretary had finished typing it. Then I sat down and had a cup of coffee. While I was doing that, I realised that I was fighting with a junior official who was probably only following orders from his superiors. I then telephoned him and apologised for the tone of my letter.* *During the conversation he told me that it was not necessary for me to make a donation of part of my land to the municipality in order to get permission to develop the rest of the land. All Province was interested in was that the sensitive parts of the land should be protected and that my development proposals should address that issue. I asked him what he thought I should do. He said I should write to the MEC and modify the proposal. He would keep the other letter on file but would not act on it. So I wrote the second letter to the MEC with the new proposal.*

Note:

You should ask for an explanation only when you are certain that the witness can give a good one.

19.4
Technique in re-examination

The basic technique for re-examination is the same as for leading evidence-in-chief, with some notable differences. For example: While the evidence-in-chief would be elicited in such a way that the 'whole story' is told in chronological order, re-examination is 'topical' in the sense that it deals only with topics (themes) which were raised in cross-examination. Further, while the evidence-in-chief could be planned in advance with a fair [Page 372] amount of precision, re-examination is more dynamic. While you could prepare to some extent for re-examination during the preparation stage when you considered possible angles of cross-examination, you will have to wait for the cross-

examination to be completed before you can make a final decision about whether to re-examine at all and, if so, on what topics.

Your decision and its implementation will depend on the following principles and tactical considerations:

- The most important consideration is whether the cross-examination has hurt your case or your witness. If no harm has been done, there is no need for re-examination unless the cross-examination opened the opportunity to lead further evidence that is favourable to your side.

- If your case or witness has been harmed but the re-examination is not likely to repair the harm, there is no purpose in re-examining.

- There is some benefit to be gained from a confident, '*I have no re-examination, thank you, M' Lady*.' The judge may wonder whether she has imagined the harm done by the cross-examiner since your approach suggests there was none.

- If you are in doubt whether you can improve your case, you should not re-examine.

- If you do decide to re-examine, there are two golden rules to obey: The *first* is that you have to be sure that the witness will respond with a favourable answer. The *second* is to keep the re-examination short and convincing.

- Since re-examination is arranged by topic, it is necessary to indicate to the witness what that topic is. The topic has to arise from the cross-examination, so you may have to refer the witness to what he or she has said in cross-examination in order to focus his or her attention on the topic you want to pursue. The technique was demonstrated in the three examples given earlier in this chapter and proceeds in three steps:

  - *One*, remind the witness what he or she has said while under cross-examination.

  - *Two*, allow the witness a moment to recall that evidence.

  - *Three*, ask the questions you want to ask arising from that earlier evidence.

19.5 Protocol and Ethics

The same principles apply as for examination-in-chief.

19.6 Checklist and assessment guide

If this book were to be used as a teaching guide or prescribed work for advocacy exercises, the following checklist may be used to prepare for the exercises, to serve as an assessment guide, or to serve as a marking guide.

If the checklist were to be used as a marking guide, the best way to go about the matter would be to allocate a grade to each student or pupil whose performance is being assessed as follows:

C = Competent (meaning that the performer has attained the desired standard of competency in respect of the skill involved).

NYC = Not yet competent (meaning that the performer has not yet reached the desired standard).

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Table 19.4 Checklist for re-examination

	Skill involved	**Competent/ Not Yet Competent**
1	Re-examining only when necessary	
2	Using the three-step process of asking questions: o Remind the witness what he or she has said under cross-examination o Give the witness a moment to remember o Ask the question	
3	Asking clear questions	
4	Asking non-leading questions	
5	Avoiding argumentative matter	
6	Avoiding unnecessary repetition	
7	**Protocol:** o Practising SOLER principles (Shoulders square, Open stance, Leaning slightly forward, making Eye contact, Relaxed posture) o Maintaining eye contact with the witness o Speaking at appropriate volume and pace o Addressing the court with proper deference o Ensuring that only one counsel is standing at any time o Addressing the court from the correct location, not moving about the courtroom o Responding appropriately to objections	

Chapter 20
Special procedures

CONTENTS

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20.1 Introduction

Special techniques are necessary for certain incidents of the trial. Examination-in-chief and cross-examination skills are incomplete unless the questioner is proficient in dealing with:

- exhibits.
- inspections *in loco*.
- prior inconsistent statements.
- a forgetful witness who needs to refresh his or her memory.
- hostile witnesses.
- expert evidence.

- objections.
- identification evidence (in criminal cases).
- common admissibility issues.

20.2 Exhibits

The nature and importance of exhibits as evidence is discussed in chapters 4 and 11. Exhibits are relied on because they form part of the evidence (real and documentary exhibits) or help the witness to explain or the court to understand the evidence (demonstrative exhibits). Real and documentary exhibits have been described as 'links in the chain of proof'. It stands to reason that exhibits have to be admissible as evidence before they can be introduced. You would introduce an exhibit when it helps your side to prove or disprove a fact in issue. Whether the exhibit is introduced or relied on during examination-in-chief or cross-examination depends on the circumstances of the case. Either way, you need to prepare for the moment during the trial when you have to refer a witness to the exhibit concerned. If it is your own witness, you will have briefed the witness on the procedure you intend to use when questioning the witness about the exhibit.

Exhibits cannot speak for themselves. In the absence of an admission by the opposing party, every exhibit has to be proved by cogent evidence given by a credible witness. Some examples may make the principles clear.

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- An object like a knife, used in an assault, must be introduced or produced by a witness who can give first hand evidence to identify it as the weapon used, for example:
  - '*This is the knife I saw the accused use when he stabbed the deceased.*'
- Documentary exhibits must be proved by the persons who executed them or received them, or who can otherwise authenticate them. Their evidence could be as follows:
  - '*This is a copy of the letter I wrote. I posted the original and kept this copy*.'
  - '*I received this letter from the plaintiff. I recognise his signature.* '
  - '*This is a drawing of the house we built for the plaintiff. I did not prepare it but my draughtsman did so under my supervision.*'
- Official documents such as birth, death and marriage certificates may be proved by mere production, although they are usually handed in through a witness in any event.

  Q. *Mrs X, is the document I now show you your birth certificate?*

  A. *Yes.*
- Demonstrative exhibits should be proved by the person who prepared them.

– *'I prepared a plan of the scene. The document I have here is the original.'*

– *'I made notes of my observations on the usual post mortem form, Form Health 1, as I proceeded during the examination of the body. This is the form I completed.'*

– *'I took these photographs of the plaintiff's injured leg.'*

Whether an exhibit that is otherwise admissible may be used during the trial, depends also on procedural questions such as whether it has been discovered properly and whether there has been compliance with statutory requirements laid down in, for example, the Civil Proceedings Evidence Act 25 of 1965. In practice, the parties often reach agreement on the admissibility of exhibits without further proof. Where the exhibits are mainly documents, they are usually introduced by way of an agreed bundle with an associated agreement on the status of the documents in the bundle. The way an exhibit is handled during the evidence also depends on whether the exhibit has already been proved by being introduced by consent or through prior evidence (of the witness or a prior witness) or not. If the exhibit has been proved (by admission or through a prior witness), counsel is entitled to show the witness the exhibit and to ask the witness admissible questions on it. It is generally not necessary to ask for the court's permission to show the exhibit to the witness, but you must remember that you have to stay at the bar. You hand the exhibit to the usher who takes it to the witness and puts it before him or her.

Table 20.1 Handling an exhibit which has already been proved

What to do	How to do it
Step 1: Show the exhibit to the witness.	Q. *Could you please look at the letter, exhibit A14? Mr Usher, could you please take the exhibit to the witness?* A. *I have it. What do you want to know?*
Step 2: Allow the witness to become familiar with it.	Q. *Please read the letter and tell Her Ladyship whether you wrote that letter.* A. *Yes, I recognise it. I wrote it.*
Step 3: Ask the witness such questions as you have with regard to the exhibit or its contents.	Q. *In that letter you said . . .*

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Questions of the nature used in this example could be asked either in examination-in-chief or in cross-examination. You must identify the exhibit and give the witness an opportunity to get acquainted with it before asking further questions about it. That way the accuracy of the record is maintained and the evidence is more likely to flow naturally.

If the exhibit is disputed (or not admitted) and needs to be proved, a different procedure would have to be followed. Generally speaking, the witness should first describe the exhibit, from memory, before being shown the exhibit. The evidence should also prove the chain of custody. How did the exhibit get from the place where the events occurred to the courtroom? Who had custody of it? Is it still in the same condition? If the witness did not have possession of the exhibit throughout that period, other witnesses may have to be called to establish the chain of custody.

Table 20.2 Proving an exhibit formally, through a witness

What to do	How to do it
Step 1: Ask the witness to describe the item.	A. *The accused then ran away but he left the knife he had used behind. It was still in the complainant's side.* Q.

	Did you do anything about the knife? A. *Yes, I pulled it out.* Q. *Describe the knife please?* A. *It was an Okapi knife with a brown handle and a blade of about 8 centimetres. It had the accused's initials carved on the handle.*
Step 2: Ask the witness what happened to the item after the incident. (Did the police take possession of it? Did someone else keep it? Who? How did it get from there (where the incident occurred) to here (in court)?)	Q. *What happened to the knife after that?* A. *I handed it to the investigating officer when he came to the house that evening.*
Step 3: Show the exhibit to the witness.	Q. *Could you please look at the item I show you now? Mr Usher, could you please show the witness this item?* A. (Witness looks at item placed on the witness box.)
Step 4: Ask the witness to describe it. (The description should match the earlier description.)	Q. *Please describe the item handed to you.* A. *It is an Okapi knife just as I have described. Look, here are the accused's initials on the handle.*
Step 5: Give the exhibit the next number for exhibits. Use a letter of the alphabet for a document and a number for other things.	Q. *May the exhibit be marked as Exhibit 1, M' Lord? I intend calling the investigating officer to give evidence that this is the knife the witness handed over to him and that it is still in the same condition.* By the Court: *Proceed.*
Step 6: Ask the witness the questions you want to ask about the exhibit.	Q. *Had you ever seen the knife, Exhibit 1, before that night when the accused stabbed the complainant?* A. *Yes, many times. The accused always used it when we went fishing.*

The first phase of the process involves a description by the witness of the item he or she saw at the scene. The second phase involves the identification of that item in court. It is crucial to get a full description from the witness before the item is shown to the witness in court.

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If the exhibit is a document, you must ensure that a good copy is available to your opponent as soon as the exhibit is handed to the witness so that your opponent can object immediately if necessary. The original of a document must be shown to your opponent and handed to the judge after it has been given a number. A copy must be available for the witness if further questions are to be asked on the document. Your opponent must be given a set of your documents in a bundle before the witness gives evidence. You do not want any distractions while you are conducting the examination-in-chief.

Demonstrative exhibits are dealt with slightly differently.

Table 20.3 Proving a demonstrative exhibit, a medical report

What to do	How to do it
Step 1: Refer the witness to the relevant exhibit.	Q. *Doctor, did you make any notes when you examined the complainant?* A. *Yes.*
Step 2: Allow the witness to produce the exhibit (or show it to the witness).	Q. *Where did you make the notes and where are they now?* A. *I made them on the form we know as a J88 and I have it here with me now.*
Step 3: Ensure that the exhibit is proved properly and give it the next exhibit number.	Q. *When did you make those notes?* A. *As the examination progressed.* Counsel. *M' Lord, I have given my learned friend a copy and I ask leave to hand a copy to Your Lordship. I have taken the liberty to mark it as Exhibit 'F'.* By the court: *Proceed.*
Step 4: Ask such questions as you have with regard to the exhibit.	Q. *Could you please read your notes to the court?*

The original must be handed in as the exhibit to be kept as part of the trial record because it is the primary or best evidence. The witness may read from a true copy or may hand the original in as an exhibit at the end of his or her evidence.

Witnesses are frequently asked to point out features on an exhibit or to mark positions on them. Features must preferably be marked or identified on a copy rather than the original. If you follow this procedure, the marked copy should be numbered Exhibit 'B.1' (if it is a copy of Exhibit 'B') and any further copies could be numbered in similar fashion, 'B.2', 'B.3' etc. If the witness points at a feature on the exhibit, that demonstration has to be recorded. Thus the point of impact may be marked on a plan or photograph.

Table 20.4 Recording a demonstration by the witness

What to do	How to do it
Step 1: Allow the witness to give the demonstration (or make the pointing out or mark the exhibit).	Q. *Please look at the police plan, Exhibit 'A'. Mr Usher, could you please show the witness Exhibit 'A'?* (Pause while the witness studies the plan.) *Do you understand what the plan depicts?* A. *Yes, I recognise the scene.*
	Q. *Are you able to mark the point where the two cars collided with each other?* A. *Yes.* Q. *Please mark the point of impact as accurately as you can with an X.* A. (The witness marks the plan.)

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What to do	How to do it

Step 2: Show opposing counsel and the court what the witness has demonstrated, pointed out or marked.	Q. *Mr Usher, could you please take the exhibit to my learned friend and show him where the witness has put the mark?* (The plan is shown to counsel.) Q. *Could you also show Her Ladyship where the witness has marked the plan?* (The plan is shown to the Judge.)
Step 3: Place the demonstration 'on the record' by putting it in words.	Q. *M' Lady, the witness has marked a point on the eastern side of [*street*], within the intersection.* By the Court: *Yes, carry on.*

20.3 Inspections *in loco*

While the main purpose of an inspection *in loco* before the trial is to enable counsel to become fully acquainted with the facts in order to present them persuasively, an inspection *in loco* during the trial has dual purposes. The *first* is to acquaint the judge with the facts for a better understanding. The *second* is to allow witnesses to give demonstrations and to point out things that form part of their own observations during the events giving rise to the trial.

The preparation for an inspection must be done well before the hearing. If your own witnesses are able to point out relevant features at the scene, they must be taken to the scene and properly briefed so that they know what to expect and how to conduct themselves during the inspection. You must ensure that a camera, tape measure and any other necessary equipment are available. Transport and accommodation may have to be arranged in advance. Special permission may likewise have to be obtained to gain access to the site. Most of all, you must anticipate what the inspection is capable of revealing to the court and prepare so that you can expose those features (or discredit them, if they are against your case).

Whether the judge is to attend an inspection, is in the discretion of the court. An inspection may be held at any time during the proceedings but will not be held so late that the parties no longer have the opportunity to adduce evidence on it or to deal with the judge's observations. The judge is entitled to rely on the observations he or she has made at an inspection. Care should therefore be taken during the inspection that the important features of the scene are pointed out to the judge, preferably by a suitable witness. While the court attends to the inspection, it functions as a court. The protocols and ethics of trials apply as if the court is sitting in a formal session, even though the inspection may be held at the lowest level of a gold mine, kilometres below the surface, or at a waterfall high up on the Drakensberg.

The parties have an opportunity at the scene to ask their witnesses to point out relevant places and features; these must be recorded one by one for inclusion in a schedule or list. Plans and photographs may also be prepared or taken during the inspection. Once the inspection has been completed, the practice is for the parties to prepare an agreed schedule of the observations made and the demonstrations given at the scene. Some judges may prefer to read their own list of observations into the record when the court reconvenes at its usual seat and to give each of the parties an opportunity to agree with them, to challenge their observations and to suggest additions to the list. This is a time for tactful intervention if the judge does not see matters exactly like you do.

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Witnesses may be examined and cross-examined on the features of the scene and anything pointed out or demonstrated by them during the course of the inspection. What is pointed out at the

scene is not necessarily evidence; the demonstration must be recorded and confirmed when the witness is under oath.

Table 20.5 Confirming a demonstration given at an inspection

What to do	How to do it
Step 1: Ask the witness a closed but non-leading question to set the stage.	Q. *You were present at the scene this morning when the court inspected it?* A. *Yes.*
Step 2: Refer the witness to the observation, demonstration or aspect pointed out. Make sure you state the facts correctly.	Q. *You were asked to indicate where you were when the two cars collided with each other?* A. *Yes.* Q. *And you pointed out a spot in front of the restaurant?* A. *Yes.*
Step 3: Ask the questions you have for the witness on that score.	Q. *Could you tell the court what you noticed while you were at that spot?* A. *. . .*

20.4 Prior inconsistent statements

The prior statements of a witness are not generally admissible as evidence, subject to one or two exceptions. If the witness has made a prior statement that is consistent with his or her evidence, that statement may not be used as evidence unless it is suggested in cross-examination that the version given by the witness is a recent fabrication. The statement may then be used to counter that suggestion. On the other hand, the rule that the answers given by the witness on matters of credit are final is subject to this exception: if the witness can be shown to have made a prior inconsistent statement, that statement may be proved to attack the credibility of the witness.

The purpose of confronting a witness with a prior inconsistent statement is to undermine the credibility of the witness. If such a prior inconsistent statement is admitted (or proved when the witness has denied making it), the court may (not must) find the witness to be unreliable. Nevertheless, whether the court believes the witness will depend on the circumstances of the case, including any explanation the witness has given for the inconsistency. So the idea is not to ask for an explanation, if you are the cross-examiner. However, you will ask for an explanation (if you know there is a good one) in re-examination if it is your own witness who has contradicted himself.

A prior inconsistent statement may have been made orally or in writing. In either case, the witness may be cross-examined on that statement and if the witness denies having made the statement concerned, evidence may be led in rebuttal to prove the statement. The opportunity typically arises in criminal cases (but it is not limited to criminal cases), where the defence has copies of the statements of prosecution witnesses and a witness departs from his or her statement. The technique for the use of a prior inconsistent statement to discredit the witness requires a lot of concentration, a bit of guile and a degree of assertiveness. You must know the case materials well enough to recognise that there is a discrepancy; you may even have elicited the discrepancy with intelligent cross-examination.

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Table 20.6 Using a prior inconsistent statement to discredit the witness

What to do	How to do it
Step 1: Commit the witness to the version which departs from the statement. This closes all escape routes and pins the witness down.	Q. *So the man you saw holding up the teller wore glasses and had a beard and a ponytail?* A. *Yes.*
Step 2: Contrast that version with the version previously given by the witness.	Q. *Wasn't it a clean-shaven man with short hair?* A. *No.*
Step 3: Suggest the witness has previously given a different description.	Q. *Didn't you previously describe the man as clean-shaven with short hair?* A. *No.*
Step 4: Establish that the witness has made a prior statement and identify that statement.	Q. *You made a written statement to the police immediately after the robbery?* A. *Yes.* Q. *Please look at the document the usher shows you now. Look at the signature at the foot of the last page. Is this the statement you made to the police?* A. *Yes.* Q. *And you made this statement the same day of the incident when the facts were still fresh in your mind?* A. *Yes.*
Step 5: Confront the witness with the conflicting passage.	Q. *Please read the passage starting with* 'I got a good look at the man'. A. *It says:* 'I got a good look at the man. It was a white man, about 30 years old, about 80 kilograms and 1,75 metres. He was clean-shaven with short hair and wore glasses.'
Step 6: Resist asking a question too many. You might prefer not to ask this last question and to leave the point for argument.	Q. *In your evidence today you said the man had a beard and a ponytail. In your statement you said he was clean-shaven and had short hair. One of those statements must be untrue, mustn't it?* A. *Well . . .*

Note:

If the witness at any stage of this series of questions admits that he or she has given a different version previously, you should carefully consider whether there is anything to be gained by asking any more questions. The purpose of the questions is to demonstrate that the witness has given contradictory versions. Once that has been established, any further

questions you put may allow the witness to give an acceptable explanation for the apparent discrepancy.

If the witness denies having made the prior statement or having said what is recorded in it, you will be allowed to lead evidence in rebuttal. You must then call the person who took the statement (or heard the words being spoken if you are relying on an oral statement) to prove that the witness had made the prior statement and that it accurately reflects what he had said.

Note that section 190(2) of the Criminal Procedure Act 51 of 1977 (CPA) allows the parties to a criminal case to prove a prior inconsistent statement in respect of their own witnesses. It is not necessary to go the length of proving the witness to be hostile to the party calling him or her in such a case.

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20.5 Refreshing memory

It happens frequently that witnesses forget important details when they give evidence. The registration number of the car used by the robbers for their flight, the identity number of a child who has been injured in a motor collision, what was said during a telephone conversation; these are the type of details witnesses often cannot recall with any degree of accuracy. Yet there are equally frequently reliable documents recording such details. In some cases the document has been issued or prepared by a third person, like the details recorded in an identity document. In other cases the witness created the document, for example, when the registration number of the robbers' car is written down on a cigarette box by an eye witness. Witnesses also give detail that is recorded in their statements to the police or to attorneys shortly after an event when the events are still fresh in their mind. The relevant information could equally be in a file note, in the correspondence or in a photograph; it could be in virtually anything that may help the witness remember. It does not have to be a statement or even a note made by the witness personally.

Witnesses are not allowed to read their evidence from prepared statements. Yet, it is obvious that the courts would not receive all the available evidence if witnesses were not allowed to refresh their memory. To this end, refreshing the witness's memory is allowed and there is a procedure that can be followed to elicit the details required from the witness.

There are some evidential requirements to be met before a witness will be allowed to refresh his or her memory from a document or statement:

- *First*, the witness must once have had the fact or evidence to be adduced, in his or her memory. If the witness never 'knew' the fact concerned, there is no memory to refresh.
- *Second*, the witness cannot now recall that memory. This inability could be long term, or it could be the result of the anxiety of having to give evidence. Either way, the witness first has to exhaust his or her memory before he or she will be allowed to refresh his or her memory.
- *Third*, there must be something which may help the witness to recall the relevant information or detail. It stands to reason that there must be something from which the witness can refresh his or her memory. The accuracy of the note or recording has to be established.
- *Fourth*, the note or statement or other recording must have been made reasonably contemporaneously, meaning during or shortly after the relevant observation or incident and when the witness still had an independent and accurate recollection of the fact concerned.

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Table 20.7 Refreshing memory

What to do	How to do it
Step 1: Exhaust the witness's memory of the fact required first.	A. *When the robbers drove off, I saw the registration number of their car and wrote it on the palm of my hand.* Q. *What was the number you saw and wrote down?* A. *I can't remember anymore.*
Step 2: Establish that there exists a record of the fact he or she cannot recall.	Q. *Is there anything that might help you remember the number?* A. *Yes. I made a statement at the police station and the number was written down in the statement.*
Step 3: Establish that the note or statement was made when the events were still fresh in the mind of the witness.	Q. *When did you make that statement?* A. *The same morning.* Q. *Where was the note you had written on your hand when you made that statement?* A. *It was still visible on the palm of my hand.* Q. *What did you do with the information written on the palm of your hand when you made the statement?* A. *I copied it to the statement.*
Step 4: Ask the witness whether he would like to refresh his or her memory.	Q. *Would you like to refresh your memory from the statement?* A. *Yes, please.*
Step 5: Ask the judge for permission to use the statement before the statement is shown to the witness. Your opponent has to be given an opportunity to object.	Q. *M' Lord, may the statement be shown to the witness?* By the Court: *Does counsel for the defence have any objection?* Defence counsel: *No, I don't M' Lord.* By the Court: *Carry on.*
Step 6: Let the witness identify the note or statement.	Q. *Mr S, could you please look at this document. Is this the statement you were referring to?* A. *Yes.*
Step 7: Give the witness a chance to find the relevant part. Then ask the witness about the relevant fact.	Q. *Please find the passage where the car's registration number is reflected and tell us what the number was.* A. *The number was , . .*

If a witness has refreshed his or her memory from a privileged document or statement, the whole of that document becomes available to the other side for cross-examination; in other words, the privilege is lost. The document itself does not become evidence. If the document is handed in as an exhibit, it becomes evidence not of the truth of its contents but for the purpose of confirming or undermining the credibility of the witness. It appears that a witness may refer only to part of a document and, if necessary, cover up the rest of it, in which event the privilege attaching to the rest of the document may be protected. (This question has not been finally resolved.)

These principles do not apply to documents used for refreshing the witness's memory before the witness starts giving evidence. The witness may refresh his or her memory from any document before entering the witness box, whether the witness prepared or executed the document or not, and such documents retain the privilege that might attach to them. Therefore, if you don't want the opposition to have access to a privileged document, you should perhaps ensure that your witness's memory is refreshed before he or she enters the witness box.

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Police officers (and similarly placed witnesses) are usually allowed to refresh their memory from their notebooks or diaries without having to exhaust their memory first. There are two reasons for this. The *first* is that they have so many cases that it would be unreasonable to expect them to give their evidence from memory alone. The *second* is that they are required to keep notes for the purpose of ensuring that their evidence is accurate. Usually there is no objection to them referring to their notes, nor should there be. District surgeons fall in the same category of witnesses. They perform hundreds of injury examinations (recorded on form J88), post mortem examinations (recorded on form Health 1) and sobriety examinations (recorded on a similar form). It would be unfair to expect them to give their evidence from memory. (Consult Kruger *Hiemstra's Criminal Procedure* LexisNexis for a discussion of documents falling under the provisions of Part VI of the Civil Proceedings Evidence Act 25 of 1965 and sections 221 and 222 of the CPA.) These provisions allow for the use of contemporaneous records at the trial. It is recognised that contemporaneous records that are created when the witness had no motive to be untruthful are more likely to be accurate than the witness's memory. When you intend to call such witness, you must prepare copies of the contemporaneous note or form for the court and for the other side.

The court has a discretion whether to allow or disallow the application to refresh memory; it will generally only allow refreshing memory if the fact concerned is relevant to the issues in the case rather than the credibility of the witness.

20.6 Hostile witnesses

A party is not permitted to cross-examine their own witness unless the witness is declared hostile. A hostile witness is one who is unwilling to tell the truth for the benefit of the party who has called him or her. There must be more to it than the mere fact that the evidence given by the witness does not suit or please the party calling the witness. Even a prior inconsistent statement made by the witness may not be enough to persuade the court that the witness is hostile, although in practice that is often the decisive factor. Whether a witness is hostile to the party calling him or her, depends on factors such as the demeanour of the witness, the relationship between the witness and the parties or other witnesses in the case, the general circumstances of the case and any prior inconsistent statements made by the witness. The demeanour of witnesses may be the decisive factor; the demeanour of the witness in the witness box often mirrors what is in their hearts. It is often said that the witness must display a hostile *animus* towards the side calling him or her.

If there are good grounds for the suspicion that your witness is hostile to your side, an application may be made to the court to declare the witness hostile. The court has to be persuaded by the party making the application, so you had better get your evidence and argument ready before you rise to make the application. You may consider making the application in the absence of the witness if you think the witness might gain an advantage over you (as cross-examiner) if he or she has heard your argument. The effect of the order is that you may then cross-examine the witness. From a tactical point of view, an application to declare the witness hostile must only be made if there are reasonable

prospects of gaining some advantage by cross-examining the witness. When the witness demonstrates his or her hostility, it will probably be too late to do anything to prevent the harm the witness has done, or is going to do. You are thus left having to discredit the witness completely. The nature of the cross-examination of a hostile witness is therefore [Page 385] often confrontational and without any pretence at being subtle. The aim is to undermine the credibility of the witness and the process is destructive. It can be emotionally draining too. You must not expect to achieve much more than showing that the witness is untruthful or biased.

Care must be taken in the preparation stage that potentially hostile witnesses are identified in advance. Avoid calling them if you can. If a witness won't even speak to you before the trial when you tell them the purpose of the interview and whom you represent, it may be that the witness feels some hostility towards your client. Such a witness can seldom help your case and has the potential to do it a lot of harm. However, there may be a case where you have to call the witness to prove something no other witness can prove for you. Then you must be prepared to extract what you want with subtlety and to control the potential damage the witness can do as far as you can.

20.7 Expert witnesses

Examining and cross-examining expert witnesses require very specific advance preparation. The selection of an appropriate expert and how to brief an expert is discussed in chapter 11. Once those steps have been taken, counsel has to prepare for the examination-in-chief of his or her own expert witness and the cross-examination of any expert witnesses to be called by the other side.

20.7.1 Preparation

The steps taken by the parties are dictated by the fact that each will (or should) have its own expert witness or witnesses to examine-in-chief and opposition expert witnesses to cross-examine. Both processes require a full understanding by counsel of the facts and the technical complexities of the expert evidence to be adduced. This applies to both civil and criminal cases. In civil cases the rules lay down certain procedural requirements for expert evidence. Generally speaking, you will do the following in a High Court case:

- Ensure that you understand your side's expert's report. Ensure that you similarly understand the rule 36(9)(*b*) summary of the other side's expert. If you can't understand what the expert witnesses have to explain to the court, you will be unable to lead their evidence or to cross-examine effectively.

- Ensure that you can put the expert's opinion and reasons in lay terms. If you cannot do this, you are unlikely to be effective in persuading the court that your side's evidence and opinions must be accepted in preference to the other side's opinions.

- Read into the subject. Ask your own expert to provide you with helpful reading material to help you to gain a broad understanding of the subject-matter of the expert evidence. In most cases this would not be too taxing. It could be a simple driving case where you may have to read a little on the effects of alcohol on humans, absorption and excretion rates, and the tests doctors do to determine whether a person is under the influence of alcohol or not. It could, however, be far more difficult (and intriguing) than that.

- Ensure that the underlying facts are capable of being proved. An opinion is only as good as the facts supporting it.

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Ensure that you understand the reasons for every opinion and that you are able to convey the gist of the opinion and its supporting reasons to the court. Use charts, graphs, maps and photographs to make this easier or more convincing.

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- Ask your expert to help you prepare your cross-examination of the opposing experts. Ask your expert for a list of questions, if you think that will help.

- Help your expert to prepare a written report which may be used as the basis of the evidence to be given by him or her. Obtain the agreement of the other side to use this report. Such a report may serve as the summary in terms of rule 36(9)(*b*).

- Prepare a written *curriculum vitae* for your expert. This should include his or her academic qualifications, practical experience and publications. This may shorten the examination-in-chief considerably.

These processes may be adopted so far as they may be appropriate to criminal trials.

20.7.2 Examination-in-chief of an expert witness

The evidence-in-chief of an expert witness usually goes through three phases. The *first* is the introduction of the witness and the establishment of his or her expertise. The *second* phase covers the facts, including any facts the expert can depose to from personal knowledge. The facts on which the expert is to base his or her opinions must be spelled out in some detail in order to establish a proper evidential and logical basis for the opinions. In the *third* phase the expert's opinions and the reasons for those opinions are laid before the court. The structure for the examination-in-chief is as follows:

- Introduce the witness by name, occupation and residence.

- Establish the academic and other qualifications of the witness, including membership of professional bodies.

- Establish the practical experience of the witness in the field or science concerned.

- Establish the reputation of the witness in the relevant field or science by reference to any publications emanating from his or her pen.

- Ask the witness about his or her expertise in respect of the precise subject under scrutiny by the court.

- Allow the witness to state all the relevant facts on which his or her opinions are to be based. If necessary, state the facts as hypotheses or assumed facts, to be proved by other witnesses.

- Ask the expert for his or her opinions and ensure that the reasons for each opinion are given fully.

- Put any contrary views to the expert for his or her comment. Ensure that the expert gives the reasons for any further opinions expressed during this phase.

-

If appropriate, ask the expert what his or her opinion would be if the facts were different. In this situation you must be careful not to undermine your own expert or any of your other witnesses.

20.7.3 *Cross-examination of an expert witness*

Cross-examination of an expert witness requires even more detailed preparation than examination-in-chief. The basic principles of cross-examination (see chapter 18) must be applied very strictly when you have to cross-examine an expert. The dangers of a question too many, of arguing with the witness and of failing to control the witness, are all magnified as you will probably be dealing with a witness who is your intellectual equal or superior. The cross-examination of an expert witness must therefore be undertaken with tact, courtesy, detailed preparation, strict control and equal measures of patience and guile.

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An attack on the expert's evidence can be directed towards four main areas. The *first* area is the status of the witness as an expert. Is he really an expert in the particular field or science? Nowadays there are fields of expertise within fields of expertise. Is she as well qualified as your side's expert? Does he know your expert? Perhaps he was a student of your own expert? The *second* is to attack the facts and assumptions on which the expert has based the opinions you want to discredit. Did the opinion take into account all of the known facts? If not, do the facts not taken into account make a difference? The *third* is to attack the opinions and reasons given by the expert. This will require a complete mastery of the subject and a good deal of help from your own expert. The *fourth* is to attack the witness personally on the grounds of bias, interest or even dishonesty. Such cases are rare because parties usually do not call expert witnesses who will be open to attack on these grounds. And neither should they!

Table 20.8 Cross-examination of an expert to demonstrate bias or interest

The facts: The following cross-examination occurred in a Magistrates' Court when an expert witness gave evidence in support of the accuracy of a speed-trapping device in a criminal case. The accused had relied on the speedometer of his aging pick-up truck.
The aim of the cross-examination: To demonstrate bias on the part of the expert witness.
Q. *This device was sold to the traffic department by the ABC company, wasn't it?* A. *Yes.* Q. *You own shares in ABC and you are a director of ABC?* A. *I don't see what that has to do with this case.* By the Court. *Please answer the question*. A. *Yes, I do and I am a director.* Q. *The agreement between ABC and the municipality contains a clause in terms of which ABC guarantees the accuracy of the device, doesn't it?* A. *Yes.* Q. *And ABC undertook to provide expert evidence of the accuracy of the device if its accuracy were to be questioned in any prosecution for speeding?* A. *Yes.* Q. *And you have given evidence in many cases, across the length and breadth of the country, that the ABC device is absolutely reliable and accurate?* A. *Yes.* Q. *And you have also given evidence in many other cases where other speed-trapping devices had been used, have you not?*

A.
Yes.

Q.
And in those cases you have consistently given evidence for the defence to the effect that the speed-trapping devices of your company's competitors were unreliable and inaccurate?

A.
That has nothing to do with this case.

Q.
Please answer the question. My learned friend will object and His Worship will stop me if I ask you inappropriate questions.

A.
*Okay, but they **are** unreliable.*

Q.
And in those cases other experts gave evidence supporting the accuracy and reliability of those other devices, didn't they?

A.
Yes.

Q.
And the same experts have attacked the ABC device, in and out of court, as being unreliable and inaccurate, haven't they?

A.
Yes, but they are wrong.

Q.
It seems that each manufacturer supports its own device through evidence like your own and denigrates the devices of every competitor, doesn't it?

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A.
It might seem like that, but that is not the whole picture.

Q.
If this court were to hold that your company's device is not accurate and reliable, your company will in all likelihood lose its custom as no traffic department can afford to use a device which has been discredited. What comment do you have on my suggestion?

A.
The device is accurate. The rest is speculation.

20.8 Objections

Objections are usually aimed at

- the form of the question
- the evidence it seeks to introduce
- inadmissible evidence
- evidence which is introduced without a proper foundation having been established.

The first requires sound knowledge of the rules of trial; who may ask what sort of questions and why. The other three require a good working knowledge of the rules of evidence.

Objections are made in a few crisp steps. They are not the focus of the trial. You proceed as follows:

- Rise to your feet. You cannot make an objection while seated or from a slouched position. Your opponent has to sit down when you rise to object.

- Say that you have an objection. Your first words should to the effect that: '*M' Lady, I object . . .*' Shouting, 'Objection!' from a seated position may be acceptable in America but it is not acceptable in South Africa.

- Explain your objection by stating what it is you are objecting to and giving the reason for the objection briefly, for example

  - '. . . *on the grounds that the question is leading*'

  - '*. . . on the ground that the question seeks to elicit hearsay evidence*'

  - '*. . . on the ground that this is opinion evidence without a foundation for such evidence having been laid*.

- Avoid long explanations and argument. If the objection is good, the judge will see that very quickly. If a long explanation is required, the objection may not be so good.

- Sit down and give your opponent a chance to answer. Listen carefully to the justification put forward. You have the right to reply. If you intend to reply, rise to your feet again as soon as your opponent sits down, otherwise the judge may give a ruling before you can respond.

- Wait for the ruling.

- Acknowledge the ruling. Rise and say, '*As the Court pleases*.'

- Act on the ruling. If the ruling goes against you, allow your opponent to carry on. Don't raise the same objection again unless there are additional grounds for a fresh objection. If an objection against your own question is upheld, implement the ruling by changing course. If your question is disallowed because it was in an offensive form, change the form of the question. If the objection was against evidence you tried to introduce, don't try to lead that evidence again.

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Objections have to be made in a calm, courteous and reasoned manner. Don't attack your opponent and don't address him or her directly. Be prompt and brief. While you have the right to object to questions put by the judge, the situation calls for tact. If your objections are overruled, one after the other, you may create the impression that you are bickering or that you have such a bad case that you have no choice but to raise petty objections. Judges know when to ignore slight infringements of the rules of the game. You should object only if it is necessary to advance your case or to protect it. Often an entire trial is conducted without any objections at all, simply because both counsel know what is important and what is not; they don't infringe in respect of matters which are important to the other side. By the same token, they don't object when, for example, leading questions that help to speed things up are asked on matters not in issue. While it is technically possible to object during an opening address or closing argument, objections to what has been said or done during the opening or argument can usually be dealt with when your opponent sits down and you get a turn to speak or argue.

You must not use an objection as a tool to upset your opponent or a witness. Spurious objections to achieve those ends are not only irritating; they may also alienate the judge. It is also unethical to knowingly raise points without any merit.

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Table 20.9 Objections to questions and evidence, and phrasing the objection

To the form of the question	To the subject-matter of the question	To inadmissible evidence	To evidence lacking foundation
The question is leading.	The question misstates the prior evidence.	This evidence is not the best evidence.	No foundation has been laid for this opinion.
The question is argumentative.	The question assumes a fact not yet in evidence.	This evidence is hearsay.	This exhibit is not admissible as evidence because the chain of custody has not been established.
The question is confusing.	The question is hypothetical.	This evidence is not relevant to the issues (or credit).	It is not permissible for my learned friend to pursue this line of questioning because this version has not been put to my witnesses.
The question is unintelligible.	My learned friend is cross-examining his own witness.	The prejudice the introduction of this evidence is likely to cause, outweighs its probative value.	This evidence is not admissible because the records are computer records which have not been proved as required by the Electronic Communications and Transactions Act 25 of 2002.
The question contains more than one proposition. This is a compound question.	The question calls for speculation on the part of the witness.	This evidence is inadmissible character evidence.	These documents are not admissible because the defendant has not discovered them in terms of rule 35.
There is no question here, only a statement.	The question calls for a conclusion the witness is not qualified to draw.	The witness is not an expert and an expert opinion is called for.	This evidence is in the nature of expert evidence. I object because the plaintiff has not served a notice and summary as required by rule 36(9).

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Some evidential issues relate to the weight of the evidence rather than its admissibility; in such a case there is no cause for an objection. On the contrary, objecting to such evidence may flatter its importance. It is perhaps wise to regard objections as interruptions of the proceedings to be avoided, if at all possible. Use your right to object sparingly; object only when you are certain that you are right and that there is something to gain.

Responding to an objection requires a similar approach. If a question can legitimately be put in another way, do so, even if you think the question was a proper one. An argument over a single question is hardly worth the effort and can be very distracting. It is usually better to direct the attention to the evidence, even if it means asking the question in another way. Avoid questions that are likely to provoke an objection, if you can. But do not give up your right to put relevant evidence before the court simply because your opponent objects, or may object. Defend your position firmly but politely. Some objections can be dealt with by referring the court to an exception to the general rule or principle. In other cases you may have to lay the foundation for the evidence objected to.

20.9 Identification evidence (in criminal cases)

20.9.1 Introduction

The identity and thus the identification of the accused as the offender is often the only defence to a criminal charge. It is an 'all-or-nothing' defence in the sense that the accused can hardly raise any other defence in conjunction with it. The identification of the accused as the offender is also fraught with difficulties, ranging from human frailty to outright dishonesty. Observation skills, memory and

the ability to recount what has been observed differ greatly among persons and a witness could easily be 'honestly' mistaken.

One of the problems with the leading of identification evidence is that the accused is there in the dock for all the world to see and the witness might easily be tempted to say it was him (or her) that the witness saw at the scene. The defence and the prosecution would both do well to study the commentary on sections 36A, 36B, 36C and 37 of the CPA in Kruger *Hiemstra's Criminal Procedure*. Consider the following dictum from *S v Mthetwa* 1972 (3) SA 766 (A):

> 'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive.'

The prosecution will find in the factors mentioned in *Mthetwa*'s case the circumstances to prove in order to aid in the identification of the accused as the offender while the defence will look to those same circumstances for an opening to undermine the reliability of the identification. Special techniques have to be used by both sides when dealing with identification evidence.

20.9.2 *Prosecuting counsel*

Seen from a prosecutor's perspective, the identity of the accused as the offender may be proved by one or more of the following:

- Admissions or confessions made by the accused.

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- Primary observation by an 'eye witness' at the scene. (This includes voice identification.)
- Subsequent identification by the eye witness (at a properly conducted parade).
- Dock identification.
- Circumstantial evidence.

Admissions and circumstantial evidence will be led in the usual way, but a special procedure is necessary to lead the evidence of the primary identification, subsequent identification and the dock identification. The prosecutor can hardly expect to get away with: '*So is the accused the man you saw stabbing the deceased?*' That would be a grossly leading question. It would also undermine the worth of the prosecution witness.

In order to lead the evidence of the eye witness to maximum effect, his or her evidence must be broken down into three separate stages with each stage receiving due attention. It can be done by asking non-leading questions as follows:

Stage 1: Scene or primary identification:

Q. *What was/were the visibility/the lighting conditions at the scene at that time?*

A. *It was clear daylight.*

Q. *Which way was the man [*don't call him the accused yet*] facing in relation to you when you saw him stabbing the deceased.*

A. *He was facing me.*

Q.

How far apart were you?

A.
From here to you, about four paces I would say.

Q.
Please describe the man.

A.
It was a white man, about 1.75 metres tall. He had a tidy, trimmed sort of beard and he had blondish hair. He was about 20 to 25 years old.

Q.
What else did you notice about the man?

A.
His nose was skew. I thought it had been broken.

Q.
For how long did you have sight of him, face to face?

A.
I would say half a minute. Then he turned and ran away.

Stage 2: Subsequent identification:

Q.
Did you ever see him again?

A.
Yes.

Q.
*Did you attend an identity parade at the police station on [*date*]?*

A.
Yes.

Q.
Were you able to identify anyone in the line-up?

A.
Yes.

Q.
Who was it?

A.
The man I had seen stabbing the deceased.

Q.
Did you point anyone out at the parade?

A.
Yes, the same man.

Stage 3: Dock identification:

Q.
Would you be able to recognise that man again?

A.
Yes.

Q.
Do you see him here today?

A.
Yes.

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Q.
Can you point him out?

A.
It is that man sitting over there, in that box.

Q.
Describe him please.

A.
White guy, blondish hair, about 25 years old. But he has shaved his beard.

Q.
Describe what he is wearing.

A.
Blue jacket, white shirt, red tie.

At this stage you place on record what has happened by saying: '*Your Worship, may it be recorded that the witness has identified the accused in the dock?*' (It is only from this point on that you may refer to the accused as 'the accused' while leading the evidence of this witness.)

20.9.3 *Defence counsel*

The defence will approach the identification evidence with two things in mind. The *first* is to ensure that the prosecutor does not stray from the three-stage procedure explained above. The *second* is to cast doubt on the identification evidence and witness by cross-examining to the themes identified for each witness during the preparation for trial. Those themes will have to come from one or more of the following:

Themes that test the reliability of the identification evidence

- Observation
- Memory
- Ability to recount.

Themes that attack credibility of the witness

- Bias, interest, prejudice, corruption
- Prior convictions
- Prior bad acts
- Prior inconsistent statements
- Bad reputation.

Of these themes the first, observation, is the one most likely to produce results. People are very easily mistaken with regard to the identification of another person, as everyone who has ever waived at a stranger thinking that it was someone they knew will know. To pay due regard to the possibility of an honest mistake, the so-called *Turnbull*-checklist has evolved. It derives its name from *Q v Turnbull* [1977] QB 224 where the following was said:

> 'Whenever the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defendant alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance of the correctness of the identification or identifications ;at 228–229].
>
> How long did the witness have the accused under observation?
>
> At what distance?
>
> In what light?
>
> Was the observation impeded in any way, as for example by passing traffic or the press of people?
>
> Had the witness ever seen the accused before?

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> How often?
>
> If only occasionally, had he any special reason for remembering the accused?
>
> How long elapsed between the original observation and the subsequent identification to the police?
>
> Was there any material discrepancy between the description given to the police by the witness when first seen by him and his actual appearance?
>
> . . .
>
> [A]ll these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger [at 552].

For defence counsel each of the items on the *Turnbull*-checklist is a potential theme for cross-examination.

20.10 Common admissibility issues

Evidential questions arise regularly during the examination-in-chief and cross-examination of witnesses. The evidential questions that may arise can be anticipated during the preparation for trial so that you are ready to deal with them. However, not every point and not every answer given by a witness can be accurately predicted. For those eventualities you need to know the law of evidence reasonably well. In the absence of such knowledge, a rudimentary table serving as an emergency aid may have to be relied on. Whether you think you know the law of evidence or not, you must not go into a trial without a good textbook on the law of evidence in your briefcase.

The basic or primary rules of evidence consist of one fundamental rule and five exclusionary rules, each with a number of exceptions. Then there are a number of subsidiary rules.

The fundamental rule is that evidence has to be relevant to an issue in the case to be admissible. Relevance, in this context, means no more than that the evidence proves, or tends to prove, the existence or absence of a fact in issue. Relevance is a question of logic, not law. Once evidence is admissible on this basis, it has to be admitted unless it is excluded by one of the exclusionary rules.

The five exclusionary rules are the rules against:

- hearsay evidence.
- opinion evidence.
- character evidence.
- similar-fact evidence.
- highly prejudicial evidence of little probative value.

Evidence may also be excluded because it has been obtained improperly, but that subject is too wide to be covered in this book.

Each of the exclusionary rules is subject to a number of exceptions. Evidence amounting to opinion, character or similar-fact evidence *must* be excluded unless it falls within one of the exceptions. Hearsay evidence *may* be excluded, depending on whether the provisions of the Law of Evidence Amendment Act 45 of 1988 have been complied with. Previously hearsay evidence had to be excluded unless it fell within an exception. In the case of highly prejudicial evidence of little

probative value, the court has a discretion to allow or disallow such evidence, the decision in each case depending on the facts.

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20.10.1 *Exceptions to the hearsay rule*

You have hearsay evidence when witness A tells the court what another person, B, who is not a witness or party in the proceedings, has observed or experienced. Thus A tells the court what B has told him he, B, has seen, heard, smelled, tasted or felt. Hearsay evidence is inadmissible only if it is tendered to prove the truth of what B has said to A. In short, in hearsay evidence the cogency of the evidence depends on the credibility of a person other than the witness. There is a lot to be said for the view that hearsay evidence is no longer excluded but is admissible subject to the provisions of section 34 of the Law of Evidence Amendment Act 45 of 1988. This Act has to be studied very carefully as it dramatically changed the traditional basis on which hearsay evidence is treated.

There are many traditional exceptions to the hearsay rule. The most important ones are:

- In criminal cases admissions and confessions made by the accused are admitted (provided they are not excluded for other reasons).
- Generally, admissions that are against the interests of the speaker are admitted.
- Dying declarations are admitted.
- Statements that are inextricably part of the events, the so-called *res gestae*, are admitted. (*Res gestae* is not truly hearsay evidence.)
- Similarly spontaneous, contemporaneous exclamations are admitted.
- Statements that are adduced to prove the state of mind of a person are admitted. So are statements that are necessary to explain the sequence of events. In such cases the statements are not adduced for the purpose of proving the truth of what was said.
- Statements that fall within the exceptions allowed by the Civil Proceedings Evidence Act 25 of 1965 are admitted, subject to compliance with the provisions of that Act.
- Similarly, statements which fall within the exceptions allowed by the CPA are admitted.
- The Law of Evidence Amendment Act 45 of 1988 allows the court, in its discretion, to admit hearsay evidence under various circumstances and on compliance with certain basic safeguards.

20.10.2 *Exceptions to the opinion rule*

The distinction between opinion evidence and evidence of an observation is somewhat blurred, but one could say that an opinion is a conclusion drawn from known or proven facts. The existence of another fact is deduced from the known or proven facts by a process involving logic, experience and special knowledge or skills. Thus a fingerprint expert can state, as a matter of opinion, that no two persons have the same fingerprints, not even identical twins. These experts can say this by virtue of their special training and experience; if the converse were true, why haven't they found two persons with identical prints yet after a century of applied fingerprint science?

The traditional reason for not admitting opinion evidence is that it is for the witnesses to give the facts and for the judge to form opinions based on those facts. However, it is now accepted that there may be good reasons for admitting opinion evidence in particular cases. The test is that the evidence must be helpful to the court. Opinion evidence passes that threshold when it is:

- the opinion of a suitably qualified expert.

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- the opinion of a lay person on a matter well within ordinary human experience, usually relating to the identity, emotional or physical state or character of a person.

- evidence of reputation.

20.10.3 *Exceptions to the character rule*

Character evidence is evidence about the nature and qualities of a person, as opposed to evidence of that person's actual conduct during the events under consideration. Character evidence is usually introduced to show a propensity to behave in a particular way, whether it is to commit crimes or simply to tell lies. Thus the boy who cried 'Wolf!' was not believed because he had lied previously even though there really was a wolf on that occasion. As this fable demonstrates, it is illogical and even dangerous to try and determine the facts by giving undue weight to the character of the witnesses or participants. Character evidence is generally excluded except that:

- in a criminal case, the accused is allowed to lead evidence of his or her good character, in which event the prosecution is given an opportunity to rebut that evidence and to cross-examine the witnesses who give it by suggesting that the accused is of bad character.

- in a criminal case, where the accused may attack the character of prosecution witnesses, in which event his or her own character becomes relevant and may be attacked.

- generally, the character of witnesses may be relevant to establish or diminish their credibility and therefore such evidence may be admitted for that purpose.

- in defamation cases the character of the plaintiff may be relevant to the quantum of damages to be awarded.

- in seduction cases the character of the plaintiff may be relevant to the question whether she was a virgin at the time and evidence on that score may be admitted to disprove the evidence (or to displace the presumption) of virginity. (It is doubtful whether seduction cases will survive the gender equality principles of the Constitution and you may never have a seduction case.).

20.10.4 *Exceptions to the similar-fact rule*

Similar-fact evidence is evidence of other events or acts that tend to prove that the event or act under scrutiny occurred in a similar way, or, put another way, it is evidence that shows a propensity to behave in a certain way. It is mostly used to rule out innocent explanations for suspicious events. This can perhaps be explained best with reference to the so-called *Brides in the bath* case. A man called Smith's wife (by a bigamous marriage – he was still married to another woman) drowned in her bath. Smith, when charged with her murder, contended that she had suffered an epileptic fit and then drowned. However, a number of Smith's previous wives had also died in their baths under similar circumstances shortly after marrying Smith. Each wife had property that fell to Smith upon her death. None had any prior history of epilepsy. Don't these circumstances suggest that the last

Mrs Smith's death was not an accident? The similarities between the three cases were so striking that one had to conclude that there was something sinister in all of them.

However, similar-fact evidence focuses the attention on the prior events rather than the current case, much the same as happened with the little boy who cried wolf. The [Page 397] dangers of relying on such evidence are obvious. For that reason the similar-fact evidence must have high probative value before it will be admitted. If the prejudice the introduction of similar-fact evidence may cause would be too great, having regard to its value, it may be disallowed even if it were otherwise relevant. The circumstances of the prior cases are usually said to be of 'close or striking similarity' to the current one, or that 'striking peculiarities' are present in all the cases, or that 'uniquely similar' methods, systems or courses of conduct were present.

Where similar-fact evidence is admitted, it usually tends to:

- prove a strikingly similar design, system or *modus operandi*.
- rebut a defence.
- establish the state of mind with which something was done.

A sound working knowledge of these basic rules of evidence allows you to respond quickly and appropriately when you have to make an objection or have to respond to one. Here are some examples of responses to objections:

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Table 20.10 Examples of responses to objections

Facts	Objection	Response	Comment
A policeman gives evidence that he stopped the car in which the accused was travelling after receiving information that the bank robbers were fleeing in a particular car.	Hearsay.	*'M' Lord, the evidence is not adduced to prove the truth of the statement, but to establish the sequence of events and also the state of mind of the witness.'*	Evidence tendered to prove something other than the truth of the statement is allowed where it is relevant to the state of mind of the person receiving the statement or to the sequence of events.
A witness gives evidence that the bank teller said, 'Please don't shoot me', to the person in the front of the queue. The witness did not see any firearm.	Hearsay.	*'M' Lady, the statement was a spontaneous exclamation forming part of the* res gestae.*'*	Spontaneous exclamations forming part of the events don't fall under the hearsay rule. The spoken word forms part of our every day conduct and cannot logically be excluded from our description of relevant events.
	Relevance.	*'M' Lord, in my submission the evidence is relevant because . . .'*	If an objection is made on the basis that the evidence is not relevant (to the issues or to credit) you should be ready to explain why the evidence is relevant.
The witness refers to a copy of a document.	Not the best evidence.	*'M' Lady, the original has been lost. I will establish a proper foundation for the evidence.'*	A copy of the document may be used if the original has been lost (or destroyed) and cannot be found after a diligent search. The provisions of the Civil Proceedings Evidence Act 25 of 1965 may also apply.
The prosecutor attacks the character of the accused.	Character evidence.	*'M' Lord, the defence opened the accused's character to scrutiny when it suggested, in cross-examining the prosecution witnesses, that the accused was of good character.'*	Evidence of the accused's bad character may be led if the accused suggests that he is of good character or attacks the character of prosecution witnesses.

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Facts	Objection	Response	Comment
The witness gives evidence that the driver of the insured bus had been intoxicated in a case where the issue is negligence.	Opinion, the witness not being an expert.	*'M' Lady, this is a conclusion which lay persons are capable of drawing. The factual basis and reasons for the opinion will be given.'*	Many of our observations are really opinions we have formed on the basis of particular facts and some experience. The court may or may not allow this type of opinion evidence, depending on the circumstances.
The witness refers to something you want to hand in as an exhibit.	The chain of custody has not been established.	*'M' Lord, I intend to call X as my next witness. He will say that he received the item from the witness at the scene, has kept it ever since, brought it to court today, and that it is still in its original condition.'*	If an exhibit is to be used as real evidence, it has to be shown that it is in the same condition it had been at the material time.
Counsel re-examines on something that was not raised in re-examination.	The evidence does not arise from a matter raised in cross-examination.	*'I beg M' Lady's pardon. I should have led this evidence in-chief. I ask for leave to adduce this evidence and concede that my learned friend would be entitled to cross-examine afresh.'*	If you have made an error, concede it and try to retrieve the situation.

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20.11 Protocol and Ethics

The protocol and ethics for the special techniques and skills discussed in this chapter are essentially the same as for examination-in-chief and cross-examination. The following points may be emphasised:

- Expert witnesses have a duty to the court and are not to be partisan. It is counsel's duty to ensure that their expert witnesses are aware of their duty to the court.
- Objections must be used sparingly. Objections should not be made merely to annoy an opponent or interrupt the flow of an opponent's questioning.
- Asking the court to declare a witness hostile, must be done with circumspection as the imputation is that the witness is untruthful, or will not tell the truth at the instance of the party calling him or her. Ascribing dishonesty to witnesses should only be done when there are reasonable grounds for such a suggestion, and even then it should be done with tact.

Chapter 21
Closing argument

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21.1 Introduction

After all the evidence has been led, one or more counsel for each party may present their closing argument on the evidence, the facts and the law. The closing argument may be delivered at the end of the trial process, but you will have started to formulate your argument as your theory of the case when you first met the client or received the brief. An argument, of course, is a series of connected facts or propositions, harnessed in a logical and persuasive way to support a suggested or desired outcome. A legal argument relies in whole or in part on established legal principles or procedures.

The purpose of a closing argument is to persuade the judge to accept your theory of the case and reject your opponent's theory; that is to say, to decide the issues in your favour and to grant judgment in favour of your client. You have to persuade the judge on two scores, *first*, that your theory is supported by the facts and the law; and *second,* that your opponent's theory is not supported, or if it is, that your theory is more probable. In a criminal case the test is different – proof beyond reasonable doubt is required. The purpose of a closing argument becomes clear when one takes into account that the judge is presented with a problem (the issue to be decided) and has to find an answer for it in the evidence, the facts and the law. Your closing argument has to provide the judge with a platform for a judgment in your client's favour.

21.2 Preparing a closing argument

The conduct of litigation requires an advocate to master two distinct skills. The *first* is the 'production' of the evidence by leading, cross-examining and re-examining witnesses. The *second* is the 'presentation' of the final argument on the facts and law of the case. Although these are distinct skills, they are inextricably bound together, not just to each other, but also to the preparation that preceded the trial. During the stages when you have to produce the evidence, you have to keep your proposed closing argument very clearly in your sights, otherwise the evidence would be a random hotchpotch rather than a logical and organised collection of the individual pieces of evidence supporting your theory of the case. Conversely, the strength of your closing argument depends on the success with which you produced the facts when you led the evidence of your own witnesses and cross-examined opposition witnesses. The final argument is therefore a logical extension of the

overall process that began with the assembling of the evidence. It also runs through all the steps taken during your preparation for trial and the trial itself.

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The planning for a closing argument therefore has to start long before the trial commences. In fact, it must start with a conceptual argument at the time of the first interview with the client when you develop a preliminary theory of the case. During the subsequent stages of the litigation process, you will collect and marshal the evidence to support your theory of the case. During the trial you will produce and protect the evidence on which your theory and argument depend by examining your witnesses and cross-examining opposing witnesses. The planning and development of your argument will involve the following steps:

- *Identifying your goal(s) for the hearing*: Ask yourself what outcome your client wants. Then consider what obstacles you need to overcome to achieve those goals.
- *Identifying the relevant and helpful factual material*: An exhaustive fact analysis (along the lines explained in chapter 13) is required. Ensure that you have a clear understanding of the facts and the evidential material.
- *Identifying the relevant and helpful legal material*: Undertake appropriate legal research in order to find the relevant legal principles and their sources. Make sure that you can demonstrate how those principles assist your side.
- *Anticipating your opponent's goals*: Your opponent's goals ought to be apparent from the pleadings, in a civil case, and from the charge sheet or indictment and plea in a criminal case. What order or orders does the other side seek?
- *Anticipating your opponent's factual material*: Investigate the evidential material again in order to identify the facts that may support the other side in pursuit of their anticipated goals. Try to find an answer to the opponent's good facts. (They are usually bad facts for your side.)
- *Anticipating your opponent's legal material*: Investigate the law again, this time from their point of view. Are there any authorities supporting their stance? If so, can they be distinguished? Prepare an answer to the anticipated argument.
- *Drafting a skeleton (or heads of) argument*: The draft can later be adapted and enhanced before handed to the judge as your heads of argument.

The argument is worked out in advance in draft, as a provisional argument. It anticipates the evidence your own witnesses will give as well as the evidence and argument for the other side. During the trial, the argument is refined and modified, if necessary, as each witness completes his or her evidence or at the end of the day when you have a chance to reflect on the evidence given that day. When all the evidence for both sides has been led, the argument is finalised and reduced to writing in the form of heads of argument. That is not yet the final product, as even during your opponent's argument you will note points to answer in reply.

21.3 Order of closing addresses

Generally the prosecutor argues first in a criminal case, followed by counsel for the accused, after which the prosecutor has the right to reply to matters raised in the defence argument. Where there are multiple accused, their counsel address the court in the order in which their clients are named

in the charge sheet or indictment; accused No 1's counsel speaks first, then accused No 2's, and so on. In civil cases a similar order applies. The plaintiff's counsel argues first, then counsel for the defendant, and counsel for the plaintiff may thereafter reply to matters raised in the defendant's argument. If there are multiple plaintiffs or defendants, they follow the order in which they appear on the pleadings. The [Page 403] process escalates when there are third parties. There is another complication: if the onus of proof is entirely on the defendant, the order is reversed, with the defendant arguing first and having the right to reply.

Judges frequently deviate from the generally accepted order, especially when there are counterclaims or third-party claims. Remember that the judge may give directions with regard to the form and content of the argument. In case of doubt, the judge ought to be approached for directions as to the order in which counsel are to present their argument. Be aware of the fact that judges often call on counsel out of turn. Expect this when you have a bad case.

The order of the closing addresses affects the structure and content of each party's argument.

Plaintiff's counsel has the opportunity to address the court fully on the facts and the law and may deal with the argument anticipated from the defendant. Plaintiff's counsel has to make a tactical decision, namely whether to deal with the anticipated argument for the defendant during the course of the main argument or to leave it for the reply. The first advocate to address the court usually sets the scene and has to deal with the facts in more detail than those who follow.

Defendant's counsel has a similar opportunity to address the court fully on the facts and the law, but must also answer the plaintiff's argument. There is no other opportunity for it. Whether the plaintiff's argument is dealt with first and the defendant's main argument addressed thereafter depends on the circumstances of the case and counsel's tactics.

Plaintiff's counsel may deal with points arising from the defendant's argument in reply. The reply is not the time to address the main argument. If new matters are raised in reply, the court will almost invariably invite defendant's counsel to deal with the new matter, and is unlikely to give plaintiff's counsel another opportunity to reply.

21.4 Structure of a closing argument

An argument can be structured in a number of ways. There can be only a single point to argue – a point of fact or a point of law arising from the facts. There can also be many different points to be argued separately within a far larger argument. Each case has to be approached with the particular facts and circumstances of only that case in mind. Try to build the argument around a logical structure or scheme, for example:

Table 21.1 Scheme for a closing argument

What to do	How to do it
Step 1: State the issues.	Isolate the issues or essential questions of law involved. Arrange them in logical order and structure the rest of the argument accordingly.
Step 2: Deal with the onus and standard of proof.	Mention on whom the onus of proof lies in respect of each issue and state what the standard of proof is (*prima facie*, balance of probability, beyond reasonable doubt).
Step 3: Marshal the evidence in support of your theory of the case.	State briefly what evidence there is in support of the theory of the case being pursued and deal with the associated questions of credibility, probability, probative value, circumstantial evidence and numeral preponderance. Deal with the inferences to be drawn from the facts. In short, arrange the evidence, facts, circumstances and points of argument so that they tell an interesting and convincing story.

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What to do	How to do it
Step 4: Deal briefly with the opponent's case.	Discuss the opponent's case to show its weaknesses, lack of credibility, insufficiency of proof and other defects. If necessary, deal with the matter on a comparative basis to point out why your case should be preferred.
Step 5: Deal with the law and integrate it into your argument.	Apply any relevant points of law to the facts and the relief claimed.
Step 6: Discuss the relief claimed.	Discuss the relief claimed or the order to be granted. The purpose of the argument is to justify the relief claimed by your client. Ensure that each item in the prayer is dealt with.

It is not possible in all cases to keep these steps completely separate from each other. They may flow into each other or overlap. It may even be that it is unnecessary to cover all these items. It is, for example, hardly necessary to tell an experienced judge that the onus of proof rests on the prosecution to prove the guilt of the accused beyond reasonable doubt. You may prefer to join Steps 3 and 5 and deal with the law and the facts together. You may also prefer to deal with the opposition's case *after* dealing with the law, rather than *before*. However, a good argument has to address every step in the structure in Table 21.1, even if they are arranged differently.

The structure of the argument is also dictated by factors such as the audience to whom the argument is to be addressed and the content and difficulty of the argument. The argument must therefore be managed in such a way that it covers all the points you need to make but with the ultimate aim of presenting an argument that will appeal to the bench you have.

21.4.1 *Dealing with the issues one at a time*

In most cases the issues can be isolated and dealt with separately. Related issues can be clustered together, but it is still important to keep them firmly in mind as separate from each other. How else could one justify a finding in one's favour on any *particular* issue? The argument should also progress from one issue to the next. However, there must be some cohesion or connection between the points and issues raised during the argument. For example: In a negligence case involving the driving of a car, the argument could deal first with proof of the identity of the driver and only then deal with the grounds of negligence and thereafter with any questions of contributory negligence. Dealing with contributory negligence first in that situation does not appeal to logic as contributory negligence would only be relevant if negligence on the part of the defendant has been established.

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Table 21.2 Dealing with the issues in turn

What to do	How to do it
Step 1: State the questions or issues to be decided.	*M' Lord, there are three questions to be decided by the court.* *1* *Was the defendant the driver of the car?* *2* *Was the defendant negligent in that he entered the intersection against the red traffic light?* *3* *Was the plaintiff also negligent in failing to take reasonable steps to avoid the collision?*
Step 2: State where the onus lies.	*I submit that the onus on the third issue is on the defendant but accept that the onus on the first two is on the plaintiff.*
Explain the consequences of the court's finding on each question.	*If Your Lordship's findings are in the plaintiff's favour on each of these questions, then she would be entitled to judgment as claimed. If the finding on either of the first two questions is in favour of the defendant, there should be judgment in his favour or absolution from the instance, depending on whether M' Lord regards his version as*

	more probable than the plaintiff's or simply as not less probable than the plaintiff's. If the first two questions are answered in favour of the plaintiff but the third in favour of the defendant, then M' Lord may apportion the blame and reduce the plaintiff's damages.
Deal with each question in turn. Start by restating the first question.	*The first question is whether the defendant was the driver of the car.*
Step 3: Develop your points in favour of the answer contended for. **Step 4:** Deal with the opponent's version.	*There is ample evidence that the defendant was the driver.* *1* *The plaintiff and witness X saw him driving. Witness X has no reason to be untruthful about this.* *2* *The defendant admitted that he had been driving when constable Y spoke to him.* *3* *It was the defendant's own car too; it is more likely that he drove it than his little brother, who doesn't even have a driver's licence.* *4* *Last, but not the least, there were numerous inconsistencies between the defendant's and his brother's evidence. Their evidence is not credible.*
Suggest the answer.	*I submit that it is more likely than not that the defendant was the driver.*
Restate the second question.	*The second question is whether the defendant had been negligent in that he entered the intersection against the red traffic light.*

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What to do	How to do it
Step 3: Develop your points in favour of the answer contended for. **Step 4:** Deal with the opponent's version.	*The plaintiff and witness X both gave credible evidence to that effect. The defendant's false denial that he had been driving undermines his version that the light was green for him. Apart from that, he apologised to the plaintiff after the collision. Why apologise if the collision was not his fault, as he now claims?*
Suggest the answer.	*I therefore submit that there is clear evidence of negligence on the defendant's part.*
Restate the third question.	*The last question should really be, could the plaintiff have done anything to avoid the collision?*
Step 3: Develop your points in favour of the answer contended for. **Step 4:** Deal with the opponent's version.	*M' Lord, the burden of proof on this issue is on the defendant. The only evidence is that of the defendant and his brother. Both of them have been untruthful about other aspects of the matter. Their evidence of what the plaintiff could and should have done to avoid the collision, is speculative. What they cannot demonstrate, is how the plaintiff could have avoided the collision, having regard to the amount of time the plaintiff had after it became apparent that the defendant was not going to stop. In any event, the defendant drove into the side of the plaintiff's car. She was legitimately in the intersection and had every right to expect other motorists to obey the most basic of our traffic laws; you have to stop at the red light.*
Step 6: Suggest the answer.	*I therefore submit that the defendant has not discharged the onus of proving contributory negligence on the part of the plaintiff.*
State the overall conclusion.	*For these reasons I submit that the plaintiff is entitled to judgment as prayed. If M' Lord were to be against me on the question of contributory negligence, I would submit that the apportionment should be heavily in favour of the plaintiff.*

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21.4.2 *Submissions on the facts*

Submissions on the facts require attention to detail and the organisation of the material into a comprehensible and attractive package. You should have such a complete mastery of the facts and evidence that you can spin an interesting and convincing tale. Advocacy is about spin, meaning that you put a particular slant, favourable to your client, on the material before the court. Good spin is realistic; it does not attempt the impossible. The bigger the case, measured by the volume of the material and not the importance of the matter, the more important it is for counsel to create order out of the apparent chaos of the mass of evidence and exhibits. You could create order in your argument by adopting this scheme:

- Refer to the evidence by naming the witness and reminding the court what the witness has said. It is not necessary to quote at length from the evidence. If the evidence has been transcribed, give the judge the page and line references for important items of evidence.

- Refer to a document by name or other identifying features, such as date, author or exhibit number, and remind the court what it records. It is not necessary to read long sections from the document again. Allowing the judge to find it and directing him or her to the relevant passage is usually enough and is far more effective. Paraphrase, if necessary.

- Whether you refer to the evidence or a document, be accurate. It is therefore important to keep an accurate note of the evidence during the trial. You may have to argue before the transcript is ready.

- Be brief. By the time you argue the case the judge will have heard all the evidence. It is not necessary to repeat everything every witness has said. Stick to the main points.

- If you want to launch an attack on the credibility of a witness, make sure that you arrange your material in a logical order, for example, by –

  - referring to internal inconsistencies, where the witness has contradicted himself or herself;

  - referring to external inconsistencies, where the witness has been contradicted by other witnesses; and

  - referring to the inherent probabilities of the matter, where the prior conduct of the witness has been inconsistent with his or her evidence or the inherent probabilities of the matter.

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Table 21.3 Argument on the facts

What to do	How to do it
Step 1: State the fact to be proved. **Step 2:** Deal with the onus of proof.	*Your Worship, I now turn to deal with the question whether the accused has been shown, beyond reasonable doubt, to have had the necessary intention for the crime of theft.*
Tell the court what you are going to submit.	*I submit that he did not, for the following reasons:*

Step 3: Marshal the evidence to support your submission.	*It is common cause the accused came into the store and, after browsing for a while, put his own backpack on the floor and picked up Exhibit 1 from the display rack. Also that he left the store after browsing for a while longer and did so without paying for the Exhibit 1. His conduct fits that of a brazen thief and that of someone who had made an honest mistake equally. The most important features in his favour are the following:* *1* *As soon as he was stopped outside the store, he apologised, saying that he had made a mistake. There is a dispute between the witnesses about precisely what he had said, but the store detective's statement to the police is decisive. She said to the police, and I quote from Exhibit B,* 'He said: "I am sorry, it's a mistake."' *This statement is exactly in consonance with what the accused has told the court.* *2* *The accused has been consistent in this version. He gave it instantly, before there had been any opportunity for reflection or intrigue.* *3* *It appears that even the store detective believed him. She admits that she had said to the accused that it was 'unfortunately' the store's policy to prosecute. Why should it be unfortunate, unless she thought the accused had made an honest mistake?* *4* *There was nothing furtive in the accused's behaviour. He quite openly took the backpack, wandered around with it and then left.* *5* *The undisputed evidence of Dr Stone is decisive; the accused suffers from colour-blindness which makes this kind of mistake understandable.*
Step 4: Deal with adverse facts or evidence, if you haven't already done so.	*1* *The only evidence of a guilty state of mind is that of the store detective, to the effect that the accused apologised and did not have enough money to pay for the backpack. The first part of this evidence is not consistent with what is in her statement, as I have already pointed out. But even if it were true, it is not evidence of guilt. An innocent person could well apologise in such circumstances.* *2* *And the fact that the accused did not have enough money to pay for the backpack is neutral; it fits in equally well with his version that he never intended to buy a backpack at all but wanted a different type of bag, which is also less expensive.*

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What to do	How to do it
Step 5: Allude to the law on the incidence of the onus and the standard of proof required, if necessary.	*The question Your Worship has to decide is whether the accused's version has been demonstrated to be false, beyond reasonable doubt.*
Step 6: State the conclusion.	*1* *I respectfully submit that the prosecution evidence falls far short of the standard required. The accused's version has not been demonstrated to be false; on the contrary, it appears to be more probable than the prosecution theory.* *2* *It is, of course, not necessary that his version should be probable; it has to be shown to be false beyond reasonable doubt.* *3* *I submit the State has not been able to achieve that standard of proof.*
Step 6:	*In the circumstances I submit that the appropriate finding is that the accused be acquitted.*

	Tell the court what order should be made if the court finds the facts to be as contended for.	

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21.4.3 *Submissions on matters of law*

Submissions on matters of law are made in similar fashion but the argument tends to be more technical. Argument on matters of law has to be carefully managed. For one thing, the judge (or the magistrate) will probably know as much of the law as counsel as a result of their own years in practice and their experience on the bench. The opposite is true for the facts where counsel has the opportunity before the trial to get acquainted with them while the judge only gets to know them during the trial. The difficulty and importance of the legal points to be argued will usually determine how you present the argument. Here are some general guidelines:

- There is no need to argue basic legal principles. Telling the judge in a criminal case that the onus is on the prosecution to prove the guilt of the accused beyond reasonable doubt is hardly likely to give the judge any new or helpful insight. Explain instead in what respects the proof proffered by the prosecutor falls short of that standard.

- The purpose of a reference to a legal principle or an authority is to help the judge make the correct legal decision on the facts of the case. The legal principles you advance must therefore be relevant to the facts and have to be presented against the background of the facts.

- There is no need to quote lengthy passages from cases or textbooks. Paraphrase the relevant principle if you can. If a telling point is made particularly well in an authority, you may quote that, but be careful not to bore the judge by reading a long passage which loses its force in the monotone of your reading. Let the judge read it instead. Have a copy available for that purpose. It will be far more effective. Inexperienced counsel often read long passages from authorities to the court. They do so for two main reasons, both fallacious. The *first* is that they think they are actually helping the court by doing that. The fact is that judges prefer to read the relevant passages themselves. The *second* is that they don't have faith in their own ability to paraphrase the passage they want to read in full. Practice and experience will overcome this problem. Make sure you understand the principle you want to bring to the notice of the judge first; then find a way of putting it succinctly. Make a short note to help you say precisely what you want to submit to the court. Read from the authority only if there is no other way to do it.

- There are standard references or modes of citation for most authorities. Be accurate when giving a citation and use the full citation when you first refer to a particular authority. You may abbreviate the citation for subsequent references.

- Most cases are decided on the facts. There may not be any important or difficult legal principle involved at all. There is no reason to refer to the law in such a case.

- If the authorities you want to rely on are obscure or scarce, make copies for the judge. If a translation from the Latin or any other language is required, make sure it is accurate and that you have a passing knowledge of each word in the relevant passages. Keep a dictionary handy.

- The more difficult the legal principles involved, the greater the need for written heads of argument. While counsel may not wish to quote from each authority, the main point made in an authority should be mentioned briefly. A difficult legal argument relying on reams of authorities may be written out in full in counsel's heads of argument. The style of presentation then changes; the argument is not to be read out, [Page 411] word for word. It is far more effective to take the judge to a particular paragraph in the heads and to paraphrase the point

made there. Give the judge a chance to read the written submission or the passage from the authority relied on before moving on to the next point.

Table 21.4 Argument on a point of law

The facts: The plaintiff sued an insurer under a disability policy on the basis that he had contracted an incurable disabling disease. The insurer alleged that the plaintiff, unbeknown to either party, was already suffering from that disease when the contract of insurance was concluded and that the contract was therefore void. (See *Kent v South African National Life Assurance Company* 1997 (2) SA 808 (D).)
Task: Study the judgment and consider whether counsel's argument helped the judge to come to a decision based on legal principles found in rather obscure authorities. Copies of the foreign authorities were provided to the judge as they were unavailable in the court's library. The passages quoted in the heads were not read to the judge; they were paraphrased during the oral argument.

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Table 21.4 Argument on a point of law

What to do	How to do it
State the main submission.	*We contend that there can be no valid insurance contract if the risk sought to be insured against has, with or without the knowledge of the parties, already materialised prior to the effective date of the contract of insurance.*
1 Refer to each authority for the point in turn. 2 Quote only telling passages, for effect. 3 Provide a translation, if necessary.	*Josephi de Casaregis* Discursus Legales de Commercio *(1707) said the following at* Discursus *1 note 13:* 'Assecuratio non tenet, si tempore assecurationis merces erant deperditae, vel casus sinister erat sequutus*',* *which can be translated as follows:* 'The insurance does not hold, if at the time of the insurance the merchandise has already been lost, or the casualty has already occurred.'
1 A submission can be 'attached' to an authority. 2 It is not always necessary to provide a translation, especially when the authority is well-known.	*Hugo De Groot* Inleidinge tot de Hollandsche Rechtsgeleerdheid *(1631) defined insurance at 3.23.1 as follows:* 'Verzekering is een overkoming, waer door iemand op hem neemt het onzeecker gevaer dat een ander had te verwachten: den welcke wederom hem daer voor gehouden is loon te geven'. *We submit that it is clear from this definition that the risk relates to an uncertain danger which may eventuate in the future, that is to say, after the contract has been concluded.*
1 When a passage is quoted in full in the heads, it is not necessary to repeat it in oral argument. 2 It is often sufficient to draw the judge's attention to the authority and to move on to the next one.	*Joubert (ed*) The Law of South Africa *Volume 12 'Insurance' (1988) states the following in footnote 4 at para 172:* 'According to Gordon & Getz 168 "*the risk cannot attach as there is no insurable interest; the policy is accordingly void"*. The authors probably mean that there can never be an insurable interest in an object which has already been lost, and that for this reason the basis of the contract falls away.'

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What to do	How to do it
	French law is to the same effect. Lambert-Faivre Droit des Assurances *8 ed (1992) para 307 states that:* 'Des trois éléments de l'assurance – risque, prime, sinistre – le risque est le plus fondamental et détermine les deux autres . . .' *This passage can be translated as follows:* 'Of the three elements of insurance, risk, premium and peril, the risk is the most fundamental and determines the other two . . .' *In para 309 the learned author states that:*

	'". . . si le risque n'existe pas, le contrat d'assurance devient nul faute d'objet . . .', *meaning* 'If the risk does not exist, the contract of insurance becomes void for want of an object (or purpose)'.
State the conclusion contended for.	*On the admitted facts, the risk sought to be insured against in the current case no longer existed when the proposal was made, nor when the proposal was accepted, nor when the policy vested.* *No valid contract of insurance could therefore come into existence, notwithstanding the common but mistaken belief of the parties that the plaintiff at that time did not suffer from a permanent disability such as contemplated by the policy.*

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21.4.4 *Discrediting the opposition's argument*

An argument which ignores the opposition's argument is unlikely to be helpful or persuasive. It is clearly deficient because it does not answer the other side's facts or argument. The other side's argument therefore has to be confronted in a way that will result in it being rejected. You can proceed in two steps. The *first* is to distinguish the opposition's theory of the case from your own. The *second* is to discredit it.

- *Distinguish* the other side's theory of the case from yours by:
  - stating your theory and contrasting it with the opposing theory of the case.
  - showing where the two theories rely on the same facts or evidence.
  - showing where they diverge from each other.
- *Discredit* the other side's theory by attacking one or more of:
  - the evidence on which the other side's theory relies.
  - the credibility of the witnesses on whom the other side's theory depends.
  - shortcomings or lapses in logic or gaps in the opposing theory or in the other side's evidence.
  - the inferences drawn by the other side from the facts or evidence.
  - the other side's submissions on the law, or their application of the law to the facts.

21.4.5 *Heads of argument*

There are few things as helpful to a judge in reaching a decision as well-drafted heads of argument. They can be used as a framework for the judgment, even if the judge does not accept every submission counsel has made. They also serve as a handy reminder of the main points of counsel's argument and the authorities relied on. Yet, too few advocates make full use of this simple device to make their trial advocacy more persuasive. A skeleton argument is an invaluable device for the assistance of counsel in the presentation of a closing argument.

Draft heads or main points of argument must be prepared as the final stage in your trial preparation. By preparing an argument in draft form at that stage, you are able to check that your theory of the case is a tenable one. You can even ask a colleague to consider it and give you constructive criticism. The draft heads can also be updated each day during the trial to accommodate the evidence actually given by the witnesses so that, as soon as the evidence stage of the trial has been completed, you are able to place helpful heads of argument before the court. Every opportunity to be of assistance to the court is an opportunity to sway the court in your client's favour.

Heads must be short. They are not supposed to be a written argument. A written argument proceeds on the basis that there will be no opportunity for oral argument. The heads are not supposed to take the place of your final or closing argument. They are meant to be a summary of the main points of your argument. Points dealt with briefly in the heads are usually elaborated on in the oral argument. Conversely, points that are covered in detail in the heads may be dealt with more tersely in the oral argument.

The structure for heads of argument differs from case to case, but generally counsel would cover each of the steps set out in Table 21.1. It is also a good idea to ensure that your heads comply with the general principles set out in the Supreme Court of Appeal rule 10(3). (See chapter 25.)

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21.5 Style and tactics in the closing argument

Lawyers differ from each other as much as other people do. No two advocates will have exactly the same personality or talents. The skill or technique of persuasion is very personal to an individual advocate. It is therefore rather optimistic to expect that there should be only one way to present argument. Experienced counsel may adapt their style of argument to the particular judge before whom they appear. They take into account the character of the judge and the known or perceived predisposition of the judge. Nevertheless, in order to be persuasive, counsel has to apply certain basic principles:

- Counsel must appear to be honest and sincere. An advocate must also appear natural in his or her address, which must appear to be of an *ex tempore* rather than formal, rehearsed address.

- Counsel's presentation of the argument must be done with an air of confidence and competence. Confidence comes from preparation. Competence comes from experience and hard work. The appearance of confidence will be helped along if you use proper grammar and syntax; express yourself clearly, using short words and phrases; present your argument in an organised manner; and demonstrate an awareness of the judge's concerns and questions. You therefore have to anticipate the concerns and questions the judge might have and deal with them.

- Both confidence and the appearance of competence are enhanced by appropriate body language and non-verbal communication. Be aware of the need to make eye-contact, of your body posture, head movements, arm movements and hand gestures, even the position of your feet.

- The argument must be delivered without emotion but not without passion: you must give the appearance of one who believes in the justice of your client's case. The tone of an argument is determined by the demands of the particular case and the disposition of the judge. The process is dynamic; it is shaped by that curious and indefinable mixture of influences we call the mood of the case. By the time the last witness finishes his or her evidence, the participants, including the judge, advocates, attorneys and even the clients and witnesses, will probably have a good 'feel' for where the case is heading. The tone adopted by counsel ought to tap

into that atmosphere. Some cases are full of humour while others have tragedy. It stands to reason that humour has no place in a tragic case, even though it may assist in the process of persuasion in different circumstances.

These finer points could help you present a more persuasive argument:

- There must be an orderly presentation of the matter. An argument, after all, is the logical and persuasive arrangement of a series of facts, circumstances and points in support of a final conclusion. The points to be made must follow logically from each other:
  - Give the judge a roadmap right at the beginning of the argument. '*I am going to develop the following points in my argument, M' Lady*.' Then number them and when you move from one point to the next, tell the judge, '*I now get to point number 3 . . .*'
  - When you get into difficulties with one point, make the necessary concessions and move on to the next point. Tell the judge what you are doing.
- You must have a clear view of what you are going to say, as a complete argument. You can deal with the events sequentially, in the order that the events occurred, or [Page 416] you can address the court on separate topics. In either case, the order of the points you make should proceed logically from the introduction of the issue to be determined to the conclusion you suggest the court should arrive at.
- Be aware of your short- and long-term objectives at all times during the argument. Ask yourself: '*Why am I making* this *point in* this *manner at* this *time*?'
- Every point you make must contribute to an acceptance of your theory of the case. Your argument must therefore contain only those points necessary to establish your theory and to ward off attacks on it from the other side.
- Your first point must be a good one. It is rather difficult to recover when the judge responds to your first point with a cynical, 'So what?' The first point must therefore be either unanswerable or uncontroversial.
- Make concessions where appropriate. If possible, demonstrate why the points you are prepared to concede should make no difference to the outcome.
- Do not bury a good point under a heap of bad ones. There is seldom a case with only good points.
- Understate rather than overstate your case. The point should tease rather than overwhelm. An exaggerated and vindictive argument is unlikely to be persuasive. It may even be counter-productive.
- Use key words and phrases for emphasis and impact. If necessary, remind the court of the evidence given by a witness. This will reinforce the point you wish to make.
- Examples and illustrations may be used to good effect.
- The other side's argument must be dealt with briefly, without flattering it by spending too much effort or time on it.
-

The judge's questions must be answered at the first opportunity. Don't promise to deal with the judge's question later. Tackle the problem straight away. Questions from the bench must also be answered in a forthright manner. If the question suggests that the judge may be labouring under a misapprehension on a question of fact or law, return to the relevant evidence or legal principle and point out what you submit the correct position is. Then deal with the question anyway, if it can be dealt with. If the point made by the judge is good, you may have to withdraw tactfully, by saying something like, '*That may be so, but there are other points in the case.*' This is not guaranteed to work!

- Repetition may be employed for impact and emphasis, but should be used sparingly. You may wish to end on a high note, repeating your best point, although there is some risk in repetition. Remember that a good point does not get any better with repetition; a bad point is more likely to be exposed when repeated.

- Be brief. The argument must be balanced and well proportioned in length. In his *De Ware Pleiter*, Johannes van der Linden wrote that one of the greatest defects in advocacy is '*langwijligheid*', meaning 'long-windedness'. That is as true today as it was in 1827.

- An opponent's argument must not be interrupted. Any comment must be reserved for the reply. Counsel must not respond, by means of *sotto voce* comments, body language or facial expressions, to the opponent's argument.

- While a robust approach is allowed when dealing with an opponent's argument, the idea is to attack the ideas, not the person who expressed them.

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- Counsel has the right to make submissions; there is no place for personal views, beliefs or opinions. Counsel is employed for his or her advocacy, not for his or her judgment. Submissions must therefore be preceded by phrases such as '*I submit*' or '*It is my submission*' or '*I contend*' rather than '*I feel*' or '*I believe*' or '*In my opinion*'. Never personally vouch for the credibility of a witness or the correctness of any evidence. Your role is to make submissions, not to give guarantees or personal assurances.

  - Don't say, '*The plaintiff submits* . . .' The responsibility is yours, not the client's.

21.6 Ethics

- Counsel has a duty not to mislead the court on the facts. Counsel may not argue for a conclusion counsel knows, from his or her instructions, to be untrue, or which counsel knows is based of perjured or mistaken evidence.

- Counsel has a duty to find the law and present that to the court. This means that both sides are obliged to bring adverse authorities to the notice of the court. The emphasis is on disclosure; once the adverse authority has been brought to the notice of the court, counsel may still argue against its acceptance. Helping the court to find the law includes the right and duty to argue points of law which are reasonably arguable, to distinguish cases and even to question precedent and principles.

-

It follows from these principles that counsel may not take advantage of a concession which is wrongly made. It does not matter whether it is a concession of fact or of law; counsel's duty is to speak up to ensure the court is not misled. When such a concession is made, counsel has to rise and say something to the effect that, '*While I would like to rely on that concession, I fear that it is wrong.*' A full explanation must be given.

The LPA Code of Conduct states the main principles as follows:

57.

Disclosures and non-disclosures by legal practitioner

57.1

A legal practitioner shall take all reasonable steps to avoid, directly or indirectly, misleading a court or a tribunal on any matter of fact or question of law...

57.4

A legal practitioner shall, in any ex parte proceedings, disclose to a court every fact (save those covered by professional privilege or client confidentiality) known to the legal practitioner that might reasonably have a material bearing on the decision the court is required to make.

57.5

A legal practitioner shall, in all proceedings, disclose to a court or a tribunal all relevant authorities of which the legal practitioner is aware that might reasonably have a material bearing on the decision the court or tribunal is required to make.

57.6

A legal practitioner shall, if the interests of justice require the disclosure to a court or tribunal of information covered by professional privilege, seek from the instructing attorney (where one is appointed) and the client permission to make the disclosure, and if permission is withheld, the legal practitioner shall scrupulously avoid any insinuation in any remarks made to a court or tribunal that all information that would serve the interests of justice has been disclosed.

57.9

A legal practitioner shall not rely on any statement made in evidence which he or she knows to be incorrect or false.

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21.7 Checklist and assessment guide

If this book were to be used as a teaching guide or prescribed work for advocacy exercises, the following checklist may be used to prepare for the exercises, to serve as an assessment guide, or to serve as a marking guide.

If the checklist were to be used as a marking guide, the best way to go about the matter would be to allocate a grade to each student or pupil whose performance is being assessed as follows:

C = Competent (meaning that the performer has attained the desired standard of competency in respect of the skill involved).

NYC = Not yet competent (meaning that the performer has not yet reached the desired standard).

Table 21.5 Checklist for closing argument

	Skill involved	**Competent/ Not Yet Competent**
1	Stating the issues accurately	

2	Dealing with the onus and standard of proof	
3	Marshalling the evidence in support of the theory of the case o naming the witness o briefly reminding the court of the evidence given by the witness o incorporating the exhibits in the argument	
4	Dealing with the issues one at a time	
5	Dealing appropriately with the opponent's argument by distinguishing it and discrediting it	
6	Dealing with the law and integrating it into the argument	
7	Avoiding unnecessary quotations from authorities	
8	Citing authorities correctly	
9	Using examples and illustrations appropriately	
10	Discussing the relief claimed	
11	Making use of written heads of argument	
12	**Protocol:** o Practising SOLER principles (Shoulders square, Open stance, Leaning slightly forward, making Eye contact, Relaxed posture) o Maintaining eye contact with the judge o Speaking at appropriate volume and pace o Addressing the court with proper deference o Ensuring that only one counsel is standing at any time o Addressing the court from the correct location, not moving about the courtroom	

Chapter 22
Motion Court

The Motion Court is a paper court.
But it is no paper tiger!
Anonymous advocate

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22.1 Introduction

Proceedings in the Motion Court (or Chamber Court, as it is sometimes called, or Third division in at least one division of the High Court) differ from proceedings in other courts in many ways. The advocacy in the Motion Court is non-adversarial in the sense that the proceedings are not opposed by the defendant or respondent and there is no appearance by counsel on behalf of the defendant. Counsel's duty to raise matters that are adverse to his or her case is higher than where the defendant is represented. Judges take a more active part in the debate and often take an adversarial stance to the applicant in order to test the validity of counsel's submissions. Cases are also dealt with in a hurry; there is usually a long list of cases for the day and the judge may even have been allocated a trial to hear as soon as the Motion Court finishes its work.

There is a hustle and bustle and excitement about the proceedings in the Motion Court that can be quite disconcerting for onlookers, especially if they are clients with current matters before the court. Counsel hold multiple briefs, people come and go as cases are called and are disposed of in quick succession, the legal practitioners (who will henceforth be referred to as counsel) have whispered, last-minute discussions about settlements, postponements and the terms of consent orders. Every now and then the unexpected happens: a defendant turns up to argue the matter in person or asks for an adjournment to obtain legal advice. Things can, and do, go wrong in so many ways. The return of service is mislaid, the papers are defective, counsel does not have a complete set of papers; the list is endless. The best laid plans of mice and men . . .

The Motion Court also deals with some opposed matters, ranging from opposed applications for postponements to substantive applications that are defended. So there remains an element of adversarial advocacy, but the overwhelming atmosphere is that of non-adversarial advocacy. The Motion Court is also distinguished from the Trial Court in that the procedures in the Motion Court are not designed to resolve disputes of fact by way of oral evidence. In this sense, the Motion Court is a 'paper court'. If evidence is [Page 420] required in a contested matter, that evidence is (usually) taken at a later date in a setting similar to a Trial Court.

22.2 Function of the Motion Court

The Motion Court hears mainly three categories of cases, namely unopposed matters, interlocutory applications and substantive applications.

22.2.1 Unopposed matters

When proceedings are served on the defendant (or respondent) and they do not defend the claims that are made, the plaintiff can proceed to judgment in the absence (or default) of the defendant. A judgment is necessary if the plaintiff is to enforce the claim by making use of the execution process provided by the rules. The registrar has the power to grant default judgment in certain cases. The variety of the cases that can come before the Motion Court as default judgments is limited only by the imagination. The proceedings can be instituted by way of a summons or by way of notice of motion. The orders sought can range from a simple judgment for the payment of the purchase price of goods to an order presuming a person to have died (with ancillary orders with regard to the distribution of the estate). The distinguishing feature of this type of Motion Court matter is that the proceedings are served on a named or nominal defendant who has the right to oppose the relief claimed. It is only when no notice of opposition is given within the time allowed by the rules or the Superior Courts Act 10 of 2013 (Act) that the matter proceeds by default in the Motion Court.

22.2.2 Interlocutory applications

The Motion Court also deals with procedural matters where the intervention of the court is anticipated from the outset or where it becomes necessary for the proper conduct of the proceedings. A summary judgment application, for example, anticipates that the court will be required to make an order, whether the application is to be granted or refused. In other interlocutory applications the court may make orders with regard to the *status quo* pending the resolution of the main proceedings. Applications for extensions of time, to compel discovery or the delivery of further particulars, are further examples of interlocutory applications.

22.2.3 Substantive applications

We use the term 'substantive applications' to refer to cases where notice of motion procedure is the prescribed procedure and cases where, even though action procedure could be used, final relief is claimed in notice of motion proceedings. Applications for orders under rule 57 (for the appointment of curators for persons under disability) or rule 58 (interpleader proceedings) have to be brought by way of application. In such cases, the procedures are prescribed by the Rules. Where final relief is claimed by way of notice of motion proceedings, the relief claimed could be extremely diverse. An application for judgment on a settlement can be made instead of instituting a fresh action. Sequestration and other insolvency-related orders are usually sought by way of notice of motion proceedings. These applications end up in the Motion Court, whether they are opposed or not. If they are not opposed, they are dealt with as default judgments. If they are [Page 421] opposed, they eventually reach the stage where they are ready for an opposed hearing. The date for the opposed hearing may be fixed at a time when the matter is on the Motion Court roll and the matter is then adjourned to the opposed roll for a particular day. In some cases the matter makes its first appearance on the opposed roll after the filing of a notice of set down. Whichever route the matter takes to reach the opposed roll, the court hearing the matter will be a Motion Court.

22.3 Preparation for a Motion Court appearance

As with all other aspects of advocacy, competent and confident Motion Court advocacy is the product of systematic preparation. In a Motion Court matter, more than any other matter, the devil is in the detail. Judges take an extremely technical approach to unopposed Motion Court matters, probably

because of the inherent dangers in the situation where the defendant does not appear to question the claim or to raise technical defences.

The general principles applicable to Motion Court matters are to be found in the High Court Rules. The law, as found in statutes, decided cases and textbooks, also plays a role, as it does in all forms of litigation. You also have to comply with any relevant Practice Directives issued by the Judges President for their respective divisions. These directives could, and in most cases do, cover a host of matters relevant to motion court practice, with the ones mentioned in the following table just the tip of the iceberg. (As a matter of interest, the Practice Directives of the North Gauteng High Court span 175 pages in Harms *Civil Procedure in the Superior Courts* LexisNexis.)

Table 22.1 Table of practice directives (examples)

Service by way of publication	Matters not on the roll	Service on the registrar of deeds
Urgent applications	Anton Pillar orders	Expedited hearings
Orders for sequestration or liquidation	Social grant applications	Bail appeals
Appointment of curators	Opposed motions	Settlement agreements
Default judgment	Notice of set down	Eviction matters
Summary judgment	Standard orders	Rehabilitation
Rule 43 applications	Variation of custody	Bank overdraft interest

It is counsel's professional duty to acquaint themselves with the directives that are applicable in the court where they appear.

The cases heard in the Motion Court range in their level of difficulty from the relatively simple to the extremely complex. Since this book is not designed as a model for advanced advocacy skills, the examples that follow are typical cases that could be expected on the Motion Court list of any of the High Courts any day of the week. The emphasis is on the kind of cases in which the more junior advocates or attorneys would be engaged.

The basic rules with regard to methods of service, time limits or what constitutes a proper summons or other founding document, are set out in the Rules and in decided cases. Counsel has to be acquainted with them. Note that there may be a practice [Page 422] directive in play as well. Every Motion Court brief must be scrutinised very carefully to establish whether those requirements have been met. Counsel must also consider the consequences of non-compliance; not every error is fatal. Further, in every case the underlying cause of action must also be considered against the branch of the law applicable, for example, the Divorce Act 70 of 1979 in a divorce matter and the Insolvency Act 24 of 1936 in a sequestration case.

There have been extensive reviews of and changes to the law relating to credit agreements and consumer protection over the last ten years. Even a simple ejectment of an overstaying tenant or a defaulting mortgagee has now become a major endeavour. Many other procedures that were previously simple and uncomplicated are beset by numerous technicalities, with possible defects in the procedure ranging in seriousness from simple errors that may be condoned to constitutional shortcomings that may vitiate not only the procedure – summary judgment, for example – but the underlying contract or the right to enforce it in a particular way.

The law is developing as fast as the law reports are published. The Constitution also plays a large part in what happens in the Motion Court. Many practices that were previously taken for granted are now unconstitutional.

Dealing with such matters is not within the import of this chapter or this book. For guidance in that regard consult a specialist publication on motion court practice such as Neukircher, Fourie & Haupt *High Court Motion Procedure*: A Practical Guide (2012) LexisNexis (loose-leaf service also available online), a work on consumer protection law, the statutes concerned and the law reports.

In the examples that follow matters of protocol, such as saying, 'May it please the court' and 'As the court pleases' have been omitted. The special protocols of the Motion Court are dealt with later in this chapter. (For the general protocols of the courtroom, see chapter 15.) The style of counsel's presentation must also take account of the customary protocols of the particular division of the High

Court as there are local customs that may not be known to outsiders. The examples to follow have to be adjusted for the individual style of counsel too.

Caution: Counsel must prepare their own checklist for each example given below taking into account the customs and practice directives of the division in which the matter is to be heard. The examples are provided to illustrate the methodology and are not to be used as a template for all cases in all courts.

Note 1:

In all the examples the documents in counsel's brief are copies, unless otherwise stated. (The attorney setting the matter down must ensure that the originals are in the court file.)

Note 2:

In all cases where more than one defendant is sued counsel must ensure that the basis of their liability, whether joint or joint and several, is set out in the summons or other founding document.

Note 3:

Section 24 of the Superior Courts Act 10 of 2013 (Act) applies to the time allowed for entering an appearance to defend where the summons is served outside the area of jurisdiction of the Division in which it was issued.

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Table 22.2 Provisional sentence (unopposed)

Documents in the brief	Preparation checklist	What to say
1 Original instructions 2 Provisional sentence summons 3 Return of service 4 The original of the liquid document sued upon 5 Notice of set down	1 Does the summons comply with rule 8 in all respects? 2 Has a copy of the liquid document sued upon been attached? 3 Has there been proper service in terms of rule 4? 4 Have the correct number of days been given to oppose in terms of rule 8(1) and section 24 of the Act, and have they elapsed? 5 Is the document sued upon, a liquid document? 6 Has a proper cause of action been pleaded? 7 Are the rate and date of interest justified? 8 Is any special order for costs justified by the liquid document or the facts pleaded? 9 Any constitutional issues? Substantive law issues?	'*M' Lord, I appear for the plaintiff. There has been proper service of the provisional sentence summons. I surrender the original document sued upon.*' Hand the document to the usher and wait for the judge to have an opportunity to inspect or read it. '*I submit that a proper case for provisional sentence has been made out and I move for an order as set out in paragraphs 1, 2 and 3 of the summons.*'

Table 22.3 Default judgment (without evidence)

Documents in the brief	Preparation checklist	What to say

1 Original instructions 2 Summons 3 Return of service 4 Notice of set down	1 Does the summons comply with rule 17? 2 Has there been proper service in terms of rule 4? 3 Have the correct number of days been given to defend in terms of rule 19 and section 24 of the Act, and have they elapsed? 4 Has a proper cause of action been pleaded? 5 Are the rate and date of interest justified? 6 Is any special order for costs justified by the facts pleaded? 7 Any constitutional issues? Substantive law issues?	*'M' Lady, I appear for the plaintiff. There has been proper service of the summons on the defendant. The defendant is in default. The papers are in order. I ask for judgment as claimed, with the interest in paragraph (b) to run from the date of service, being . . .'* **Note:** Where the summons does not disclose the date from which the defendant has been *in mora*, interest from the date of service may be claimed since the service constitutes a demand.

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Table 22.4 Default judgment (with evidence)

Documents in the brief	Preparation checklist	What to say
1 Original instructions 2 Summons 3 Return of service 4 Notice of set down 5 Statements or affidavits by witnesses to prove damages 6 The original and 2 copies of each documentary exhibit (The original is for the judge and the copies are required for the witness and counsel.)	1–6 As per Table 22.3. 7 Does the evidence prove the amount of the damages? 8 As far as the evidence is opinion evidence, is the witness an expert who can give admissible opinion evidence on this issue? 9 Any constitutional issues? Substantive law issues? **Note:** In some cases proof by affidavit is accepted.	*'M' Lord, I appear for the plaintiff. Evidence is necessary to prove the damages and I ask that the matter stand down for that purpose until after matter number . . . on the list.'* When the matter is recalled later: *'M' Lord, this is the matter which stood down for evidence. There has been proper service on the defendant. I intend to call two witnesses. My first witness is . . .'* Then call the witnesses and lead their evidence. When the evidence has been completed, ask for judgment.

Table 22.5 Summary judgment (unopposed)

Documents in the brief	Preparation checklist	What to say
1 Original instructions 2 Summons 3	1 Does the summons comply with rule 17? 2 Has a proper cause of action been pleaded?	*'M' Lady, I appear for the plaintiff. This is an application for summary judgment. The application was served on the defendant (or the defendant's attorneys, as the case*

Notice of intention to defend 4 Summary judgment application (notice and affidavit) 5 Proof of service	3 Is the claim one in respect of which summary judgment can be granted under rule 32(1)? 4 Has the application been served in time (within 15 days from the date of notice of intention to defend)? 5 Does the application comply with the requirements of rule 32(2) and (3)? 5 Is the interest claim in order, with regard to both the rate of interest and the date from which it is claimed? 6 Is any special order for costs justified by the facts pleaded? 7 Any constitutional issues? Substantive law issues?	*may be) on [*date*] and there has been no response.* *I submit that the papers are in order and ask for judgment as claimed in paragraphs . . . of the notice of application.'*

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Table 22.6 Summary judgment (consent order)

Documents in the brief	Preparation checklist	What to say
1 Original instructions, including the original consent to the order to be taken, if in writing 2 Summons 3 Notice of intention to defend 4 Summary judgment application (notice and affidavit) 5 Proof of service 6 Defendant's opposing affidavit	1–6 As per Table 22.3. 2 Does the defendant's affidavit disclose a defence? 3 Is there an agreement between the parties to take the usual order?	*'M' Lord, I appear for the plaintiff. This is a summary judgment application. I ask that the usual order refusing summary judgment be granted by consent.'* **Note 1:** The 'usual order' is one refusing the application for summary judgment, granting leave to defend and reserving the costs for decision by the court due to hear the trial. **Note 2:** If the matter is to be argued, counsel would arrange a date for the hearing of the matter on the opposed list with the registrar and adjourn the application to that date, with the costs of the current hearing reserved.

Table 22.7 Application for substituted service

Documents in the brief	Preparation checklist	What to say
1 Original instructions 2 Notice of motion and affidavits 3	1 Is the notice of motion in order? 2 Are the founding and supporting affidavits in	*'M' Lady, I appear for the applicant. This is an application for directions with regard to substituted service. I submit the papers make out a case for the orders sought and if your*

If proceedings have already been instituted, the pleadings or application papers **Note 1:** The usual order is for leave to serve all processes by a specified method or methods of substituted service and for the costs of the application to be costs in the cause (to be dealt with as costs in the main case).	order? (Have they been attested properly?) 3 Do the affidavits make out a proper case for substituted service by meeting the requirements of rule 5(2) – nature and extent of claim? – grounds (cause of action)? – jurisdiction? – manner of service proposed? – defendant's last known whereabouts? – enquiries made to find him or her? – time for defending? – Form 1 of First Schedule to be used?	*Ladyship is satisfied, I ask for an order as set out in paragraphs . . . of the notice of motion.'* **Note 2:** Edictal citation is very similar. In a substituted service case the defendant is in the Republic; in an edictal citation case the defendant is outside the Republic. Rule 5(2) applies to both procedures.

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Table 22.8 Divorce trial (unopposed)

Documents in the brief	Preparation checklist	What to say
1 Original instructions 2 Summons and particulars of claim 3 Family Advocate's report 4 Return of service 5 Original and copy of marriage certificate 6 Original and copy of any written settlement agreement 7 Amended order prayed.	1 Do the summons and particulars of claim comply with rules 17 and 18? 2 Has there been personal service in terms of the longstanding practice? 3 Have the correct number of days been given to defend in terms of rule 19 and section 24 of the Act, and have they elapsed? 4 Has a proper cause of action been pleaded for each claim? 5 Does the court have jurisdiction as contemplated by section 2 of the Divorce Act 70 of 1979?	*'M' Lady, I appear for the plaintiff. The summons was served on the defendant personally on [*date*]. . . He or she is in default and I call the plaintiff.'* Then call the plaintiff and any further witnesses who may be required. The plaintiff should cover the following matters (assuming an ordinary case) in his or her evidence: – the names of the parties; – the particulars of the marriage, with the original certificate to be handed in; – the basis for the court's jurisdiction (domicile or residence: Divorce Act 70 of 1979 section 2);

Note: The last 2 items are required only if there has been an agreement between the parties.	6 Do the details on the marriage certificate match those pleaded? (Is an amendment necessary?) 7 Does the available evidence prove all the matters of which the court must be satisfied, particularly with regard to the welfare of the children? 8 Have the Family Advocate's concerns been met? 9 Are the orders asked for in the proper form? 10 Is an amended order necessary?	– the names, gender and birth dates of their minor children, if any; – the irretrievably breakdown of the marriage and the reasons for the breakdown (Divorce Act 70 of 1979 section 4); – the basis (justification) for any guardianship, custody or access claims; – the basis for any maintenance claims; – the basis for any property claims; – any agreement settling any of the claims, with any written agreement to be proved and handed in. **Note:** Some leniency is allowed with regard to leading questions, but counsel must take their cue from the court and from more experienced colleagues.

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Table 22.9 Rule 43 application (opposed)

Documents in the brief	Preparation checklist	What to say
1 Original instructions 2 Summons and particulars of claim 3 Notice in terms of Form 17 of the First Schedule and affidavit 4 Copy of opposing affidavit	1 Does the notice comply with Form 17? 2 Is the affidavit 'in the nature of a declaration?' 3 What are the issues? 4 What is my argument on each issue? 5 What orders am I going to seek, having regard to the facts and my opponent's likely argument?	*'M' Lord, I appear for the applicant.'* Wait for the opponent to announce his or her appearance. *'This is an opposed rule 43 application. We are ready to proceed.'* The judge will give an indication whether you may start, and if he does, present your argument as in any other opposed motion, but be brief as rule 43 applications do not lend themselves to detailed argument on disputed issues. *'May it please M' Lord. My submissions are as follows . . . '*

Table 22.10 Sequestration application (unopposed and at provisional order stage)

Documents in the brief	Preparation checklist	What to say
1 Original instructions	1 Is the notice of motion in order?	*'May it please M' Lord, I appear for the applicant. This is an application for a*

2 Notice of motion and affidavits 3 Return of service, where service is required 4 Acknowledgement of receipt of a copy of the papers by the master or his local representative 5 The bond of security 6 If the notice of motion did not call on the registrar to set the matter down, the notice of set down	2 Are the founding and supporting affidavits in order? (Have they been attested properly etc.?) 3 Has there been proper service on the respondent (where required), on his or her spouse (where applicable) and the master or his or her representative? 4 Is the security certificate valid and current? (Has it perhaps become stale? Check time limits.) 5 Does the applicant have the required *locus standi* to bring the application? – liquidated claim? – nature, cause and amount of claim sufficiently set out? – claim over 50 Pounds? (Rand equivalent?) – the nature and value of any security?	*provisional sequestration order. There has been proper service of the papers on the respondent, his wife and the master.* *The master's report has been filed. There is nothing of relevance there.* *I submit with respect that the papers make out a case for the orders sought.* *There has been an act of insolvency in that the respondent has admitted in writing that he is unable to pay his debts, which on the papers exceed his assets by approximately Rx.* *There is a demonstrable benefit to creditors in that the respondent has assets valued at Ry that should bring in a not negligible dividend to creditors after the costs of the sequestration process have been met.* *Those assets are now under attachment in execution proceedings for various judgments taken by other creditors. It is necessary that those processes be halted so that all creditors can share in the proceeds.'*

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Documents in the brief	**Preparation checklist**	**What to say**
	6 Jurisdiction – is the respondent domiciled or does he or she own property within the jurisdiction? 7 Are the respondent's date of birth and identity number given in the papers? If not, is there an acceptable explanation for the omission? 8 Is the respondent's marital status given? If married, the names, identity number and date of birth of his or her spouse must be given. 9 Is there proof of an act of insolvency or of actual insolvency? (Check the Act and	**Note 1:** The test for a provisional order is whether, at a *prima facie* level, a case has been made out for the sequestration of the respondent. **Note 2:** On the return day the test is whether, on a 'balance of probability', a case has been made out. In practice these cases often turn on proof of actual or presumed (by way of an act of insolvency) insolvency and proof of advantage to creditors. **Note 3:** Sequestration matters require more research than most other Motion Court briefs. Counsel's preparation must include a reading of the relevant sections of the Insolvency Act 24 of 1936 and case law on what constitutes actual and presumed (by way of an act of insolvency) insolvency, benefit to creditors and the court's ultimate discretion. **Note 4:** Section 9(4A)(*a*) contemplates service on the SARS and on a Labour Union representing employees of the insolvent. The affidavit should disclose whether there is such a union and service will have to be effected on SARS and the union concerned in appropriate cases.

	case law for the requirements.) 10 Is there a demonstrable advantage to creditors? (Check the Insolvency Act and case law for the legal and factual requirements.) 11 Are there any matters to be brought to the court's attention for the exercise of its discretion? (For example, if it is a 'friendly' sequestration.)	

Table 22.11 Urgent application (unopposed and called out of turn)

Documents in the brief	Preparation checklist	What to say
1 Original instructions 2 Notice of motion and affidavits 3 Return of service, if any 4 Certificate of urgency	1. Are the notice of motion and affidavits technically in order? 2. Are proper grounds for urgency set out in the affidavit? (See rule 6(12).) – – why should the judge dispense with the usual forms? – why should the judge dispense with the usual service? – why is the matter urgent?	*'M' Lady, I appear for the applicant. This is an urgent application. It does not appear on the court's list for today.* *I would like an opportunity to address M' Lady on the question of urgency in an endeavour to persuade M' Lady that the matter is so urgent that it would be appropriate to hear it out of turn and for that purpose to enrol it. May I hand the court file up to M' Lady?'*

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Documents in the brief	Preparation checklist	What to say
	– what prejudice will the applicant suffer if the matter were to be dealt with in accordance with the usual procedures? 3 Is a case made out for the relief sought? 4 Has there been a full disclosure of all relevant matter?	At this juncture the judge is likely to ask if the matter can't wait until she has had a chance to read the papers. Present the case when the judge is ready. **Note:** It is customary to deal with the question of urgency before the merits of the application.

22.4 Urgent applications

While rule 6(12), decided cases on it, and the commentary in the standard textbooks are fairly comprehensive in their guidance on how to handle an urgent application, each division of the High Court has its own preferred or prescribed ways. There are often set practices known only to the local legal fraternity. Urgent applications therefore require the strictest compliance with the principles set out in the rules and case law as well as the practice directions and customs of the court where the application is to be made.

Because urgent applications are often made in the absence of the respondent, the duty of disclosure is heavy. Care must be taken that the court is given all the facts, including those militating against the applicant. The duty to disclose adverse factual matter and cases relates also to the grounds of urgency. Most divisions require counsel to certify that the matter is so urgent that the usual forms and service may be dispensed with and that the applicant would suffer prejudice which a hearing in due course cannot eliminate or compensate for. This is done by way of a certificate signed by counsel. The certificate has to accompany the papers when they are issued and served. The form of the certificate of urgency varies from province to province. Counsel must certify at least the following:

- that he or she has read the papers.
- that, in counsel's opinion, the papers disclose such grounds of urgency that the usual forms of service and service may be dispensed with.
- that, in counsel's opinion, the papers disclose that the applicant would suffer prejudice which cannot be eliminated or compensated for at a hearing in the ordinary course.

Table 22.12 Urgent spoliation application (opposed)

Documents in the brief	Preparation checklist	What to say
1 Original instructions 2 Notice of motion and affidavits 3 Return of service, if any 4 Certificate of urgency 5 Opposing affidavits, if any	1 Are the notice of motion and affidavits technically in order? 2 Are proper grounds for urgency set out in the affidavit? (See rule 6(12).) –	'*M' Lord, I appear for the applicant.*' Wait for your opponent to announce his or her appearance. '*This is an opposed application for a spoliation order. We are ready to proceed.* '

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Documents in the brief	Preparation checklist	What to say
6 Original and copies of counsel's own heads of argument (The judge and opposing counsel must be given the original and a copy	– why should the judge dispense with the usual forms? –	Presumably arrangements have been made to argue the matter at this time. If the judge indicates that you may proceed, present your argument.

respectively, as soon as practicable.) 7 Respondent's heads of argument, if any	why should the judge dispense with the usual service? – why is the matter urgent? – what prejudice will the applicant suffer if the matter were to be dealt with in accordance with the usual procedures? 3 Is a case made out for the relief sought? (undisturbed possession and unlawful dispossession) 4 Is the prayer in order? (restoration of possession *ante omnia*) 5 Are there factual issues that cannot be resolved on affidavit evidence? If so, should the matter be referred to oral evidence to resolve those issues? 6 What are the issues? 7 What is my argument on each of the issues? 8 What orders am I going to seek, having regard to the facts and my opponent's likely argument?	*'May it please M' Lord. I have prepared heads of argument and I ask leave to hand them up. I have given my learned friend a copy.'* Hand the original to the usher and wait until he has handed your heads to the judge. Make sure the judge does not want to read them first before you proceed with your argument. It is preferable to deliver your heads to the judge before the hearing. *'My submissions are as follows . . .'*

22.5 Opposed applications

Some Motion Court matters are likely to be opposed from the outset. A summary judgment application, for example, is likely to be opposed as the defendant will already have indicated an intention to defend the action by delivering a notice of intention to defend. Even if there has been no advance indication of opposition, virtually any Motion Court matter could be opposed at the last moment. Many an advocate has risen to ask for a judgment or order thinking that there would be no opposition only to hear a voice saying:

> *'M' Lord, I appear for the defendant. The defendant wishes to oppose the provisional sentence proceedings. I have been instructed to apply for an adjournment to enable the defendant to deliver an opposing affidavit. The defendant tenders the costs occasioned by the adjournment.'*

Counsel then has the dilemma of having to make a decision on his or her feet. Should I consent to the adjournment? Do I have a mandate for that? Is this a case where I should insist that the defendant must make a formal application for condonation or should I accept the reasons given by defendant's counsel for the failure to comply with the rules?

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The preparation and presentation of an opposed motion go through a number of stages. The papers have to be complete before the registrar or the Motion Court judge will allocate a date for the hearing of argument. This requires that all the affidavits for both sides have been filed. The court file must be put in order. The bundle containing the notice of motion, the founding and supporting affidavits, the opposing affidavits and the replying affidavits must be paginated. Care must be taken that all the exhibits referred to in the affidavits are included and are legible. If any document is not legible, a typed transcript has to be made and included. An index (contents page) must be prepared and the whole lot bound in a bundle according to the practice of the court concerned. Both counsel must have sets of papers identical to those in the court file, otherwise the argument could become quite farcical. It happens more often than you would imagine. A notice of set down must be filed and served on all interested parties. Proof of service must be put in the court file.

In some divisions a short note (three to five pages) is required explaining what the issues are, how long it is estimated the argument will take to complete, what counsel's main points are, and what relief will be asked for. The note must also identify the parts of the record that need not be read by the judge and are not necessary for the decision. A Practice Directive emanating from the Judge President's office is usually the basis for these requirements. Ensure therefore that there has been compliance with the Practice Directive of the relevant division. The note, known as the 'practice note' or short heads, does not take the place of your heads of argument.

Opposed applications are argued on the papers, like appeals. The processes involved in preparing for the hearing, preparing heads of argument and in the presentation of the argument are therefore similar to those for appeals. (See chapter 25.) The order of the presentation of argument is that counsel for the applicant argues first, then counsel for the respondent, with counsel for the applicant having a right of reply. If the onus is on the respondent, the order is reversed with respondent's counsel having the right of reply.

The preparation of an argument for an opposed motion relies on the following preliminary steps:

- *Ensure that the papers are complete*. You must have the notice of motion, founding affidavits, opposing affidavits and replying affidavits, together with all exhibits attached to the affidavits as annexures. If any interlocutory orders have been made in the course of the application, they must be included in the bundle. The papers must be paginated and supplied with an index (contents page). The applicant's attorney bears responsibility for this task.

- *Read the papers thoroughly and identify allegations in the founding affidavits which are disputed*. Make notes in the margin of the page and paragraph numbers where the contrasting allegations appear. This will make it easier for you to find relevant passages when you are on your feet arguing the matter.

- *Identify and list the main issues*. Are they questions of law or questions of fact?

- *If there are disputes of fact, consider very carefully whether the matter can be argued on the papers as they stand*. If you think the matter ought to go to oral evidence for factual issues to be resolved, approach your opponent and enquire whether agreement on that subject could be reached. If so, prepare a consent order referring the matter to oral evidence. You will need to stipulate the issues and the witnesses to be called and cross-examined. A question that rears its head very frequently in opposed applications, is whether there are real disputes of fact that cannot or should not be [Page 432] resolved on affidavit evidence. What constitutes a real dispute and what the court ought to do in such a case, have been the subject of a number of reported decisions and discussions in textbooks. Different divisions of the court have slightly different approaches too. Counsel must be aware of the relevant principles and approach each opposed application as if the point may be taken by the judge or by opposing counsel. Remember, even if opposing counsel does not take the point, the judge may still raise it.

- If the matter is to be argued, prepare heads of argument along the lines you would use for an appeal. (See chapter 25 for an example.)

22.6 Counsel as *curator ad litem*

The courts rely heavily on advocates and attorneys for assistance in matters where persons are, or may be, incapable of managing their own affairs as a result of their being of unsound mind. In such cases an advocate or attorney is appointed under rule 57 as *curator ad litem* to the 'patient' in order to conduct an independent investigation of the circumstances of the case and to report to the court what that investigation has unearthed. An analogous situation arises where a minor lacks a guardian and cannot bring proceedings without assistance. In such a case the courts again rely on advocates and attorneys to investigate the matter as *curator ad litem* and to report to the court.

The appointment of the *curator ad litem* is usually only for the purpose of investigating and reporting to the court. In the case of a patient who is found to be incapable of managing his or her affairs, the court usually appoints a second person as *curator bonis* to manage the patient's affairs. It is customary, although not obligatory, for the *curator bonis* to be an attorney or accountant. In the case of a minor lacking the capacity to institute proceedings unassisted, the court usually appoints an advocate to act as *curator ad litem* in the proposed action. Such an order is made only if it appears that there is a *prima facie* case in the proposed action.

The procedure for the appointment of a *curator ad litem* is to make application to the court on notice of motion. The strict procedures set out in rule 57 must be followed for cases involving persons of unsound mind. The first part of the application is interlocutory in form and substance, but at the second stage the application is a substantive one. Counsel must investigate the matter as soon as possible after the appointment and file a report setting out the details of that investigation and counsel's recommendations with regard to the underlying questions. Counsel must appear at the hearing to give such further assistance to the court as he or she may be able to.

The following checklist may be used for the *curator ad litem*'s report in a rule 57 application:

- Ensure that there is a valid order for your appointment and that you have a brief.
- Check whether the applicant has complied with the requirements of rule 57 generally and particularly with regard to the following, which should appear from the supporting affidavits
  - the *locus standi* of the applicant
  - the grounds for jurisdiction
  - the patient's personal details (age, gender)
  - the patient's assets and liabilities

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  - the patient's physical state of health
  - the relationship between the applicant and the patient
  - the reasons why it is suggested the patient is of unsound mind and incapable of managing his or her own affairs
  - details of any proposed *curator bonis* (name, occupation, address)

- the consent to act by the proposed *curator bonis*
- evidence of the patient's mental condition, to be given by a person or persons who know the patient well
- a declaration by such person(s) of their interest, if any, in the application with full details of their interest, where applicable
- the evidence of at least two medical practitioners, of whom at least one should be an alienist (a psychiatrist who specialises in the legal aspects of mental illness), who have recently examined the patient in order to ascertain his or her mental condition
- whether the medical practitioners concerned are related to the patient or have an interest in the application
- their opinions and reasons for suggesting the patient is of unsound mind and unable to manage his or her own affairs.

The *curator ad litem* must make such independent inquiries as are necessary to establish whether the evidence set out in the founding affidavits is true and must report to the court if any discrepancies or shortcomings are detected in the evidence placed before the court by the applicant.

- Visit the patient and conduct an interview with him or her and with those persons under whose care the patient is. This includes doctors, nurses, family and friends; anyone who has daily contact with the patient and has the responsibility to take care of the patient's daily needs. Ensure that you
  - identify the patient against his or her identity document or passport
  - have a full interview with every caretaker
  - question each caretaker about the patient's condition over the period they have known the patient (get the patient's life history, if necessary)
  - make notes of what is said and revealed to you
  - treat the patient with extreme care and sensitivity
  - are never alone with the patient – try to have a caretaker with no family ties to the patient or the instructing attorney or a clerk present
  - get as much information as you can about the patient's condition, assets and liabilities, any adverse interest any member of the patient's family may have, and the prognosis of the doctors on the case.
- Make such further inquiries as you think necessary to enable you to get a clear and complete picture of the patient's physical and mental condition, as well as his or her estate and the need to administer that estate on their behalf. Visit the patient again if necessary; make it a surprise visit if you have any suspicion that the family or caretakers are hiding something from you.

- Investigate the suitability of the proposed *curator bonis*.

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- Check whether the powers proposed to be granted to the *curator bonis* are relevant to the case and whether the order complies with the requirements laid down by the courts for such orders. (See *Ex parte Hulett* 1968 (4) SA 172 (D). There are similar cases in each division.)

- Write your report.

- Deliver the report to the registrar and a copy to the applicant's attorney as soon as you can. There is usually a rule *nisi* with a return date. Don't be late with your report.

- Appear on the due date, ready to answer any questions the judge might have, and deal with any additional evidence the applicant may have put up by way of further affidavits. Remember, you represent the patient. Advance the patient's case as you think the circumstances require. When in doubt about any matter, raise it pertinently and let the judge decide. Ensure that you have complied with any practice directives that may apply.

22.7 Protocol

- The two most important protocols of the Motion Court are the result of the absence, in the first instance, and the presence, in the second instance, of other lawyers. The absence of a lawyer representing the defendant places an additional burden on counsel for the plaintiff to ensure that all relevant authorities and points – including those that are against his or her client – are brought to the notice of the judge. The presence of so many other lawyers – be they advocates, attorneys or candidate attorneys – means that some arrangement needs to be made with regard to their seating and the order in which matters are called. There are other protocols to observe.

- The traditional seating arrangements for the Motion Court are that the more senior practitioners sit in the front row of the bar and junior members behind them. When the front row is fully occupied and a more senior member of the profession arrives, you will find that someone in the front row gives up his or her seat.

- Counsel appear in their cases in the order determined by the court roll for the day. Some judges make an exception for Senior Counsel and call upon them to state what business they have before the court and then deal with their cases out of turn. This ancient privilege of Senior Counsel is falling into disuse in most divisions.

- When a matter is called and there is no appearance by counsel some judges will allow, or call on, the most senior practitioner present to find out why there is no appearance. Often the brief is lying unattended on someone's table. Other judges strike the matter off the roll, as they are entitled to do, and some go as far as to require an affidavit by the attorney to explain why there was no appearance.

- Advocates and attorneys are entitled to enter the Motion Court and to leave according to the requirements of their briefs. Those who are due to appear in the first few cases on the roll

must be in court before the judge enters. It is customary to bow on arrival and also when leaving while the court is sitting.

- It is customary for some counsel to remain in court until the judge has left. There must always be at least two practitioners in court, so counsel in the second last matter sometimes has to remain until the court has dealt with the last matter on the list. Judges often excuse counsel if the last matter is going to take time. The request to be allowed to leave must be made as soon as it becomes clear that the last matter is going to take some time.

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- Raising a matter that is not on the roll, or an urgent application, or a matter lower down on the list, is allowed in limited circumstances. Ordinarily such matters must wait their turn, or wait until the end of that part of the roll dealing with unopposed matters. If a matter is called out of turn, there must be a request for permission to call the matter out of turn. It is usually sufficient to say:

  '*M' Lady, I ask leave to call this matter out of turn. It should have been on the list but as a result of an error in the registrar's office it is not. The matter is simple and there would be no inconvenience to anyone if it were dealt with now.*'

Exercise care, however, as the judge or other counsel may resent what they could perceive as a selfish approach. It is better to wait a few minutes than to annoy them.

- Special arrangements may be made to call your matters first if you have to appear in another case 'at the request of the court'. This means *pro Deo* cases and nothing else. A brief in the trial court is not an excuse. If the Motion Court list is divided between two courts, affected counsel are usually given an opportunity to call their matters in the one court right at the outset and then to depart for the other. You must arrange for your matters in the other court to stand down in the meantime.

- Matters requiring evidence are usually placed at the end of the unopposed list. However, it may be necessary to lead evidence of the amount of the damages in a default judgment application. In such an event counsel must ask that the matter stand down to be called again after the last matter not requiring evidence (usually just before the divorce matters).

- Opposed matters are dealt with last, except for applications for postponements and extensions of time, which are usually dealt with as they arise. If an argument becomes too involved, the judge may well stand the matter down to the end of the unopposed list. In some divisions there is a dedicated court for opposed motions.

22.8 Ethics

- Counsel's duty to make a full disclosure of adverse authorities and facts is higher in unopposed matters than in defended cases. The reason is that in defended proceedings the judge has the benefit of counsel's argument on both sides of the case. Each side would point to weaknesses in the other side's case and draw attention to supporting authorities. In an unopposed matter there is the danger that adverse authority or points may escape the notice of the judge. Counsel appearing for the plaintiff is therefore saddled with the ethical duty, not only to bring any adverse facts and authorities he or she is aware of to the attention of the judge, but actively to search for them.

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Counsel has the right and the duty to raise every question or point that could reasonably be advanced in favour of the client's case, whether the point appeals to counsel or not. Cases are often decided on points that appeal to the judge more than to counsel; conversely, judges are often not persuaded by points of great appeal to counsel arguing them.

- As *curator ad litem* counsel carries a heavier burden than usual. The curator has to investigate the facts and the law on behalf of the court and present an objective appraisal of the matter to the court. Counsel who is briefed as curator is not beholden to the party who sent them the brief; counsel instead acts as *amicus curiae* in the interests of the person suffering from the disability. When acting in this capacity, [Page 436] counsel would be entitled to place his or her own views before the court as well as to make submissions with regard to the facts and the law. In short, counsel has to make an independent assessment of whether the patient needs a *curator bonis* and place all the relevant material necessary for a decision on that score before the court if the applicant has not already done so. (See the checklist earlier in this chapter.)

22.9 Checklist and assessment guide

If this book were to be used as a teaching guide or prescribed work for advocacy exercises, the following checklist may be used to prepare for the exercises, to serve as an assessment guide, or to serve as a marking guide.

If the checklist were to be used as a marking guide, the best way to go about the matter would be to allocate a grade to each student or pupil whose performance is being assessed as follows:

C = Competent (meaning that the performer has attained the desired standard of competency in respect of the skill involved).

NYC = Not yet competent (meaning that the performer has not yet reached the desired standard).

Table 22.12 Checklist for opposed motion

	Skill involved	Competent/ Not Yet Competent
1	Making appropriate use of heads of argument	
2	Speaking without reading	
3	Stating the issues clearly	
4	Dealing with each issue in turn by o stating the issue o stating the submission o stating the argument in support of the submission o stating the opposing argument o disposing of the opposing argument	
5	Providing concise references to the papers and to authorities in support of the argument	

6	Stating the order or orders to be granted	
7	Dealing appropriately with questions by the court	
8	Dealing appropriately with the opponent's oral argument	
9	**Protocol:** o Practising SOLER principles (Shoulders square, Open stance, Leaning slightly forward, making Eye contact, Relaxed posture) o Maintaining eye contact with the judge o Speaking at appropriate volume and pace o Addressing the court with proper deference o Ensuring that only one counsel is standing at any time o Addressing the court from the correct location, not moving about the courtroom	

Chapter 23
Persuasive advocacy: Substance and style

Skill is my luck
and courage is my friend.
George Crabbe, 1754–1832

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23.1 Introduction

The degree of persuasion with which an argument can be presented depends on its substantive content and the manner in which the material is presented. The substantive content of a legal

argument is based on evidence, facts, logic and legal principles. The manner in which it is presented depends on the arguer's skills in the art of oratory or public speaking. The one is a matter of substance; the other a matter of style. These are the two main components of persuasive advocacy. They are inter-dependent. An argument that is supported by the evidence and the law but is badly presented is unlikely to persuade. By the same token, not even brilliant oratory can save an argument that is devoid of substance.

In the broad sense 'advocacy' can be defined as oral support for an argument or cause and an 'advocate' is someone who speaks in support of a cause or argument. In the narrow sense, however, advocacy is regarded as 'the skill of advancing your client's case in the most persuasive way before the tribunal before whom you appear as an advocate', and an advocate in this sense is 'a professional pleader for another'. Advocacy may then be seen as 'the act of persuasion'. You might conclude that the term 'persuasive advocacy' contains a tautology because advocacy, by its nature, has to be persuasive. That may be so, but the term persuasive advocacy is used here because that allows the true function of advocacy, namely to persuade or to convince, to be emphasised.

The process of persuasion is at the core of every skill and technique covered in this book. It is applicable to every stage of the litigation process. It is not reserved for use only when counsel gets up on his or her feet in court. No, lawyers use persuasion all the time. When our client, Mrs Smith, arrived at our office for an interview, she was upset and, naturally, a little apprehensive about what was going to happen during the interview. (See chapter 1.) In order to make her comfortable and to alleviate her concerns, we applied certain interviewing techniques. What we did was to persuade her by our words [Page 438] and conduct that her problems were safe in our hands and that we were going to be working on the case competently and expeditiously. We eventually drafted letters of advice and opinions, pleadings and applications, even notices of appeal and heads of argument; each time we tried to put our views or our client's case or our argument in such a way that it was convincing. Even when we wrote documents which at first blush seem to have nothing to do with advocacy, we were involved in the process of persuasion.

Maugham and Webb *Lawyering Skills and the Legal Process* Butterworths (1995) have an interesting view of advocacy. They suggest that advocacy is 'communication for the purpose of persuasion'. In court counsel communicates with the witnesses, the judge and the opponent. The setting for these communications is very formal, ritualistic even, when you think of the trial process. In the first part of the trial counsel communicates with the witnesses by examination-in-chief, cross-examination and re-examination, interspersed with communications between the judge and counsel. There may even be communications with opposing counsel, not directly, but through addressing the judge, for example, by objecting and responding to objections. During this phase advocacy skills are employed to produce the facts on which the court's decision is to be based. The second phase is the argument itself, the culmination of the litigation process. These two phases are not quite separable; they are parts of the larger litigation process.

Our ability to persuade depends on our ability to communicate. We communicate with others when we create, in their minds, an event of our choosing. In other words, we make them see what we want them to see. While language is the usual means of communication with a judge or other tribunal, we use more than mere words to get our message across. In fact, the words we use carry a very small portion of the whole message. The rest is conveyed by the structure of the argument and the manner in which it is presented. This chapter is devoted to the importance of communication, structure and presentation in the process of persuasion.

What then, you might ask, are the tools or devices we use to persuade? An experiment was conducted with a class of 16 students. Each student wrote a topic for a two-minute speech down on a piece of paper. These were then placed in a hat and each student drew one from it. They then had five minutes to prepare a short speech on their randomly allocated topics. As they were speaking, one after the other, it became clear that they were using different devices and tricks to make their arguments persuasive and, more importantly, that they were doing so instinctively. They had not been taught these tricks; they just knew them. Here are some of the devices they employed:

Intrigue	Ridicule	Emotion
Anecdotes	Gestures	Animation
Humour	Flattery	Acting
Surprise	Logic	Personality
Demonstration	A diagram	Tragedy

Explanation Experience Passion

At the same time, one could not help noticing how unconvincing they were in their posture and general demeanour, how clumsy they were in making these devices work efficiently for them. Some were hopping about, with their weight now on the one leg and then on the other. Others made no effort to make eye contact with their audience. Some swallowed the words at the end of their sentences. All of them were nervous in the beginning; surprisingly their nerves improved after only a few seconds of speaking. None had been given a reasonable amount of time to prepare, so their speeches were lacking [Page 439] in clear structure and the content was rather superficial. Each of them lost something in the way they presented the message.

So it seems that we are imbued with an instinctive knowledge of the various devices and tricks that we can use in order to persuade, but that the skills and techniques to harness those devices in the most efficient or persuasive manner need to be learned and practised.

23.1.1 Substance

Persuasive advocacy requires a complete mastery of the case and a degree of composure which can only be produced by a combination of skills and attributes all advocates (in the generic sense) must have. These skills and attributes include:

- *Firm knowledge of the case materials:* Counsel must know the facts and the evidential materials of the case backwards, better than the judge and better than the client. You need to understand where the probabilities of the case lie, what the weight of individual pieces of evidence is, what legal principles apply to the factual setting of the case and what your opponent's likely answer or approach will be. You have to tell a compelling story based on the facts and evidence, marshalling the facts and evidence so that the court is persuaded to accept the version most favourable to your client. Without systematic preparation for trial, you cannot hope to have the required degree of knowledge and understanding of the case. Nonsense remains nonsense; oratory skills are not enough. The better you know the case, the more confident and convincing you will appear too.

- *Tactical intelligence or common sense:* This quality is easier to explain than to define. Decisions based on tactical considerations have to be made at various stages of a trial. For example: You may decide to admit a number of facts, even 'bad facts', simply to minimise their impact when you conclude that disputing those facts will only serve to emphasise their value against your client's interests. If you can keep highly prejudicial evidence which your side cannot answer effectively from poisoning the mind of the judge by making admissions, you may be able to advance your own case; that is good advocacy. You may also want to create an atmosphere that makes it easier for you to persuade the court. An aggressive approach to the cross-examination of the victim of a crime may be counter-productive. A sympathetic approach may allow your argument to be more readily accepted. Suggesting that a witness is mistaken may be more persuasive than suggesting he or she is lying. Showing empathy with people of lesser talents or opportunity may be good advocacy; an arrogant disregard for their circumstances may not.

- *The ability to marshal a compelling argument:* This subject is covered in other chapters, particularly those dealing with closing argument and appeals. How well can you put the facts and the legal principles together to create a compelling argument? What else can you do to make your case more convincing? What good facts and strong points do you have to emphasise? What bad points should you eliminate from your argument because they will detract from the credibility of your argument overall? Can you substantiate every point you make with a reference to evidence or authorities?

- *The ability to organise the witnesses:* The best order in which to call the witnesses, is the order that puts the case in a clear and convincing light. Chronological order is usually persuasive for narrative evidence. When scientific evidence has to be led, the witnesses dealing with a particular topic may be more persuasive if they are called [Page 440] together. You may, however, have a case where the evidence is of a difficult technical or scientific nature

and the judge and counsel's powers of concentration and comprehension are stretched to the limit. You might, in such a case, call some witnesses who have to give evidence on more mundane matters out of turn simply to allow the judge to 'recover' from the onslaught of the expert evidence. The question is whether you can arrange the witnesses and your examination of them in such a way that the central theme of your case (your theory of the case) is supported in a convincing manner. Can you question the witnesses in such a way that they will be 'willing' to help your client? Can you draw all the favourable facts out of the witness?

- *The ability to surprise:* A surprise point, a new way of looking at the problem, even a surprise question in cross-examination may help to persuade. Can you turn an apparently bad fact or deadly point in your own favour?

- *Stamina and resolve:* Counsel needs the stamina to prevail over witnesses and opposing counsel and the resolve to resist a judge who has taken a firm but contrary view of the facts or the law. Sitting down and giving up is not an option. You have to defend your position. In short, do you have the fortitude to fight on through adversity and opposition even when the judge makes it plain he or she is against you?

23.1.2 *Style (or oratory)*

Assuming that you have mastered the case materials, you will still have to present the argument in such a way that your manner or style of presentation enhances the persuasiveness of your case. Oratory is based on three underlying skills:

- *Language and communication skills:* Simple words and sentences are sufficient to carry even the most difficult ideas we might want to communicate to another person. Some say that the most complex ideas require simple language for their communication; otherwise the listener is unlikely to follow or understand them. Precision of language is required. Every word must be carefully chosen to serve or advance the underlying purpose, namely to convey the idea accurately.

- *Organisational skills:* We organise the material in the argument by arranging the facts and the inferences to be drawn from them in a particular order. Often a simple structure employing the chronological order of events suffices to tell a compelling story. In other cases you might add argument and authorities to the chronological narrative to convey the message you want to impart. During the process you might use signposts to inform the judge what your main point is, how you are going to develop it and what you are going to ask the court to do. Aids like lists, headings and references to other material could be employed. Giving reasons, demonstrating the point by way of an example or anecdote or citing case law are other methods of communicating the whole message. We structure the contents of the message so that it will be persuasive.

- *Presentation skills:* The manner of presentation is equally important. Does the speaker have the appearance of someone who believes what he is saying? Does the non-verbal communication of the speaker detract from the central message? We make eye contact. We speak audibly. We vary the pace and tone of our speech. We pause every now and then. We regulate or adjust our speech to lend emphasis to a particular word or idea. We use gestures. Where we stand and how we stand could also detract from the message. The manner of presentation carries the materials with impact; it lends conviction to the message.

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These skills are general speaking skills, the art of oratory, and they co-exist, for example, part of the clarity of the message is determined by the manner of presentation. The structure of the message also contributes to its precise meaning and persuasion. It does not matter how well you can speak or how well you can organise your materials; if the wrong words are used, your message will still be confusing and unconvincing.

23.2 Basic language and communication skills

> 'The law has not the need of special language most laymen think it has. The law has not the need – but lawyers tend to act as though it has. This is in part incompetence – it is easier to repeat a baggy formula than find words that really fit – and in part exploitation of man's liability to magic. For centuries our lawyers, a priestly caste, used a mysterious tongue, composed in Latin, French, English, incantation and a bit of mumbling. These continue. More or less to the present day – Latin less, English more, French absorbed, incantation down a bit, mumbling steadily.'
>
> **Charles Rembar, 1915–2000**

The best part of each day of a lawyer's work will be spent communicating with other people; clients, witnesses, judges and magistrates and even other lawyers. The medium of communication is language. In South African courts that language is mostly English but in some regions or towns it may be Afrikaans. Afrikaans and English co-exist in a country where they are the second or third languages to most people. This is odd, in that the majority of the people have an African language (other than Afrikaans) as their mother tongue. As a result of this, the need for lawyers to be able to communicate their ideas clearly is greater in South Africa than in most other countries. Whether lawyers are eliciting the facts during an interview or by questioning a witness in court, whether they are advising or counselling a client or writing pleadings or a formal opinion or whether they are presenting argument, their message has to be conveyed accurately. This requires a certain degree of mastery of language.

This book concentrates on English as the major language of the courts.

Spoken English differs from written English. Spoken English is not always grammatical. Speakers often stop without finishing a sentence and then start again. Or they change course in the middle of a sentence. Sometimes there is no verb in the sentence. An error in expression or in the listener's understanding can be rectified immediately. Oral English also travels along a two-way street; there is an interaction between two people who use more than the mere words they speak to communicate with each other. In oral communication part of the message is conveyed by the tone of voice or inflection used by the speaker. The message is also affected and enhanced by body language; a nod of the head, eye contact, facial expressions and gestures. And, of course, there is no punctuation: no full stops, commas, nor any question or exclamation marks. It has been found that only about 20% of the message we intend to convey is actually conveyed to the listener by the words we speak. Another 20% is conveyed by the tone of voice we use. The balance is made up by our attitude or body language. So much has been written about this fascinating subject. Yet lawyers receive so little formal training or practice in the art of communication.

Written English is a different kettle of fish altogether. It is formal. It is grammatically correct. It is punctuated. It travels along a one-way street. There is no immediate opportunity to explain or qualify what has been written and perhaps misunderstood or misinterpreted. The written word also lasts a long, long time. It may come back to haunt the [Page 442] careless writer. Nevertheless, the written word has some advantages over the spoken word. It can be read and reread until the message is understood. It can be stored as a record of an event such as the conclusion of an agreement, a discussion during a meeting or even of what was said in court.

While everyone is taught how to read and write at school, lawyers are not taught how to 'communicate' with clients, judges and even with other lawyers, in plain, good, written English. Neither good spoken English nor good writing skills can be taught in this book. This is not the place for it. A separate book would be required for that. The best one can do is to point out what kind of English is most likely to be useful and what common errors lawyers are prone to making when they speak and when they write.

The basic principles are

- use short, plain words;
-

use short, plain sentences;

- use short, plain paragraphs; and

- create short, plain documents.

23.2.1 *Words*

Use plain English words.

- Avoid Latin words and phrases whenever possible. There are good English words you can use instead. Examples are given in Table 1: List of bad habits (below).

- Avoid tautology. Why write (or say) 'save and except for' when it is enough to say 'except for'? Why write, in a plea, that the defendant denies 'each and every allegation as if specifically traversed herein'? Is it not enough to write that the defendant denies 'each allegation in paragraph 7'? Do the words 'and every' add anything to the meaning or force of the denial? And what does the legalistic 'as if specifically traversed herein' add to the meaning?

- Avoid archaic and stilted jargon like 'hereinafter' and 'aforesaid'. There are alternatives to these words; sometimes another word can be used instead and sometimes a change of style is required. For example: Instead of referring to the collision pleaded in a prior paragraph as 'the aforesaid collision' in later parts of the pleading, create a definition when the collision is first mentioned. You can do this by adding the words (the collision) in brackets. Then use the defined term or word each time you want to refer to that collision.

- Delete unnecessary adjectives and hyperbole, as in 'the true facts', 'after a careful and detailed consideration', 'absolutely unnecessary' or 'without any shred of justification'. The words 'true', 'and detailed', 'absolutely' and 'any shred of' are 'absolutely' unnecessary!

23.2.2 *Sentences*

Every sentence must be short and grammatically correct. Law is about rules. How can we practise as lawyers if we cannot even obey the rules of grammar? Did you know that research has shown that 96% of people can understand an eight-word sentence but that only 4% can understand a 27-word sentence at first reading? (Adair *The Effective Communicator* The Industrial Society (1988)) Who wants to use long sentences after reading that?

- A sentence must contain only one idea or fact. If you have another idea or fact to add, use another sentence.

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- Avoid trying to do too much with one sentence. If you have to convey more than one idea or fact, or lists of facts, use numbers or bullet points to separate them. You can keep the relevant facts together far more effectively by using a numbered list or bullet points.

- If you have to use a long sentence, make sure it is punctuated properly and that the punctuation ensures that you have expressed yourself correctly. When in doubt, shorten the sentence even if you have to split it into two or more short sentences.

-

While it was previously thought to be bad grammar to start a sentence with 'But', it has now become acceptable. The same goes for 'And'. Starting a new sentence with 'But' or 'And' may add emphasis and give your advocacy added persuasion.

- A sentence has to have a verb. This is basic grammar. This may not be the way people speak, but it is an indispensable requirement for legal documents, especially in litigation.

- Avoid the passive case. Write, 'The car struck the dog' instead of 'The dog was struck by the car'.

- Turn negative sentences into positive ones. Instead of saying, 'He did not remember', say, 'He forgot'.

- Transforming a sentence into a question can add impact. Writing, 'So what is the principle here?' instead of, 'The principle is . . .' grabs the attention of the reader more effectively. But don't overdo it.

- Avoid the archaic 'and/or' construction. Use bullet points or numbered paragraphs. If necessary, use a different construction, for example, 'The defendant was negligent in one or more of the following respects:' Then set out the various allegations you would have linked using 'and/or'.

- Use gender neutral language without going overboard about it. Use 'he or she' instead of 'he'. Use 'you' or 'one' instead of 'he' as a different construction. It has even become acceptable to use the plural 'they' with a singular noun, for example, by writing, 'A witness should be instructed how to dress for court so that *they* do not offend the judge'. Vary your style in this respect if possible. Better still, you could have said, 'Witnesses should be instructed . . .' and the grammar would have been fine, wouldn't it? See how easy it is to remove offending grammar or syntax.

23.2.3 Paragraphs

Deal with one subject per paragraph. The first sentence of a paragraph must introduce the subject of that paragraph. The rest of the paragraph must flow naturally and logically, from sentence to sentence, idea to idea, until you have covered the subject completely. Like words and sentences, paragraphs must be kept short. It has been suggested (Margot Costanzo *Legal Writing* Cavendish Publishing Limited (1993) quoting Bain and Lindemann) that there are five 'laws of the paragraph':

- A paragraph should be divided into a number of sentences.

- It should start with an opening sentence which indicates the scope (or subject) of the paragraph.

- A paragraph should deal with only one subject.

- Sentences within a paragraph should be ordered, meaning that they should deal with the subject logically, with a clear line of reasoning flowing from the introductory to the concluding sentence.

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- Signposts should be used within the paragraph to reveal the relationship between ideas in different sentences. Common signposts of this kind include 'because', 'however' and

'therefore'. Highlighting a word or phrase by the use of italics or underlining may also act as a signpost.

23.2.4 The document as a whole

The document must serve its purpose, which is to communicate an idea or a collection of ideas to the intended reader. That means that it has to be pitched at the reader's level, both in tone and in formality. A letter of advice to a lay client will differ from one to the legal advisor employed by an insurance company. Their respective degrees of understanding of legal problems differ and you would address them differently when speaking to them.

The structure of the document will be determined by a number of factors such as the purpose of the document, the intended or likely reader and even customary protocol. Documents used in the litigation process usually have to comply with specific requirements laid down by the Rules of Court. Compare, for example, a letter of demand with a summons. Both make claims. Yet they follow different formats. They differ also in tone and in content.

Generally the documents we use in litigation, and also those used when advising and counselling, must have an introductory part, a discussion and a conclusion. The first part introduces the subject. The subject is then discussed in the middle part until the answer is given in the last part. Each paragraph must follow naturally from the previous paragraph and lead naturally to the next one. Consecutive paragraphs must lead the reader ever closer to the final conclusion or answer to the question or problem. The concluding paragraph must complete the discussion of the subject introduced in the first paragraph.

The document must comply with some of the rules for its sentences and paragraphs. It must be concise. A long-winded document is bound to lose the attention of the reader. Brevity improves the clarity of the message you want to convey. The ideal is to keep the message simple so that the largest audience can understand it. Hemingway is a lot easier to read than Milton: Why?

Here is a random collection of words and phrases often used by lawyers, together with alternatives to use instead of those words or phrases.

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Table 23.1 List of bad habits

Avoid	Use	Reason	Avoid	Use	Reason
aid and abet	assist	tautologous	at this point in time	now	padding
each and every	each	tautologous	gave evidence that	said	padding
give, make over and bequeath	bequeath	tautologous	prior to	before	keep it simple
null, void and of no effect	void	tautologous	subsequently	later	keep it simple
right, title and interest	rights	tautologous	until such time as	until	padding
safe and sound	safe	tautologous	whatsoever	(omit)	unnecessary
save and except	except	tautologous	chairman	chair, chairperson	gender bias
terms and conditions	terms	tautologous	policeman	police officer	gender bias
aforesaid, the said	(create a definition)	jargon	Anton Piller order	search and seizure order	legalese
contained in	in	jargon	*culpa*	negligence	Latin
give consideration to	consider	padding	Mareva Injunction	freezing order	(anti-dissipation order is just as bad!)
hereinafter	later	jargon	*mens rea*	intention, state of mind	Latin/legalese

hereinbefore	earlier	jargon	*res ipsa loquitur*	it speaks for itself	legalese
in the event of	if	jargon	with regard to	about	padding
respectfully suggest/disagree etc.	suggest, disagree etc.	false modesty	shoes must be worn on the escalator	you must wear shoes	passive voice

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Avoid	Use	Reason	Avoid	Use	Reason
facilitate	help, assist	big word	opening gambit	gambit	tautologous
utilise	use	big word	temper tantrum	tantrum	tautologous
bona fide	in good faith, genuine, honestly	Latin	an act of insolvency was committed	he committed an act of insolvency	passive voice
brevitatis causa	for the sake of brevity (omit if you can)	Latin/usually no shorter anyway	*propos*	about	pretentious, legalese
inter alia	amongst others/ among other things	Latin	*infra*	below	Latin
ipso facto	automatic	Latin	*ultimo*	last	pretentious, Latin
mutatis mutandis	with the necessary changes	Latin	it is not uncommon, unusual	it is common, usually	turn negative into positive
endeavour to	try to	big word	paragraph 2 is admitted (by whom, you might ask?)	the defendant admits paragraph 2	passive voice

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23.3 Organisational skills: Creating a structure

Throughout this book we have created or used structures to carry our messages more effectively and more persuasively. We used big or general structures for big or general operations and we used little structures for smaller ones. Each time our chosen structure helped us to communicate more effectively with our target audience or reader. Each time our purpose was to advance our client's case. We did that by presenting our client's case in a better light or by heaping scorn on the opposition's case. The general structures can be used time and again for the same exercises, like our scheme for interviewing a new client. The smaller schemes can be called up as we need them, for example, when we are suddenly faced with a prior inconsistent statement while we are cross-examining a witness or when our own witness suddenly forgets a crucial detail and needs to refresh his or her memory. These structures separate the different parts of the message to make the message clearer. ('Structure' = the arrangement of parts; the inter-relationship between parts; the manner of organisation of parts.)

Sometimes the structure is quite simple. We tend to tell stories so that the events are arranged in chronological order: 'Once upon a time there was a prince who . . . And then they lived happily ever after.' That is also the way witnesses give their evidence; in most instances in any event. An argument does not always follow this kind of pattern. The audience differs, the message is different, and there is the little problem that the facts or legal principles may be in dispute. So counsel has the task of having to produce and arrange the material in such a way that the court finds the facts to be as contended for and sufficiently proven to support a recognised claim or defence.

There is no single 'right' way of doing this. Different lawyers employ different styles of advocacy. Some are clever or experienced enough to change their style to suit a particular case or even a particular judge, with known or perceived predilections. But judges learn as much about counsel as we learn about them. So if you always opt for a structure where your points are arranged in order of merit or strength, as you see them, the judge who got to know your style of advocacy well, may stop paying serious attention when you start arguing your lesser points. Good judges will know that appeals are often decided on those lesser points and even points made badly or half-heartedly in the court *a quo*. So they may put extra heat on you to test those lesser points.

You might want to change your style so that you do not become too predictable. You may even choose to arrange the points in one order during the trial but in a different order at the appeal. In the trial you might want to preserve the general chronological order of the events; in an appeal you might take the view that you only need one good point to win and that you should get to that point quickly because you do not have much time.

We must organise the material so that we can communicate more effectively and be more persuasive during the presentation. It might be helpful to revisit the structures used in prior chapters. General structures were employed for general operations and special structures for special operations.

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Table 23.2 General structures for persuasive communication

Interviewing a new client Chapter 1	**Written opinion Chapter 2**	**Statements of Claim Chapter 6**	**Opening Statement Chapter 16**	**Examination- in-Chief Chapter 17**	**Closing Address Chapter 21**
Initial meeting and exchanging pleasantries.	Introduction.	Introducing the parties.	State the cause of action.	Introduce the witness.	Isolate the issues or questions of law involved.
Problem and goal identification.	Discussion of the facts.	Their *locus standi*.	State the material facts of the claim.	Qualify the witness.	Mention where the onus of proof lies.
Dealing with preliminary matters.	Analysis of the legal principles involved.	Jurisdiction.	Identify the issues as they are on the pleadings.	Deal with pre-arranged topics.	State briefly the evidence that supports your theory of the case. Elaborate.
Establishing the facts in chronological order.	Conclusion or opinion.	Reciting the material facts and conclusions to be drawn from them.	Indicate how the issues were reduced by subsequent agreement.	Lead the evidence on each topic in chronological order.	Expose weaknesses in the opposition's case. Elaborate.
Developing a preliminary theory of the case.	The way forward – practical advice.	Compliance with special procedural requirements.	Indicate where the onus of proof lies on each issue.	Complete the main evidence the witness can give.	Apply the law to the facts.
Giving preliminary advice.		The prayer.	Summarise the facts (as contended for by your client).	Deal with the other side's version, if necessary.	Discuss the relief claimed.
Concluding the interview.			Identify the witnesses you intend to call and summarise the evidence each will give.		
			Explain the relevance of any documentary evidence.		

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Refreshing memory Chapter 20	**Handling a real exhibit Chapter 20**	**Objections Chapter 20**	**Submissions of fact Chapter 21**	**Submissions of law Chapter 22**	**Submissions on appeal Chapter 25**

Exhaust the witness's memory.	Ask the witness to describe the item.	Stand up.	State the fact to be proved.	State the main submission.	Specify the finding to be challenged.
Establish that there is a note of the now forgotten fact.	Deal with the 'chain of custody'.	Say that you have an objection.	Tell the court what you are going to submit.	Refer to the authority supporting it.	Indicate, in the form of a submission, the basis for the challenge.
Establish that the note was made soon after the relevant events.	Show the item to the witness.	Give a brief explanation of the ground for the objection.	Marshal the evidence to support your submission.	(Mention analogous cases, if necessary.)	*Law*: Formulate the propositions on which the submission is based. *Fact*: Summarise the evidence relevant to the challenged findings.
Ask the witness if he or she would like to refresh his or her memory from the note.	Ask the witness to describe the item shown to him or her.	Sit down and listen to your opponent's answer. If necessary, give a short reply.	Deal with adverse facts or evidence.	State the conclusion.	*Law*: Identify the authorities supporting the submission. *Fact*: Specify any misdirection and deal with it as a submission of law.
Ask the judge's permission to use the note (to show it to the witness).	Give the exhibit a number.	Wait for the ruling.	Allude to the onus of proof.		*Fact*: Summarise the relevant evidence in support of the result contended for.
Show the note to the witness and ask him or her to identify it.	Ask your questions with regard to the exhibit.	Acknowledge the ruling.	State the conclusion.		
Let the witness read the relevant part of the note and proceed with your questioning.		Act on the ruling.	Tell the court what order should be made.		**Note:** Points of fact and law have been combined for this exercise.

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23.4 Presentation skills

23.4.1 Basic principles

The basic principles for presentation skills are:

- Speak clearly and audibly.

- Use plain English. Avoid big words and difficult expressions. Use words and phrases the client (or any other person you address) can follow. Reserve technical language for technical or expert witnesses and use plain language for others. It is in order to speak of a *Mareva* injunction or order when you are dealing with the legal advisor employed by a shipping company, but when your client is a pensioner whose savings have been stolen by an unscrupulous investment advisor you may have to call it a 'freezing order' instead. An *Anton Piller* order could similarly be described as a 'search and seizure' order. Terms of art may be used among those who understand them. Other examples of similar terms of art are 'cause of action', '*res ipsa loquitur*', 'service of the summons' and 'become prescribed'. But when you

speak to lay clients it would be better to use plain English instead, like 'claim', 'the thing speaks for itself', 'giving the summons to the defendant' and 'lapses' respectively.

- Think before you speak. Ask yourself, '*What is it I want to say to this person and how can I best say it?*' Then think of a way to say it clearly. If you have time, write down what you want to say; then look at the words and make sure they convey the exact message you want to convey.

- Try not to sound like a lawyer. This may be difficult when you are a lawyer. Big words, Latin phrases and complicated sentences will not only make you sound a bit weird, but you will also come across as cold and aloof.

23.4.2 *Speaking in court*

23.4.2.1 Protocol

The first rule is that only one person speaks at a time. When it is your turn to speak you have to get up and your opponent will have to sit down. You have to wait until your opponent sits down before you speak, except when you want to object, in which case you would get up and say, '*I object*', and then wait for your opponent to sit down before you continue.

You also have a place to speak from. In ordinary courts each counsel will have a place at counsel's table, which is usually an arrangement of long tables put end to end to form a bar. You pick your seat and speak from directly behind that position. You are not allowed to move about in the courtroom or 'approach the Bench', as they do in America. If anything needs to be handed to a witness or the judge, you hand it to the usher who will take it to the witness or judge. If the usher is absent or you need to approach the witness, ask the court's permission first. '*May I please approach the witness, M' Lord*', will do. In the Supreme Court of Appeal there is a central podium and counsel, in turn, speak from there.

When you make submissions to the court, you alone are responsible for their content. You would therefore say, '*I submit*' or '*I contend*'. If you prefer, you may add '*with respect*' to your submission as long as you do not overdo it. Judges know that when you say, '*I respectfully submit . . .*', you are making a point you think deserves consideration, and when you say, '*With great respect M' Lord . . .*', you mean the judge is on the wrong [Page 451] track. They also suspect that when you say, with an appropriate degree of indignation in your voice, '*With the greatest respect to the point Your Lordship has raised . . .*', you mean the judge doesn't have a clue.

You are allowed to make submissions arising from the evidence before the court or relating to matters of law. Now and then a judge might ask a question which cannot be answered with the material that you have before the court. In such an instance you may have to take instructions from your client and convey the answer to the court. Because these instructions are not evidence and because they are not produced by counsel as an assurance or as a guarantee of their correctness, you would convey them to the court as follows: '*M' Lady, I am instructed that . . .*'

23.4.2.2 Voice, posture, speech

The effectiveness of your speaking in court will depend on three main factors. The *first* is the speaking voice you inherited from your ancestors. No one can change that. The *second* is your posture, meaning how you project yourself. The *third* relates to your speaking habits.

A loud voice is not to be confused for a good one. Even if you were not born with a great voice, you could learn some good habits that will allow you to make the most of what you have. Speak clearly. Do not swallow your words. Do not taper off at the end of a sentence. Enunciate each word properly. If English is your second, or third, language, you will almost inevitably have an accent which is influenced by your mother tongue. Even Englishmen speak with regional accents. There is nothing to be ashamed of in having an accent. Everyone on the planet has an accent. Our accent is a link to the place where we grew up.

The credibility of the message delivered by counsel is affected by demeanour just as much as the credibility of witnesses depends on their demeanour. You therefore have to be aware of the image your body language creates. It may betray your true feelings and undermine your intended message, if you are not careful. But do not be afraid to use gestures if that will help to convey the message. You should practise, in front of a mirror, if necessary. Perhaps the most important defect in the demeanour of witnesses and counsel alike is that they do not make proper eye contact. A failure to make eye contact may create the impression that you are uncertain, insecure and even insincere. That is the last impression a witness or counsel wants to convey, is it not?

The secret for a professional and convincing posture is locked up in an acronym, SOLER:

- *Shoulders square*, meaning that you stand up straight, with your weight evenly distributed on both legs, with your feet slightly apart to allow you to stand with good balance, not leaning like the Tower of Pisa. Note how when you move your weight to one leg the opposite shoulder immediately drops.
- *Open stance*, meaning that you stand upright, chin up, facing the person you address square on, with your arms and legs uncrossed.
- *Leaning slightly forward*, engaging the audience rather than leaning away, or disengaging, from the audience.
- *Eye contact*, meaning that you make eye contact with your audience.
- *Relaxed*, meaning that your whole body should be in a relaxed rather than a tense pose.

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The desired stance could be practised in front of a mirror. Note how subtle changes to your stance change the authority of your figure. Oral advocacy relies heavily on body language. It is best to cultivate good habits early in your career and to check regularly whether you are still maintaining them. Ask a colleague to critique your performance in court.

Good speaking habits are equally important. Advocacy is about persuasion. While no two lawyers are born with exactly the same speaking talents, this is a skill you can acquire with a bit of good sense and lots of practice.

- *Be yourself:* Aim to be the best *you* can be, not an imitation of someone else. You are entitled to your own style as an expression of your individuality. So never feel inadequate or guilty because you do not sound like someone you admire.
- *Look up when you speak:* When you look up, your voice will be projected upwards to the judge.
- *Speak, don't read:* We read to our children at bedtime because it puts them to sleep. If you want to put the judge to sleep, read your argument to him or her. Speaking is natural, reading aloud is not. Memorise the important points of your address or argument and try to develop them naturally, without reading. This will take some practice.
- *Vary the pitch and tone of your voice:* Project your voice to a point just behind the judge.
- *Speak with authority and conviction:* You have the right to ask questions and to address the court. So speak firmly when it is your turn.
-

Don't interrupt anyone: Do not interrupt – not the judge, not your opponent and least of all a witness: Remember that the witness is under oath. How can the witness 'tell the whole truth' if you keep interrupting?

23.4.2.3

Making submissions

What follows is supplementary to the discussion in chapter 21, where some advice is given on the way to make submissions of fact and of law. There are many little devices you can use to present your argument in a more favourable light. Here are some of them:

- *Engage the judge:* Persuasion requires engagement of the audience. You need to be able to react to the body language of the judge. You need to be able to moderate your pace to allow the judge to take notes. You need to be alert to the judge being temporarily distracted. So you have to watch the judge very carefully.

- *Help the judge to understand:* Persuasion also requires comprehension. The judge must have enough time to absorb your argument. The judge may need time to make a note of your submission *and* to reflect on it. Note-taking takes time. You may need time to reflect or to deviate from your planned argument in order to persuade more effectively. So take your time. Wait until the judge looks up before you make the next submission.

- *Involve the judge:* Try to get the judge involved in what you are doing. '*Might I ask the usher to point out to M' Lady where the witness has marked the point of impact on the exhibit?*' '*May I refer M' Lord to . . .?*', '*Does your Lordship see . . .?*'

- *Personalise your presentation:* Don't say, '*May it please the court.*' Say, '*May it please M' Lady*', instead.

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- *Deal with your opponent's points:* When you act for the plaintiff, try to answer your opponent's main points in your own argument and deal with any new points that arise in reply. Deal with strong points against your side only if you can dispose of them persuasively. A good point against you will look better the more time and effort you dedicate to attacking it. When you act for the defendant, pursue your own argument *and* answer your opponent's points. If you do not deal with a point, you may be met with the response that you were unable to. Whether you answer the opponent's points first and then present your own points or whether you present your own argument first and then deal with the opponent's points, is a matter of personal style; you may have to base your decision on the way you see the argument developing.

- *Use a helpful structure:* When you want to deal with a point made by your opponent, do it in three steps. *First*, identify the point by reminding the court what your opponent has submitted. *Second*, state your own submission on the point. *Third*, develop your argument in support of your submission and explain why the opposition's submission is wrong.

- *Emphasise the good facts:* Don't allow the judge to forget the good facts or strong points in your case, even if they are not in dispute. Ensure that the judge is aware of them. Put your own interpretation on them. Put them in the context of your case as a whole.

- *Adjust your timing and pace:* When the judge indicates that he or she has understood the point, move on to your next point. '*It appears that M' Lady has the point I was trying to make. I'll move on to my next point.*' If it becomes clear that you are going too fast or too slow, take the cue from the judge and change the pace of your presentation. Watch the judge's pen.

-

Make it interesting: Put a new spin on an old story. Try to make the mundane interesting. Compare the following ways to open the same case:

–

'*M' Lord, the defence is that the accused acted in a state of sane automatism*.'

'*M' Lady, this is a case of three big taboos. The first is the taboo against a child killing its parents. The second is the equally strong taboo against a parent abusing its child. The third is the taboo against the defence we call the black-out defence. "I blacked out and I don't know what happened." The court is going to have to confront each of these in this case. The defence is that the accused acted in a state of sane automatism when he killed his parents. The breakdown of his mental capacity was caused by years of abuse at their hands.*'

o

Make sure: When it is plain that the judge does not know the facts, go over the facts again, slowly.

o

Avoid repetition: Try not to repeat a submission. A crack may be seen in a good point when it is repeated. A bad point will *again* be seen to be bad.

o

State what you want: Tell the court what you want it to do before you sit down, for example, '*I therefore ask for judgment . . . '* or '*I therefore submit that the appeal should be dismissed with costs.*'

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Table 23.4 What works and what doesn't

What doesn't work	What works	Comment
Overbearing, brusque argument.	Moderation in language, tone, gesture and facial expression.	Subtlety beats aggression in the art of persuasion.
Ignoring the judge.	Engaging and watching the judge, making eye contact.	Use your *antennae* to be aware of the atmosphere of the court – watch the judge very carefully. You can sometimes 'feel' whether the judge is with you or against you. When you sense that the judge is against you on the point, try to find another way to persuade him or her.
Making bad objections.	Objecting sparingly, and only when the objection is good.	If you make too many bad objections the judge will get used to ruling against you and may even start thinking that you have no answer and therefore are concentrating your efforts towards running interference.
Putting forward a plainly untenable submission.	Making points you can substantiate.	A patently bad point has the tendency to detract from the value of your good points.
Exaggeration: '*The defendant's conduct was absolutely and completely unreasonable and unforgivable.*'	Understatement: '*I submit that the defendant's conduct does not quite measure up to the standard of the reasonable man.*'	An understated argument tends to act as an invitation to the judge to take the point a little further; overstatement often acts as a challenge.
Begging: '*I crave the leave of the court to show the witness the police plan.*'	Confident assertiveness: '*Please look at the police plan. Now . . .*'	Assert your rights quietly. You don't need the court's permission for everything you do. It's your case. Take control of it. Crawling or begging is unbecoming and a waste of time.
Using useless fillers: '*With respect . . .*' '*I respectfully . . .* ' '*With the greatest respect . . .*'	Economical use of words: '*I submit . . .*'	Don't say 'with respect' too often. If you say it too often, no one will believe that you mean it. Respect is better shown by conduct than by words anyway.
Referring to authority before making the point. '*In the case of . . .*'	Making your submission first and then referring to the authority to support it. '*I submit that . . . In support of that submission I rely on . . .*'	Make the point your own by telling the judge what you submit before using the authority. If the judge questions your submission, the authority can be used.

Truculence, when a ruling goes against you: *'Well, so be it then.'*	Grace, when a ruling goes against you: *'As M' Lord pleases.'*	Everyone hates a bad loser. Judges are no exception.

Chapter 24
Reviews

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24.1 Introduction

In 1971 the late Professor Marinus Wiechers delivered a lecture to Unisa students (including the author) on the subject of administrative law. He then predicted that administrative law and its adjunct, reviews of administrative acts and decisions, would develop at an increasingly rapid pace and eventually see the judicial branch of the state as the final arbiter of the validity of the actions of the government and all government organisations and officials, and perhaps even of Parliament. That day has come.

The hierarchy of oversight by the courts looks as follows:

- At the apex is the Constitutional Court which has powers of review under section 167 of the Constitution of the Republic of South Africa, 1996 (Constitution). In certain matters it has exclusive jurisdiction, namely (i) Referral of a Bill to the court for a determination of its validity; (ii) the constitutionality of an Act; (iii) confirmation of an order of constitutional invalidity; and (iv) certification of a provincial constitution. The Constitutional Court is the final court for the review of administrative acts and decisions by all three branches of the state (the Executive with the President at its head, Parliament and the Judiciary).

-

The Supreme Court of Appeal (SCA) has powers of review by virtue of section 168 of the Constitution in that it may consider (i) appeals from judgments in matters that came before a lower court as a review; and (ii) 'issues connected with appeals' that come before it. Thus, if it should become apparent to the SCA during the consideration of an appeal that an irregularity or gross injustice not mentioned in the appeal itself has occurred, it may review the lower court's decision. This may occur, for example, if one of multiple accused were to appeal and the SCA were to uphold the appeal on grounds which are equally applicable to co-accused who did not appeal. The SCA may also intervene if it were to appear from the record of a criminal appeal before it that an accused has not received a fair trial resulting in a failure of justice.

- The High Court has review powers under section 169 of the Constitution which vests in the High Court the power to determine 'any other matter not assigned to another court by an Act of Parliament'. This includes reviews under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Reviews of proceedings in the Magistrates' Courts to the High Court are regulated by section 22 of the Superior Courts Act 10 of 2013 (Act) and High Court rule 53. Section 22 deals with reviews of proceedings in the [Page 458] Magistrates' Court. The High Court may exercise inherent review powers when it appears to the court that a failure of justice would otherwise occur, for example, in the circumstances referred to above in the discussion of the SCA's powers of review.

- The power of other courts to hear reviews is determined by section 170 of the Constitution read with section 1 s.v. 'court' of PAJA which allows for certain Magistrates' Courts and Regional Courts designated by the Minister to hear reviews.

- PAJA provides the grounds for judicial review of administrative action in section 6, the procedure for such reviews in section 7, and the remedies in proceedings for judicial review in section 8. The rules first promulgated for PAJA reviews were held to be invalid on constitutional grounds. Rule 3 of the draft rules in circulation for comment at the time of writing provide for: (i) PAJA reviews in the Magistrates' Court to be in accordance with Magistrates' Court rule 55 (applications) and the procedure set out in High Court rule 53; (ii) reviews in the High Court in terms of High Court rule 6 (applications) and High Court rule 53.

In its essence a review is an inquiry by a court into the decision of a lower court or of an administrative body to determine whether the decision taken on review has been arrived at properly. A review differs from an appeal mainly in that an appeal is concerned with the question whether the decision was right while a review focuses on the way the decision was arrived at.

There are other important differences between appeals and reviews.

Table 24.1 Reviews and appeals compared

Appeals	Reviews
Full rehearing on the merits; was the decision right?	Limited rehearing; was the correct procedure followed?
Limited to the material before the court *a quo*.	Extraneous material may be placed before the court.
Strict time limits for noting and prosecuting the appeal.	Review must be brought within a reasonable period. There may nevertheless be prescribed time limits such as those prescribed by PAJA.
Appeal procedure; see chapter 25.	Action, rule 53 or, in urgent cases, rule 6 procedures.
Suspends operation of judgment unless the court orders otherwise.	Does not suspend the judgment unless the court orders otherwise.
Generally limited to judgments of courts of law.	Also applies to decisions of public bodies and statutory bodies.
Special leave to appeal (see chapter 25) required for a further appeal (to the SCA).	Leave of the High Court hearing the review required for an appeal to its Full Court or to the SCA.

There are three main types of review under the common law. These were identified as such in the frequently cited case of *Johannesburg Consolidated Investments Co v Johannesburg Town Council* 1903 TS 111 as:

- the process in terms of which the proceedings of lower courts are brought before the High Court in order to expose a grave irregularity or an illegality which may have occurred in the course of the proceedings.

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- the process in terms of which the exercise of a statutory duty by a public body is scrutinised in order to expose a disregard for the principles regulating that duty or a gross irregularity or an illegality in the performance of the duty.

- the process in terms of which the High Court may exercise the power granted by statute to review the proceedings of statutory bodies.

The categories of review identified in *Johannesburg Consolidated Investments* are now subsumed within the grounds of review in section 6 of PAJA and section 22 of the Act.

There is a vast array of decisions that may be taken on review. Nevertheless, in each case the first inquiry will be whether the act or decision of the person or body concerned falls within the ambit of 'administrative action' as contemplated by the Constitution and PAJA.

Reviews in the SCA are a function of the appeal process and reviews in the Constitutional Court are well beyond the purview of this book. The prescribed procedure for PAJA reviews is that of High Court rule 53 whether in the High Court or Magistrates' Court, as is the procedure for reviews under section 22 of the Act. For these reasons it is deemed expedient to use a review of a proceeding in the Magistrates' Court and the procedure under High Court rule 53 as the focus of this chapter.

24.2 Grounds of review under section 22

Section 22(1) of the Act identifies four grounds on which the proceedings of an 'inferior court' may be brought on review before the High Court (having jurisdiction). They are –

- the absence of jurisdiction on the part of the court;

- an interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;

- a gross irregularity in the proceedings; and

- the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

The precise meaning of each of these grounds is beyond the scope of this work. They should be determined by careful research of the legal principles involved.

An 'inferior court' is generally any court that has to keep a record of the proceedings before it, other than a division of the High Court. The Magistrates' Court, the Maintenance Court, the Children's Court and the Small Claims Court (see, for example, section 46 of the Small Claims Courts Act 61 of 1984 for the special grounds for reviewing that court's proceedings) are all included in the category but not the Court of the Patents Commissioner.

24.3 Procedure for review under rule 53

A special procedure is prescribed for reviews by rule 53. This procedure can be summarised as follows:

- The review proceedings have to be directed to the magistrate or court who made the decision and to all other parties affected. The parties affected could include persons and officials other than the original parties before the inferior court, for example, in a maintenance case the maintenance officer should be joined.

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- The proceedings have to be brought by way of a notice of motion that:
  - calls on the respondents to show cause why the decision or proceedings should not be reviewed and set aside.
  - calls on the magistrate or presiding officer to dispatch a copy of the record of the proceedings together with such reasons as he or she is required or desires to give and to notify the applicant that he or she has done so.
  - sets out the decision or proceedings sought to be reviewed.
  - is supported by an affidavit setting out the grounds and the facts and circumstances on which the applicant relies.
- Within ten days of the record being made available to the applicant, the applicant may deliver a notice and a further affidavit supplementing (amending, varying or adding to) the notice of review and founding affidavit.
- The respondents may oppose the review by giving notice of their intention to do so and by delivering answering affidavits.
- The applicant in turn may deliver replying affidavits.

24.3.1 The notice of motion

The notice of motion prescribed by rule 53(1) is similar to the so-called long form of notice of motion (Form 2(a)) used in applications under rule 6. That form has to be adapted to allow compliance with the requirements of rule 53.

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Table 24.2 Notice of motion in terms of rule 53(1)

Text of notice of motion	Comment
[*DESCRIPTION OF COURT as prescribed*] Case no 901/[*year*]	1

In the matter between: LOGAN NAIDOO APPLICANT and LOURENS BUYS NO FIRST RESPONDENT THE DIRECTOR OF PUBLIC PROSECUTIONS, (*PROVINCE*) SECOND RESPONDENT NOTICE OF MOTION IN TERMS OF RULE 53	The case heading reflects that the proceedings are in the High Court. 2 The presiding officer and all affected parties have to be named in the notice of motion. 3 The magistrate in this example is cited in his capacity as magistrate; the abbreviation NO is for *nomine officio*. 4 The Director of Public Prosecutions is cited as representative of the state; it was a party to the criminal proceedings taken on revie. 5 The Director of Public Prosecutions may be cited by name followed by NO, but it is customary in some divisions to cite him or her by reference to the office rather than the person.
To: The Registrar [*address*] And to: Lourens Buys NO First Respondent Magistrates' Court [*physical address*]	
And to: The Director of Public Prosecutions, KwaZulu-Natal Second Respondent [*physical address*]	

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Text of notice of motion	**Comment**
TAKE NOTICE THAT the applicant, on a date and at a time to be arranged with the Registrar, intends to apply to this Honourable Court for the following orders	1 It is customary for reviews of this nature to be set down by arrangement between the Registrar and the parties. 2 Special arrangements usually have to be made because the review will ordinarily be heard by two judges.
(a) that the proceedings before the first respondent under [*place*] case no. 789/[*year*] in which the first respondent convicted the applicant of theft and sentenced him to three years imprisonment, be reviewed and set aside (b) that the conviction and sentence of the applicant in those proceedings be set aside (c) that the matter be referred back to the Magistrates' Court for rehearing on the basis that section 112(1)(*b*) of the Criminal Procedure Act 51 of 1977 has to be complied with (d) that the costs occasioned by any opposition to this application for review be paid by the respondent who opposes it (e) that such other relief as seems appropriate to this Honourable Court be granted pursuant to the review.	1 The relief should be specific to the facts of the case. The court and the affected parties should know precisely what is to be done if the review were to be successful. 2 It is unlikely that costs will be awarded against either respondent, but if they should unnecessarily oppose the review, they may be ordered to pay the costs caused by their opposition; but even that requires special circumstances to be present. 3 This is one of the few cases where I can see justification for a prayer for other or alternative relief.

TAKE NOTICE FURTHER THAT: (i) The respondents are called upon to show cause before this Honourable Court, on the date and at the time so arranged, why the relief set out in paragraphs (a) to (e) above should not be granted. (ii) The first respondent is required to dispatch a copy of the record of the proceedings before him under case no. 789/[*year*], together with any reasons he desires to give, to the Registrar of this Honourable Court within 15 (fifteen) days of service of this application on him and to notify the applicant that he has done so.	See rule 53(1).

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Text of notice of motion	Comment
TAKE NOTICE FURTHER THAT the applicant will rely on his affidavit annexed to this notice in support of the review.	All affidavits to be relied on should be listed.
TAKE NOTICE FURTHER THAT the any respondent who wishes to oppose this application for review is required to 1. deliver notice to the applicant that he intends so to oppose within 15 days after receipt by him of the notice of motion 2. in such notice to oppose, appoint an address within 8 kilometres of the office of the Registrar at which he will accept service of all process in such proceedings 2. within 30 days after the expiry of the time referred to in rule 53(4) deliver any affidavits he may desire in answer to the allegations made by the applicant.	See rule 53(5).
Dated at [*place*] this 15th day of July, [*year*].	
Signature Applicant's attorney's name (printed) Booysen and Partners Applicant's Attorneys [*address and details as per rule 6(5)(*b)] Ref: LNaid/012	

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24.3.2 *The founding affidavit*

The basic principles for affidavits generally apply to review applications. As for any other founding affidavit, the affidavit must provide the evidence for every item of relief claimed in the notice of motion.

Table 24.3 Founding affidavit

Text of affidavit	Comment
(Case heading as in the notice of motion)	
FOUNDING AFFIDAVIT OF LOGAN NAIDOO	
I, Logan Naidoo, declare under oath:	
1. I am the applicant in these proceedings. I am an adult male, shop-fitter, currently residing in [*name and address of prison*].	
2. The facts deposed to in this affidavit are within my personal knowledge save where the context indicates otherwise.	

3. The first respondent is Lourens Buys, a male, regional magistrate in the employ of the Department of Justice at the Magistrates' Court, [*name of court and address*]. The first respondent is cited in his capacity as regional magistrate presiding at the trial referred to in the following paragraphs.	
4. The second respondent is the Director of Public Prosecutions for the Province of [*name of province*], who is cited in his capacity as such and whose offices are at [*physical address*].	
5. On 1 July [*year*] I was arrested in [*place*] on a charge of car theft by a member of the South African Police Service whose name I cannot remember. Immediately before I was arrested, I was a passenger in a car driven by a friend, Peter Williams. I was told by the police officer who arrested me that the car had been stolen. I was then locked up at the [*name of*] Police Station.	The court should be told enough of the background of the case to be able to assess whether there has been a miscarriage of justice. This may involve an explanation for the applicant's being implicated in the crime, as well as an explanation for his plea.
6. The next day, 2 July [*year*], I was allowed to contact my mother after being told that I would be taken to court in [*town/city*] that morning. I spoke to my mother on the telephone and asked her to arrange for an attorney to represent me at court. I was then taken to court with other prisoners, including Peter Williams. I asked him what was going on and he said that he had taken the car from his neighbour's yard. I had not known this when I met him at his home earlier on the day of our arrest. I was under the impression that it was his brother's car.	

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Text of affidavit	**Comment**
7. We were lodged in the cells below the courts at the Magistrates' Court at [*address*] at about 09:00. I waited for my mother to come to see me but she did not arrive. Neither did any attorney.	
8. At about 11:30 Peter Williams and I were called into a courtroom by a policeman. We were told to stand in the dock and the charge was read to us. We were accused of theft of a car. Peter Williams was asked to plead first and he pleaded guilty. I thought I was guilty because I had been found in the car and pleaded guilty too. I was too scared to ask the magistrate to wait for my mother to arrive with an attorney.	
9. The magistrate, whose name I later learned was Mr Lourens Buys, the first respondent, then asked us some questions. I have no independent recollection of the questions and the specific answers we gave, but I do remember that we were asked if we had taken the car. Williams and I both admitted to that. I thought that was the appropriate answer because we did not have permission to use the car.	
10. The first respondent then said that he found both of us guilty of theft and, after asking us a few more questions, sentenced each of us to two years imprisonment. I have been in [*name*] Prison since.	
11. My attorney came to see me in prison late in the evening that day. I have since, through him, obtained a copy of the charge sheet (J 15) and a transcript of the proceedings, and I attach a copy of the charge sheet as Annexure 'A' and a copy of the transcript as Annexure 'B'. I point out that neither has been certified correct. The first respondent is required under rule 53(1) to despatch the record of the proceedings to the registrar and I assume the first respondent will advise the court whether the transcript provided to me by the clerk of the court is accurate.	
12.	1

My attorney has explained to me that the first respondent was obliged, by virtue of section 112(1)(*b*) of the Criminal Procedure Act 51 of 1977, to question me to ascertain whether I admitted the allegations in the charge to which I had pleaded guilty. My attorney has further explained to me that one of the material allegations required for theft is that I should have intended to deprive the owner of the car of it permanently. I had no such intention at the time.	The irregularity relied on should be identified and the material facts and evidence recounted. 2 The narration may, in some respects, sound like a series of submissions, but that style of laying bare the deficiencies of the procedure under attack is acceptable.

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Text of affidavit	Comment
13. The transcript of the proceedings shows that the first respondent asked the following question (of both me and Williams): 'Were you going to sell it, or just leave it where you finished using it? What were you going to do with it? Or had you not decided yet? Well, there is no reply.'	
14. I can recall waiting for Williams to reply first and that I was uncertain whether it was my turn to speak. Before I could say anything, the first respondent pronounced us guilty as charged.	
15. I have been advised and I respectfully submit that the first respondent should not have been satisfied that I admitted all the material facts or elements of the crime of theft and that he should, therefore, not have found me guilty.	
16. I respectfully submit further that the first respondent's failure to comply with section 112(1)(*b*) of the Criminal Procedure Act constitutes a gross irregularity in the proceedings as contemplated by section 24(1)(*c*) of the Supreme Court Act 59 of 1959.	The precise legal category or ground of review should be specified.
17. I deny having intended to steal the car. I realise now that I should have pleaded not guilty. I respectfully submit that the first respondent should, after proper questioning as envisaged by section 112(1)(*c*) of the Criminal Procedure Act, have recorded a plea of not guilty and that the trial should have proceeded on that basis.	
18. In the premises I humbly pray for an order as set out in the notice of motion.	
Dated at [*place*] this 14th day of July [*year*]. *Signature* Applicant's name (printed) + full attestation clause completed and signed by a commissioner of oaths (probably a prison officer)	

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24.3.3 *The supplementary notice and affidavit*

If, once the record and the magistrate's reasons have been delivered, it should turn out that there are other or further grounds for review, those grounds must be set out in a supplementary notice and a supplementary affidavit by the applicant may be required.

24.3.4 *Answering and replying affidavits*

Answering and replying affidavits in a review follow exactly the same format and style as answering and replying affidavits in application proceedings under rule 6. (See chapter 10 in this regard.)

24.4

The hearing of a review

Reviews under rule 53 are heard, if the decision taken on review is that of an inferior court, by a bench consisting of two judges. The matter is argued in similar fashion as appeals from the Magistrates' Court to a Provincial Division. The procedures and protocols relating to heads of argument, set down, and argument of an appeal apply. Urgent reviews can be brought by way of the application procedure under rule 6 and are often heard by a single judge, even when opposed. So are reviews brought by way of action.

A review is argued like an opposed motion on the evidence in the affidavits. The principles relating to the hearing of applications apply, including those relating to disputes of fact.

24.5

Protocol

Counsel is permitted to settle the formulation of the reasons for the decision taken on review when briefed for the presiding officer or tribunal concerned, provided that counsel does not materially add to, subtract from, or alter the true meaning of the reasons advanced by such officer or tribunal.

24.6

Ethics

- Counsel may be involved in a review at any of the following stages: interviewing witnesses; advising and counselling the client; drafting notices of motion and affidavits; preparing heads of argument; and presenting argument at the hearing. Counsel must therefore mind the principles of ethics that apply to those stages.

- Counsel may become involved in a review as a witness to the irregularity or conduct giving rise to the review. In such a case counsel has no option but to withdraw from the case and depose to an affidavit if new counsel should call on counsel to give evidence. Counsel – who now acts in the capacity of a witness – must exercise extreme care when deposing to an affidavit and in particular, must be on guard to be absolutely truthful and candid with the court. (Deposing to a false affidavit, withholding relevant evidence or documents, denying allegations that are not within counsel's knowledge and similar acts of dishonesty could have severe professional consequences for counsel.)

Chapter 25
Appeals

An hour is a long time in the Court of Appeal.

JL Glissan QC, 1991

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25.1 Introduction

The subject of appeals is an extremely complex one. There are several levels of courts vested with the jurisdiction (power) to hear and determine appeals. Those courts range from the Magistrates' Court at the low end to the Constitutional Court at the apex. Each court derives its jurisdiction from a statute; in some instances that statute is unique to that court. Each court also has its own rules of procedure. In some instances an appeal from one court has to follow the procedures of another. There are also several specialist courts such as the Labour Court, the Competition Court, the Court of the Patents Commissioner, to name but a few, each with its own appeal structures and procedures.

A specialist publication such as Harms *Civil Procedure in the Superior Courts* LexisNexis (2012) (loose-leaf service also available online) (Harms) should be the starting point for the research for any legal practitioner considering an appeal.

The appeal process is technical from beginning to end. At every stage there are special rules, time limits, principles applying to appeals only and Practice Directives that could derail even the most meritorious appeal. This chapter, like the rest of the book, is about skills and technique involved in the process of persuasion in litigation, and is not about the content of the law. Nevertheless, the procedural requirements of the appeal process are referred to where they have a direct bearing on the skills concerned.

The court appealed from is usually referred to as the court *a quo*, meaning the court 'from which'. That court could be a Trial Court, the Motion Court, or a Full Court (also referred to as a Full Bench). The procedures for the different courts and levels of appeal are similar but not identical. The differences have more to do with the escalating degrees of formality in procedure and in the increasing importance of the subject-matter the higher one goes in the hierarchy of appeal courts than with the underlying appeal procedures. For the purpose of demonstrating the skills required for all the appeal processes noted earlier, this chapter focuses on the skills and techniques required for the different stages of an appeal from the High Court to the Supreme Court of Appeal (SCA). Those skills and techniques can be applied to all other courts of appeal.

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An appeal is the rehearing of the case by a higher court to determine whether the judgment (or order) appealed against, was correct. For counsel the appeal process starts with analysis of the judgment to be appealed against and ends with the presentation of oral argument in the court hearing the appeal. In between are a number of steps requiring special knowledge, skills and techniques. The stages in the conduct of an appeal are:

- analysing the judgment.
- drafting an application for leave to appeal.
- preparing and presenting argument on an application for leave to appeal.
- drafting an application for special leave to appeal.
- drafting a notice of appeal.
- preparing argument and drafting heads of argument (with a practice note if required).
- presenting argument on appeal.

The skills required of counsel in the appeal process are therefore the skills of fact analysis, legal research, drafting legal documents (such as application papers), notices of appeal, and heads of argument, as well as the skills and techniques of persuasive written and oral advocacy.

25.1.1 Judgment or order subject to appeal

Before taking any steps to note or advance an appeal, counsel must consider whether the judgment or order is appealable and, if so, whether leave to appeal is necessary. Other questions then arise. What is the test for success in an application for leave to appeal? To which court does the appeal lie? How does the test for success in the appeal itself differ from the test for leave to appeal?

The decision taken on appeal must amount to a 'judgment or order' for it to be appealable. In this context 'judgment' and 'order' are synonyms. The effect, rather than the form, of the judgment must be looked at. In some cases the statute or rule concerned determines whether a judgment is appealable, for example, rule 43 orders are not appealable because section 16(3) of the Superior Courts Act 10 of 2013 (Act) provides that they are not.

The Act repealed and replaced the Supreme Court Act 59 of 1959 but, according to Harms (C1.16) it is now unclear if or how the principles discussed by the learned author will apply due to the fact that the Act refers to 'a decision' while the Supreme Court Act referred to a 'judgment or order'. Harms is of the view that unless the 'decision' to be attacked amounts to 'a judgment or order' it will not be appealable. To determine whether the judgment meets the requirements for an appealable 'judgment or order' the following questions must be answered in the affirmative (according to Harms C1.17):

- *First*, is the judgment final in effect and not susceptible to alteration by the court that gave it?

- *Second*, is the judgment definitive of the parties' rights, that is to say, does it grant definitive and distinct relief?

- *Third*, does the judgment have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings?

If the answer to any of these questions is in the negative, the judgment amounts to no more than a 'ruling' and is therefore not appealable. Harms (C1.18 and C1.19*).* [Page 471] gives the following examples of judgments that are appealable and rulings that are not appealable:

Table 25.1 Judgments that are appealable and rulings that are not appealable

Appealable judgments (or orders)	Rulings that are not appealable
The dismissal of a special plea	A ruling on a point of evidence
The dismissal of a point *in limine* if it is in the nature of a special plea	A ruling on a preliminary point of law unless it results in judgment for one of the parties
A declaratory order and any ruling that is in effect a declaratory order, for instance, a finding that the defendant is not liable	A ruling on the method of calculating damages
A declaratory order that the plaintiff's claim for damages is limited	An order referring the matter to trial or for oral evidence
A finding that the defendant is liable to the plaintiff even if the extent of the liability has not yet been fixed	An order to deliver further particulars
An order upholding or dismissing an exception where the exception strikes at the legal validity of the claim or defence	An order dismissing an exception
An order granting or refusing review	An *Anton Piller* order
An order granting or refusing an attachment to found or confirm jurisdiction	An order for security for costs (but not one refusing it)
The refusal of a judge to recuse himself or herself	A discovery order and one refusing discovery
An order setting aside a subpoena	An order granting or refusing a postponement
The refusal or grant of a final interdict	An order that the matter be heard as a matter of urgency
The refusal of an interim interdict, and the grant of an interim interdict if it is final in effect	Leave to execute pending an appeal where security for restitution is ordered
The grant of summary judgment, and also the grant of leave to defend subject to the provision of security	A ruling dismissing an application for absolution at the end of the plaintiff's case
The dismissal of leave to intervene in proceedings	An order for separation of the issues in terms of rule 33
The Maintenance Court's refusal to authorise the issue of a warrant of execution against the property of the maintenance debtor	Granting provisional sentence
	A judgment by default, even if no longer rescindable
	An order made by consent

Note:

Neither of these lists must be regarded as a *numerus clausus*. Every case must be considered carefully on its own merits. The decisions, on which Harms' selection [Page 472] is based, must be studied carefully; even should the case cited not be directly in point, it may still provide a key to the question whether the decision you propose to appeal against is a judgment or merely a ruling.

25.1.2 *The analysis of the judgment*

The judgment to be taken on appeal must be subjected to close scrutiny before any decision is made to apply for leave to appeal. The analysis of the judgment and the case materials will be repeated at various stages of the appeal, for example, when the heads of argument are prepared and when counsel does his or her final preparation before the hearing. The whole case has to be revisited, starting with the pleadings and working through the evidence on the issues before the court. Finally, you will have to compare what was produced to the court by way of evidence and argument and then consider whether justice has been done to your case in the court's judgment. For further guidance, see the discussion of the preparation of heads of argument later in this chapter.

25.2 Application for leave to appeal

Whether leave to appeal is required, depends on the status of the court appealed from. Leaving aside special courts like the Competition Court, Labour Court and Court of the Patents Commissioner, there are four general levels of appeals:

- A judgment of the Magistrates' Court may be taken on appeal to the High Court. Such an appeal is known as a 'Magistrates' Court appeal'. The right to appeal is not subject to leave to appeal in civil cases. It is different in criminal cases where section 309B of the Criminal Procedure Act 51 of 1977 (CPA) provides that leave to appeal is required for an appeal against conviction or sentence or an order of a 'lower court', with two exceptions, namely, (i) cases falling under section 84 of the Child Justice Act 75 of 2008; and (ii) cases where the accused is sentenced to life imprisonment by a Regional Court under section 51(1) of the Criminal Law Amendment Act 105 of 1997. For civil appeals the rules relating to time limits and the contents of the notice of appeal can be found in the Magistrates' Courts Act 32 of 1944 and the Magistrates' Courts Rules (mainly rule 51), but the appeal itself is dealt with according to High Court rule 49. Section 309B of the CPA (dealing with criminal appeals) provides that an application for leave to appeal has to be made within 14 days of the passing of sentence or such extended period as the court may allow on application and for good cause . The procedure after leave has been granted is that set by High Court rule 49.

- A judgment of the High Court may be taken on appeal to a Full Court of the division which heard the case, subject to leave to appeal having been granted. (If the court consisted of two judges, the appeal goes to the SCA subject to leave to appeal having been granted – see section 16(1)(*a*)(ii) of the Act.) Full Court appeals are regulated by section 16(1)(*a*)(i) of the Act and High Court rule 49.

- A judgment of the High Court may also be taken on appeal to the SCA as may a judgment of a Full Court. These appeals are referred to as 'SCA appeals'. SCA appeals are regulated by:

  – section 16(1)(*a*)(i) in the case of an appeal from a single judge

  – section 16(1)(*a*)(ii) in the case of an appeal from a bench of two judges

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section 16(1)(*b*) in the case of an appeal against a decision given on appeal but in this case the appeal is subject to special leave having been granted by the SCA.

These appeals are further regulated by the procedural provisions of SCA rules 4 and 5.

o

An appeal in a matter involving constitutional principles may be taken to the Constitutional Court directly by way of an application in terms of Constitutional Court rule 18, or on appeal from the SCA. The special rules, functions and procedures of the Constitutional Court are beyond the scope of this book.

There are substantive provisions relating to appeals in sections 15–20 of the Act which should be studied with care, in particular, provisions relating to the test for leave to appeal. Section 17(1)(*a*) provides that leave to appeal may only be given if the judge or judges concerned are of the opinion that:

o

'the appeal would have a reasonable prospect of success'; or

o

there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

As to the first point, previously the test was whether the prospective appellant had reasonable prospects of success in the proposed appeal in that another court *could* reasonably come to a different conclusion. The change of terminology in the use of '*would'* as opposed to '*could*' signifies a change in intention by the legislature, that is to say, the interpretation given to section 17(1)(*a*) given in several decisions of the courts, for example, *Notshokovu v S* (157/15) [2016] ZASCA 112 (7 September 2016) and *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016). The test for leave to appeal therefore appears to be more stringent while the basic principle – reasonable prospects of success – remains the same. Harms (B39.3D) adds that the amount in issue must not be trifling and must be a matter of substantial importance to at least one of the parties, and that a practical effect should be achieved by the appeal.

As to the second point, what may constitute a 'compelling reason why the appeal should be heard', see Harms B39.3F.

If leave to appeal were to be refused, special leave may be sought by way of application from the SCA in terms of section 17(2)(*b*). (See paragraph 25.3 below for a discussion of special leave.)

Some subtle advocacy is required in the way any criticism of the judgment is expressed because the judge who heard the trial is almost invariably the one who has to make the decision whether to grant leave or not. It is not good advocacy to offend the very person you have to persuade. The application must therefore be tactful and avoid extravagant or patently unjustifiable criticism of the judgment.

No supporting affidavit is necessary, but no harm is done if one is attached. The affidavit may be rather formal, stating little more than that the applicant applies for leave to appeal on the grounds set out in the notice of motion and submitting that there are reasonable prospects of success in the proposed appeal. The reasons why it is suggested the appeal should go to the SCA rather than a Full Court should be set out in an affidavit, which could be deposed to by the applicant's attorney. An affidavit becomes necessary if the applicant (for leave to appeal) relies on facts that were not canvassed during the prior proceedings, for example, if the importance of the matter is relied on as a reason why [Page 474] leave should be granted. The new facts must then be set out in as much detail as the circumstances require in the affidavit.

The delivery (filing and service) of an application for leave to appeal automatically suspends the judgment or order appealed against unless the court orders otherwise. The successful party (in the main case) must obtain leave to execute, which should be done by way of an interlocutory application (notice of application supported by affidavit evidence).

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Table 25.2 Application for leave to appeal from a decision of a single judge

Text of application	Comment
[*COURT DESCRIPTION as prescribed*] Case no 5432/[*year*] In the matter between: XYZ SHOES PLAINTIFF/APPLICANT And NM LEATHER SUPPLY LTD DEFENDANT/RESPONDENT	The case heading should reflect the original roles of the parties, as well as their respective roles in the application for leave.
NOTICE OF APPLICATION FOR LEAVE TO APPEAL	
To: The Registrar [*address*] and to: Brookfields Respondent's Attorneys [*address and details as per rule 6(5)(*d)]	
TAKE NOTICE that the applicant intends to apply for leave to appeal against the whole of the judgment granted by Her Ladyship, Miss Justice Smith, on the [*date*], absolving the defendant from the instance with costs.	It is customary for the costs of the application to be costs in the appeal, if the application is granted. Otherwise the unsuccessful applicant has to bear them.
TAKE FURTHER NOTICE that the application will be made on a date and at a time to be arranged in conjunction with the Registrar and the respondent's attorneys.	

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Text of application	Comment
THE APPLICATION is based on the following grounds:	
There are reasonable prospects that a court on appeal would come to a different conclusion for the following reasons: (a) The court should have allowed the evidence of Mr Jonah Ponsonby to the effect that the letters of credit presented by the respondent were not in accordance with international convention and practice. (b) The finding of the court on the inherent probabilities of the case was unduly favourable to the respondent in that there were other equally probable reasons for the applicant's failure to respond to the respondent's letter of repudiation. (c) The court should have held that the respondent was not permitted to rely on the defence of part payment when it had not been pleaded. (d) The court erred in following the decision in *H v J* 1947 (1) SA 1803 (N) and should have followed *CBA v McKay* 1987 (4) SA 1309 (O) instead. (e) . . . etc.	1 The reasons for the application should be given in the notice. 2 The grounds should ideally be phrased in such a way that they could be incorporated in the Notice of Appeal without any substantive change. 3 The test for leave in section 17(1)(*a*)(i) and (ii) of the Superior Courts Act 10 of 2013 (the Act) should be incorporated.
TAKE FURTHER NOTICE that it will be contended that the Supreme Court of Appeal would be the appropriate court for the hearing of the appeal by reason of the following circumstances:	The notice should indicate to which court leave to appeal is sought and if it is suggested that the appeal deserves to be heard by the Supreme Court

(i) It is desirable that the Supreme Court of Appeal should resolve the conflict between the decisions of *H v J* and *CBA v McKay*. (ii) The matter is of great importance not only to the parties, but also to importers and exporters generally in that it involves principles of international trade.	of Appeal, the reasons for that contention should be spelled out in the notice. (See section 17(6)(*a*) of the Act.)
Dated at [*place*] this . . . day of . . . [*year*].	The application should be filed and served within the time allowed by the rule 49(1) – within 15 court days of the judgment – unless leave is sought at the time of judgment.
Signature Applicant's attorney's name (printed)	
Cele and Associates Applicant's Attorneys [*address and details as per rule 6(5)(*b)]	

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The respondent in the application for leave to appeal is entitled to oppose the application and to that end to deliver a notice or an affidavit setting out the grounds for his or her opposition.

25.3 Special leave

The SCA may grant special leave to appeal where the judge or judges concerned have refused leave or where leave is sought for a further appeal from a decision of the High Court sitting as an appeal court. In such a case the leave to appeal is referred to as 'special leave' and it is sought by way of an application in terms section 17(2)(*b*) of the Act and SCA rule 6. The SCA may direct that the appeal be heard by the Full Court of the division concerned – section 17(6). The test for special leave is whether there are special circumstances justifying a further appeal. Examples of special circumstances in this context are a substantial point of law, factual issues of great importance, and strong prospects of success.

SCA rule 6 lays down procedural and formal requirements for an application for special leave. The application must be lodged in triplicate and must be accompanied by:

- a copy of the order of the court appealed against.
- where leave to appeal has been refused by the court *a quo*, a copy of the order refusing leave.
- a copy of the judgment of the court *a quo*.
- where leave to appeal has been refused by the court *a quo*, a copy of that judgment.

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Table 25.3 Form of order in an application for special leave

Text of notice of application	Comment
(Case heading)	The application is made in the Supreme Court of Appeal.
To: (The Registrar of the Supreme Court of Appeal and the respondent)	

TAKE NOTICE that the applicant applies to this court for the following orders:	
1. That the applicant be granted leave to appeal against the judgment and order of the …… Division of the High Court of South Africa delivered on the …… of ……. [*year*] whereby the appeal of the applicant against the judgment of the Honourable Mr Justice …… in the …… Division of the High Court in case no. ……/[*year*] dismissing the applicant's claim with costs was dismissed with costs.	The language is a bit inelegant, but it is customary to cram all this information into a single sentence!
2. That the costs of the application be costs in the appeal.	You should remember to ask for these costs at the appeal hearing.
TAKE NOTICE FURTHER that the applicant relies on the grounds set out in the affidavit of ..... , attached to this notice of application.	The case for special leave to appeal should be made in the affidavit. SCA rule 6 requires that 'all such information as may be necessary to enable the Court to decide the application' must be given.
TAKE NOTICE FURTHER that the applicant attaches the following documents pursuant to SCA rule 6 (a) a copy of the order of the court appealed against (b) a copy of the judgment of the …… Division of the High Court on appeal (c) a copy of the judgment of the honourable Mr Justice …… in the court of first instance.	
Dated ……	
Signature Name of applicant's attorney (printed) Address of applicant's attorneys	

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SCA rule 6 requires the application (notice and affidavit) for special leave to appeal:

- to be clear, succinct and to the point.
- to furnish fairly all the information that may be necessary to enable the court to decide the application.
- to deal with the merits of the case only so far as is necessary to explain and support the particular grounds on which leave is sought.
- to be paginated properly and separately from the main record of the case.

The application may not traverse extraneous matter or be accompanied by the record. Nor may the founding affidavit and answering affidavit exceed 30 pages and the replying affidavit 10 pages. The record need only be lodged with the registrar if it is called for. The affidavit is almost in the nature of an argument (an exception to the basic rule that an affidavit should not contain argument). It must set out the reasons for the contention that leave to appeal should be granted because the judgment of the court *a quo* was wrong.

After the exchange of affidavits, a decision will be made without further reference to the parties, except in extraordinary circumstances when the justices of the SCA dealing with the application may call on the parties to argue the application separately or at the same time as the appeal.

25.4 Argument on an application for leave to appeal

The test for leave to appeal (in an ordinary case) is whether the prospective appellant has reasonable prospects that another court would come to a different conclusion on the facts or the question of law at issue. The outcome of the case must be looked at as opposed to the reasons for the judgment. Conversely, leave will generally not be granted if the matter has become academic nor if the costs alone are at stake.

The argument on the application for leave to appeal usually follows a similar line to the argument on the appeal itself, except that the test for success differs. The focus is on the judgment. In the application for leave, counsel has to persuade the judge that another court 'would' reasonably come to a different conclusion on the evidence or point of law before the court. In the appeal, if leave were to have been granted, counsel has to demonstrate to the court of appeal that the judgment was wrong and that the court 'should' have given a different judgment. Counsel for the respondent, on the other hand, would defend the judgment and may even advance reasons not mentioned in the judgment to support it.

Because an application for leave to appeal focuses on the judgment, the argument for leave is structured very much like the argument on the appeal itself. There must be some continuity running from the pleadings in the case to the points argued on appeal. The point to be argued on appeal must have its origins in the issues before the court *a quo* and hence in the pleadings. That point must be apparent at each stage of the process as follows:

- It must have arisen on the pleadings and have been in issue in the case or relevant to an issue.
- It must have featured in the judgment, either by way of a specific finding or by being overlooked, but in such a way that it affected the outcome.
- It should then be raised in the application for leave to appeal as one of the findings on which another court would reasonably come to a different conclusion.

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- It must be relied on in the notice of appeal as one of the grounds of appeal and it must be within the ambit of the leave granted. (As pointed out earlier, the grounds need not be specified in appeals to the SCA.)
- It should be dealt with in the heads of argument.
- It should be further developed at the hearing of the appeal by oral argument.

25.5 Notice of appeal

High Court rule 49(3) applies to Full Court appeals, requires a notice of appeal in a particular form, and gives particular information. The content of the notice would be affected by the order granting leave to appeal. If limited or conditional leave has been granted, or if leave were to be granted only on limited issues, the notice of appeal must be restricted to what is within the ambit of the order

granting leave. If leave is granted without any restrictions or limitations in a Full Court appeal, any issue could be raised on appeal, subject to it having been included in the grounds of appeal. Keep in mind that the notice of appeal serves a purpose similar to the pleadings, namely to define the issue at stake. If a point is not raised in the grounds of appeal, it cannot be argued without an amendment of the notice of appeal and, more likely than not, an adjournment at the appellant's expense.

The notice of appeal under rule 49(3) must state:

- whether the whole judgment is appealed against.
- if not, what part and what findings of fact or law are appealed against.
- the grounds of appeal, in other words, the reasons why it is suggested the court's findings under attack were wrong.

SCA rule 7 does not require the grounds of appeal to be stipulated like High Court rule 49. SCA rule 7(3) requires the notice of appeal (and any notice of cross-appeal) to:

- state what part of the judgment or order is appealed against.
- state the particular respect in which the variation of the judgment or order is sought. (In other words, you should explicitly state the order which should have been granted, or should be granted, on appeal.).
- be accompanied by a certified copy of the order granting leave to appeal.

Where the grounds of appeal are set out in a notice of appeal, the notice of appeal should raise the broad issues but not the detailed reasons in support of them. The detailed reasons should be developed in the heads of argument and explained during the oral argument at the hearing of the appeal.

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Table 25.4 Notice of appeal (under High Court Rules rule 49(3))

Text of notice of appeal	Comment
[*COURT DESCRIPTION as prescribed*] Case no 5354/[*year*] In the matter between: ANNE SMITH PLAINTIFF/APPLICANT and JOE SOAP DEFENDANT/RESPONDENT	
NOTICE OF APPEAL	You could add 'IN TERMS OF RULE 49(3)' to the title bar of the document.
To: The Registrar [*address*] And to: Pillay and Co Respondent's Attorneys [*address and details as per rule 6(5)(*d)]	
TAKE NOTICE that the appellant, having been granted leave to appeal on the ..... day of ..... [*year*] by His Lordship Mr Justice [*name of judge*] hereby notes an appeal to the Full Court of the	1

[*name of division*] against the whole of the judgment of His Lordship granted in this action on the 1 May [*year*] and in which judgment was granted in favour of the respondent for payment of the sum of R1 000 000.00, interest and costs.	Rule 49(3) requires the appellant to state whether the whole of the judgment is appealed against, and if not, what part of the judgment. 2 In criminal cases the notice has to state whether the appeal is against the conviction or sentence or both.

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Text of notice of appeal	**Comment**
TAKE FURTHER NOTICE that the appeal is directed against the following findings of fact: 1 His Lordship's finding that PETER JONES had been properly authorised to represent the appellant in concluding the contract sued upon. 2 His Lordship's findings that 2.1 the appellant had represented to the respondent that PETER JONES was its authorised agent 2.2 that the respondent had acted on the said representation to its prejudice 2.3 that the appellant was therefore estopped from denying the authority of PETER JONES.	Rule 49(3) requires the findings of fact or law appealed against to be stated in the notice.
TAKE FURTHER NOTICE that the grounds on which the appeal is founded, are as follows: (a) There was no reliable evidence to support His Lordship's first finding. (b) The first finding was against the probabilities. (c) The evidence of PETER JONES which ought to have been accepted by His Lordship, was unequivocally to the effect that he did not purport to act as representative or agent of the appellant in concluding the contract. (d) . . . etc.	1 Rule 49(3) requires the grounds for the appeal to be stated in the notice. 2 It is preferable to organise them so that they accord with the findings of fact or law appealed against. The grounds of appeal against each finding can then be dealt with separately.
DATED AT [*place*] this ..... day of ..... [*year*].	
Signature Appellant's Attorney's name (printed)	
Van der Merwe and Partners Appellant's Attorneys [*address and details as per rule 6(5)(*b)]	**Note:** If this were an appeal to the Supreme Court of Appeal, a certified copy of the order granting leave should be attached in terms of SCA rule 7(3). The rest of the notice would also

	have to be adapted where appropriate, particularly by stating what order should have been granted by the court *a quo*.

25.6

Preparing heads of argument

Preparing heads of argument for an appeal inevitably requires counsel to prepare for the appeal itself as the heads of argument are a summary of the argument to be presented to the appeal court. Preparing an argument is a rather personal process. Every lawyer has his or her own way of doing this. However, there are certain formal requirements for heads of argument that could influence the way counsel prepares the argument and consequently the heads.

The importance of the heads of argument to the process of persuasion should not be underestimated. This is your first opportunity to bring the judges around to your client's side. The heads allow you to bring the issues and the points for oral argument into sharper focus for them. You have an opportunity to direct their attention to the best points in your client's favour and also to any weaknesses in the other side's case. The argument in the heads must therefore be structured so that it is persuasive, whether the appeal turns on the facts or points of law. You must arrange the facts and the points of law in such a way that the conclusion in your client's favour is inevitable. In short, you must try to make your argument irresistible. Written heads of argument have an intimidating value; they cannot be ignored. The Romans said, '*Literae scriptae manent*', meaning that the written words remain. This is another reason why it is a good idea to provide the court with written heads of argument even in trials where they are not called for by the rules; a written argument is hard to ignore.

Leaving aside the formal requirements for the moment, the process of preparing an argument for an appeal usually involves the different stages, namely

- an analysis of the record of the case for the purposes of a complete fact analysis, with the record of the case serving as the sole basis for establishing the facts
- the identification of the issues as they appear from the record
- the isolation of the evidence which is relevant to each issue
- an assessment of the reliability of that evidence for the purpose of determining whether the standard of proof required on each issue, has been achieved
- an examination of the judgment to determine in what respects the judgment is wrong (or, if you act for the respondent, in what respects the judgment can be supported)
- the construction of an argument to support your contentions with regard to the correctness of the judgment
- the formulation of appropriate heads of argument to pursue that argument.

The heads of argument will be shaped by a number of factors, including – (a) the test on appeal; (b) any restrictions imposed by the order granting leave to appeal; (c) whether the appeal is directed at findings of fact or law; (d) the general approach of the court to appeals against findings of fact; and (e) the provisions of the rules. The test on appeal is whether the judgment appealed against is wrong; the court will not reverse the judgment if it merely has a reasonable doubt about the

correctness of the decision. It must be satisfied that the judge was wrong. The appellant's heads must therefore explain why the judgment is said to be wrong. Nothing short of that will do. The respondent's heads, on the other hand, must concentrate on defending the judgment and in a proper case give additional or different reasons for maintaining it.

The approach of the court on appeal depends to some extent on the nature of the judgment of the court *a quo*. Courts of appeal do not readily interfere with decisions [Page 484] based on the exercise of a discretion vesting in the court *a quo*. An appeal court may, however, interfere if it can be demonstrated that the exercise of the discretion was influenced by bias, was arrived at capriciously or without substantial reasons, or was based on a wrong principle. Where the appeal turns on a point of law, the question is simply whether the trial court was right or wrong. Where the appeal turns on a question of fact, however, the appeal court applies the principles known as the '*Dhlumayo* principles', from the case of *R v Dhlumayo* 1948 (2) SA 677 (A). This decision must be studied very carefully. The main *Dhlumayo* principles are:

- The appeal court is generally reluctant to reverse the judgment of the trial court because the latter has advantages such as observing the witnesses and absorbing the atmosphere of the trial which the appeal court does not have.

- Even in drawing inferences from the evidence, the trial court may be in a better position than the appeal court, but this is not always so; there are some cases where the appeal court is in as good a position to draw inferences from the admitted facts and the facts found proved by the trial court.

- Where there has been no misdirection, the presumption is that the trial court was correct; the appeal court will only interfere if it is convinced the trial court was wrong.

- Where there has been a misdirection of fact, the appeal court may disregard the findings of the trial court and make its own assessment of the facts notwithstanding the difficulties arising from its not having had the opportunity to observe the witnesses.

The form and structure of the heads of argument depend on the case. The principles for heads of argument provided by SCA rule 10(3) could be applied to appeals to the High Court, appeals to the Full Bench and even to opposed motions, stated cases and trials (unless there are specific provisions in place in the court of appeal concerned). The heads of argument in an appeal to the SCA have to follow the format and principles set out in SCA rule 10(3). There are separate provisions in the High Court Rules with regard to the form and content of heads of argument in Magistrates' Court appeals and Full Court appeals. If the requirements of SCA rule 10(3) and the practice note are not adhered to, an application for condonation – notice of motion and affidavit – may be required. In *Premier Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) no proper practice note was filed and the heads of argument did not comply with SCA rule 10(3) (page references were absent, no chronology was attached and copies of subordinate legislation were not attached). The court made a punitive costs order.

What constitutes heads of argument is best explained by reference to the decision in *Caterham Car Sales & Coachwork Ltd v Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA) at 955B–C:

> 'The Rules of this Court require the filing of main heads of argument. The operative words are "main", "heads" and "argument". "Main" refers to the most important part of the argument. "Heads" means "points", not a dissertation. Lastly, "argument" involves a process of reasoning which must be set out in the heads. A recital of the facts and quotations from authorities do not amount to argument.'

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Table 25.5 Heads of argument

What Supreme Court of Appeal rule 10(3) requires	How to comply	Comment
(a) *(i)*	1 The points supporting the argument should be	The key concepts are

The heads of argument shall be clear, succinct and without unnecessary elaboration. *(ii)* *Each point should be numbered and stated as concisely as the nature of the case allows and must be followed by a reference to the record or an authority in support of the point.*	arranged in a logical order. 2 Each point should be made separately in a short, clear sentence. 3 Points that do not contribute to make the argument persuasive should be eliminated. 4 Avoid explanations. They can be given during oral argument.	*argument* – a point or series of points harnessed to prove or disprove a particular conclusion *clear* – understandable, free from obscurity or ambiguity *succinct* – brief.
(b) *(i)* *The heads of argument shall not contain lengthy quotations from the record or authorities.* *(ii)* *The heads of argument must state, in respect of each authority cited, the proposition of law that the authority states, and if more than one authority is cited for a proposition the reason for citing the additional authorities must be stated.*	1 Paraphrase what is stated in the authority or record. 2 Use only short, telling quotations.	The idea is to lead the appeal judges to the important principles or passages. During oral argument counsel can elaborate and quote from the authorities and record more freely.
(c) *References to authorities and the record shall not be general but to specific pages and paragraphs.*	1 For authorities, use the standard method of citation (e.g. author, title, edition, publisher and year) and give the page and paragraph number. 2 For the record, give the volume, page and line reference, and in the case of evidence, the name of the witness or a description of the exhibit.	Appeal records are bound in separate volumes of about 100 pages each, and carry line numbers, with every tenth line numbered in the margin.

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What Supreme Court of Appeal rule 10(3) requires	**How to comply**	**Comment**
(d) *(i)* *The heads of argument of the appellant shall, if appropriate to the appeal, be accompanied by a chronology table, duly cross-referenced, without argument.*	1 A chronological table is useful, if not essential, if the appeal turns on the facts. 2 The more complicated the facts and the evidence, the greater the need for a detailed chronological table. 3 Every fact or event in the table must be accompanied by a reference to the record. 4 Where the appeal turns on a point of law, a	Events are best understood if they are recounted in chronological order. It is essential for counsel's own understanding of the facts to have a chronology available. (It should have been done during the preparation for trial already.)

	chronological table may still be illuminating.	
(d) *(ii)* *If the respondent disputes the correctness of the chronology table in a material respect, the respondent's heads of argument shall be accompanied by the respondent's version of the chronology table.*	1 The disputed facts in the appellant's chronology must be excised and any material facts omitted from it added to create the respondent's own table.	*Material* means important.
(e) *(i)* *The heads of argument shall be accompanied by a list of the authorities to be quoted in support of the argument and shall indicate with an asterisk the authorities to which particular reference will be made during the course of argument.*	1 There must be some order to the list. 2 Cases must be kept separate from textbooks and statutes and arranged alphabetically. 3 Textbooks must be arranged alphabetically according to the author's surname. 4 Statutes must be arranged according to their year of enactment. 5 There must be a clear indication which authorities of the listed are to be further explored in oral argument.	A key at the head of the list of authorities should do the trick, e.g., a note that authorities in bold print will be relied on for particular references during the oral argument. (An asterisk (*) could be used to the same effect.)
(e) *(ii)* *If any such authority is not readily available, copies of the text relied upon shall accompany the heads of argument in a separate volume.*	1 If there are more than just a few of these, they may be bound separately from the heads of argument.	*Not readily available* in this context means not available in the court's library. In case of doubt, ask the court librarian. Maritime lawyers should take note that the SCA's library is particularly lacking in maritime law authorities.

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What Supreme Court of Appeal rule 10(3) requires	**How to comply**	**Comment**
(e) *(iii)* *The heads of argument shall define the form of order sought from the Court.*	1 The heads of argument must conclude with the order you contend should be made on the appeal. 2 That order must include what the trial court's order should be, if the appeal succeeds. 3 If the costs of two counsel are to be asked for, that must be stated specifically.	
(f) *A photocopy, or a printout from an electronic database, of those provisions of any statute, regulation, rule ordinance or by-law directly at issue, shall accompany the heads of argument in a separate volume.*	1 Acts of Parliament and Provincial ordinances are original legislation. 2 Attach legible copies. 3 All regulations, whether emanating from the State President, a Minister,	

	Provincial Council or Premier or a local authority must be regarded as subordinate legislation. 4 Care must be taken that all amendments up to the date the cause of action arose (and later, if relevant) are included.	
(g) *The heads of argument of any appellant or respondent shall not exceed 40 pages, unless a judge, on request, otherwise orders.*		

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The requirements of SCA rule 10(3) should not be regarded as an unnecessary administrative burden; but as an invaluable guide to help counsel to prepare a coherent and persuasive argument. Compliance with each step of the process brings counsel closer to being prepared and closer to being persuasive. The content of the heads of argument will be a precursor of the argument on the appeal. The points made in the heads may be fully developed at the hearing but in the meantime they must be stated in such a way that the opportunity to persuade is not lost. The heads should serve as a roadmap for counsel and for the judges to follow the argument from beginning to end.

The heads of argument must contain a summary of your argument on the issues of fact and law opened up by the notice of appeal. Issues of fact and issues of law will probably be handled differently by the court of appeal and must therefore be approached differently by counsel. The point must be presented in the heads of argument in such a way that the oral argument can develop the point further.

If there is a cross-appeal, the appellant's heads of argument must deal with both the appeal and the cross-appeal and the respondent's heads of argument must follow the same pattern as the main heads.

25.6.1 ***Submissions of law***

Submissions of law could be set out in a four-step process that could be used in the preparation of the heads and in the presentation of the oral argument:

Step 1:

Specify the challenged ruling or finding and locate it in the judgment. Refer to the volume and page numbers, as well as the line reference.

Step 2:

Indicate, in the form of a submission, what ruling or finding should have been made instead.

Step 3:

Formulate the propositions on which the submission is based.

Step 4:

Identify the authorities relied on in support of each proposition or submission, giving the full citation with page and margin or line references.

25.6.2 ***Submissions of fact***

Submissions of fact could be made in a similar, stepped process:

Step 1:

Specify the challenged finding and locate it in the judgment. Refer to the volume and page numbers, as well as the line reference, where the challenged findings appear.

Step 2:

Indicate, in the form of a submission, the basis for the challenge, for example, there was no acceptable evidence to support the finding; and the finding was flawed, based on a misdirection etc.

Step 3:

Summarise the relevant evidence in support of the submission, giving the name of the witness or document, the volume and page numbers, as well as the line references of the evidence.

Step 4:

Specify the nature of any misdirection or any principle that was applied incorrectly and deal with it as a submission of law but link it to the evidence.

Step 5:

Summarise the relevant evidence (giving the name of the witness or document with the volume and page numbers and line references) in support of the general submission that the ultimate conclusion (guilty, negligent, justified etc.) of the court was wrong.

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Pursuant to a Practice Directive issued by the then Chief Justice, a brief typed note (known as the 'Practice Note') must accompany the heads of argument and, with regard to the appeal, give

- the name and number of the matter
- the nature of the appeal
- a concise statement of the basis for jurisdiction in the SCA, including the statutory provisions and time factors on which jurisdiction rests
- a concise definition of the question if that party wishes to raise a constitutional question relating to the constitutional validity or the constitutional applicability of any law or of a common-law rule
- the issues on appeal succinctly stated (for example, 'negligence in RAF case', 'admissibility of confession', 'interpretation of . . .')
- an estimate of the duration of the argument
- the reasons if more than one day is required for argument is requested
- which portions or pages of the record are in a language other than English
- a list reflecting those parts of the record that, in the opinion of counsel, are necessary for the determination of the appeal
- a summary of the argument, not exceeding 100 words
- the reasons if it is contended that a core bundle is not appropriate for the appeal
- confirmation that there was due and timeous compliance with SCA rules 8(8) and (9) and, if not, why not.

The heads of argument must also be accompanied by a certificate signed by counsel responsible for the heads of argument that SCA rules 10 and 10A(a), which deal with the heads of argument and practice note, have been complied with.

25.7 Presentation of argument on appeal

In many ways, appellate advocacy relies on the same skills as trial advocacy, but there are important differences nevertheless. In an appeal, persuasion is the most important function of counsel while in a trial, counsel also has the function of directing the production of the evidence. Counsel influences the findings of fact by examination-in-chief, cross-examination and argument. Counsel's task to persuade is doubly onerous in an appeal for a number of reasons. *First*, the judgment is presumed to be correct. So the appellant's counsel starts with a severe handicap. *Second*, appeals are determined quite quickly while trials take a more leisurely stride: 'An hour is a long time in the Court of Appeal.' And it is usually a very lonely hour too. There are no witnesses to ask some bridging questions to help you through a difficult patch and the instructing attorney is usually sitting a few rows back, unable to help when tough propositions are put by a difficult judge. *Third*, the dynamics of an appeal are different with two, three or even five judges on the bench. Bringing one mind around to one's way of thinking is difficult enough; having to persuade five takes advocacy into another, higher, plane.

Yet, arguing an appeal has a special magic; there is no greater test of counsel's ability and skills. The cases are usually challenging and the stakes are high. The opponents are usually of the highest calibre too. And the game is played for keeps. The winner takes all.

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Arguing an appeal could also be a daunting experience. In a trial, the judge usually has no idea what the facts are or will be until the plaintiff's counsel or the prosecutor gives the court some insight during the opening address. Then the evidence slowly unfolds with the judge steadily learning more and more. Counsel, on the other hand, knows exactly what the case is about from the start because he or she will have prepared fully for the trial. Counsel has an advantage over the judge in the early stages of a trial; the power of superior knowledge. This is not the case in an appeal. The appeal judges will have studied the record of the appeal and the heads of argument for both sides. Add the fact that the judges sitting on the appeal almost invariably have more experience than counsel and their combined knowledge and experience will outweigh that of counsel by far. The advantage is with the judges this time; they have the power of knowledge, experience and numbers.

An hour can be a very short time when you have to persuade the court to allow an appeal. Your argument has to be compressed as there seems to be time only to make your best points. This is not necessarily a bad thing: it allows you to concentrate your effort on the sharp points of your argument. You have to weed out the lesser points and identify the strong ones. The point of a bayonet is more likely to penetrate than a flurry of blows with your fists. When you start your argument you have to introduce the issues in such a way that the court knows exactly what is in issue and what your basic proposition with regard to that issue is going to be.

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Table 25.6 Opening the appeal

What to do	Comment
By the presiding judge: '*Yes Mr X.*' Counsel for the appellant (the police): '*May it please the court. This is an appeal against the finding of His Lordship Mr Justice A in the court below, that a policeman had acted negligently when a shot he had fired at a person he was trying to arrest, struck the respondent.*'	1 Identify the principal finding appealed against. 2 It is customary to say, '*May it please the court*' before you launch into any new activity.

Counsel: '*The question this court is required to examine, is under what circumstances a police officer is or is not liable when a shot fired legitimately at one person, strikes another.*'	1 State the question the court has to answer in broad terms.
Judge Z: '*But the man who fired the shot was not a policeman. He was a soldier in the SANDF.*' Counsel: '*That is correct, but the Minister of Defence has the power to second personnel to the police, and had done so in this instance. The regulation under which this power was exercised, is attached to my heads of argument and the specific authorisation appears at Volume 3, page 87 of the record.*'	1 Listen carefully when a judge puts a question and try to deal with it immediately. 2 Give the court the references where the relevant material can be found. 3 Because the regulation is in the nature of subordinate legislation, you were obliged to furnish a copy with your heads of argument. See SCA rule 10(3)(*f*).
Counsel: '*The basic proposition I intend to develop in the course of my argument, is that the police officer is liable only if it is found that he or she has acted negligently in relation to the person injured (the respondent in this case). The emphasis is on the words "in relation to"*'	1 Tell the court what you intend to canvass during the oral argument. 2 Make important concessions early on. They should not be forced out of you.
Counsel: '*The police are often caught in a dilemma where they try to effect an arrest or to prevent harm or injury to persons and they come under fire from the perpetrator. They may have to fire shots simply to be able to do their duty or to be effective in self-defence. When this happens in a public place, a member of the public may easily be injured by a shot fired by the police. The police may not have known of his or her presence. He or she may even have been out of sight or in a passing car. There are important policy considerations to be weighed up against each other; the rights and duty of the police on the one hand and the right of persons to their physical integrity on the other hand. Under what circumstances should the police be able to do their duty without fear of being sued?*'	1 Sketch the background against which the point arises. 2 Identify any policy considerations that may be relevant. 3 Try to state the question in such a way that it favours the answer you will contend for. 4 Use rhetorical questions sparingly. 5 After this introduction, counsel should be able to move to the facts and the legal principles.

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The fundamental requirements for successful appellate advocacy are:

- mastery of the materials.
- mastery of your argument.
- a complete understanding of the opposing argument.
- flexibility.
- insight and courage.
- anticipation.
- tact.

25.7.1

Mastery of the materials

The primary material of the appeal is the record of the case and the judgment. Secondary materials would include the application for leave to appeal or for special leave and the notice of appeal. The heads of argument and legal materials (sources) for the argument are dealt with below.

When the appeal is either obviously good or obviously bad, the judges are likely to find that out in the course of their own preparation. The result may well be that the argument for the one side in the appeal is going to be subjected to close scrutiny. That, in turn, might result in an uncomfortable time for the advocate on that side when he or she rises to face the judges. There is only one counter to this imbalance; you must be thoroughly familiar with the material before the court.

Familiarity with the material before the court, enables counsel to respond quickly and persuasively when a judge asks a question. It might be that the appeal turns on a question which troubles the judges or a particular judge; if a persuasive answer can be given to that question counsel may have gone some way towards turning the appeal in his or her client's favour. This cannot be done unless counsel has the facts and the law of the case at his or her fingertips. This takes hard work, a good memory and good notes. This works starts with a careful reading of the record, making notes as you go and cross-referencing relevant parts of the evidence. A complete fact analysis must be done. Counsel should be able to put his or her finger on relevant evidence in the record at a moment's notice.

25.7.2

Mastery of your argument

You need to understand the strengths and weaknesses of your case. You also need to have a firm grasp of the strength of the propositions of law to be advanced. Relevance and strength are very important. The point to be made has to be relevant to an issue on which the appeal can be decided in your client's favour: the stronger the argument on that point, the better your chances of success. A strong argument on an insignificant point gets you nowhere.

The structure of your argument must be in the forefront of your mind throughout. You need to know at every stage of the argument how important the point you are making is in the overall context of the appeal. Keep the following questions in mind all the time: What is the point? Where are you going with it? What facts or principles are crucial for its acceptance? What happens if the court is against you on this point?

In the presentation of the argument itself, the stepped processes for submissions of fact and submissions of law described earlier should be used. Each point must be [Page 493] developed separately. The suggested conclusion on each point or issue must be given to the court before you move on to the next point.

The SCA attaches more importance to academic theses than other courts and often decides appeals on the strength of the research and recommendations in a doctoral thesis. A visit to the court's library can pay dividends.

25.7.3

A complete understanding of the opposing argument

The preparation of your argument must not stop when the heads of argument are complete and ready to be sent to the court of appeal. There are still two major exercises left. Both have to wait until the other side's heads of argument becomes available. The *first* is the analysis of the other side's heads of argument. The *second* is the identification and selection of topics for your oral argument at the hearing.

You need to work through your opponent's heads of argument methodically. What exactly is their general argument? What is their specific argument on the important parts of your own? What authorities do they rely on for their points? Have you considered those authorities and points before? If not, study those authorities and weigh up the points they have made in their heads in order to assess your client's prospects of success in the appeal. If the appeal is to proceed, you must prepare a counterpoint for each of your opponent's main points. You must find authorities to strengthen your counterpoints. Then you must decide on suitable tactics for the hearing. If you appear for the appellant, are you going to deal with your opponent's argument during your main argument or are

you going to deal with it in reply? If you appear for the respondent, are you going to present your own argument first or are you going to counter the appellant's argument before launching into your main argument?

25.7.4 *Flexibility*

The court of appeal is likely to take a more academic approach to the case than the court *a quo*. This often results in novel propositions put to counsel by judges. Policy considerations also play a larger role in the decisions of appeal courts; the higher the court, the greater role policy matters play. It is almost as if the judges sometimes consider other cases where the principles they lay down may be applied, rather than the one before them. This setting requires counsel to be flexible in the approach to the appeal. A dogmatic clinging to precedent or pre-conceived ideas in the argument is unlikely to be persuasive; it is better to make concessions to the broader perspective the judges are likely to adopt.

The SCA is also not bound by precedent; even its own decisions are sometimes overruled, not always with adequate warning that the tide is turning. A decided case in your favour does not carry the same weight here as it would in lower courts. When dealing with authorities, concentrate on the principles and logic. It is not the fact that there is authority in your favour that is important; it is the fact that the authority is relevant and is compelling in its reasoning.

When dealing with a matter of policy, articulate the policy into a proposition of law or principle if you can. Be prepared to modify your argument to accommodate policy concerns or shifts in the social or economic backdrop against which the appeal has to be decided.

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25.7.5 *Insight and courage*

These almost indefinable qualities, insight and courage, are essential for persuasive appellate advocacy. Counsel must have the ability, the insight, to discern the point or points on which the resolution of the appeal will turn. And then counsel must have the courage to restrict the argument to those points. What are the critical issues? Where do different lines of reasoning lead? What points are necessary to enable the argument on the important issues to be properly understood?

The oral argument must not be a mere reading of the heads of argument, supplemented perhaps by a few quotations from the cases cited and a few references to the evidence in the record. The judges will have seen all that; what they expect, is that counsel will use the opportunity to add to the argument already known to them by developing important points further and to answer any questions they may have where the argument is not clear or perhaps incomplete. You therefore have to identify the topics on which you are going to address the court; perhaps to develop a point made in the heads further, perhaps to explain something which is still unclear, perhaps to meet a point made in your opponent's heads. You may have found a further or better authority or a new insight into the problem the court is faced with. You may even have found a thesis you were unaware of when you and your opponent drafted the heads.

Most importantly, you must be persuasive. You may construct lines of argument which will serve that purpose by lifting a point from the heads and discussing that point in more detail, by contrasting a weakness in the other side's case or perhaps by emphasising a point made in an authority. Persuasive advocacy may require an abandonment of the strict and formal lines of the argument in the heads; it usually requires some flexibility and guile, some give and take, mixed with an almost instinctive 'feel' for the points or argument the court may find attractive. It takes courage to depart from a carefully constructed and rehearsed argument. Do not depart from the path you have so assiduously prepared unless you can see exactly where the new line of reasoning is taking your argument.

Marshalling all these into a persuasive argument, takes conscious planning and sub-conscious inspiration; the harder you work on the case, the more likely it is that you will gain new insights or a better understanding of the case. Sometimes new insights suddenly present themselves to you without any conscious effort. This could happen while you are driving your car or while you are jogging on the beach. You may even be jolted out of your dreams at 3 o'clock in the morning with a clear line of argument on a difficult point neatly worked out in the dark recesses of your mind while

you were fast asleep. When the answer appears to you in this way, write it down, consider it later at your leisure and try to find a way to incorporate that in your oral address. Your instincts are a valuable tool in your armoury as an advocate.

25.7.6 *Anticipation*

You also need to anticipate what is likely to happen during the hearing. Expect to be asked some questions, not all friendly, by the judges. Sometimes the bench is divided in the so-called *prima facie* views that the judges hold. They then may use counsel as a conduit to direct their questions to those on the bench who hold a view contrary to their own. Counsel sometimes hardly gets the opportunity to answer before another question, from the other side of the bench, suggests an answer to the previous question. What to do about all this? The advice can only be general:

- Be aware of the fact that the court expects your argument to be short and to the point.

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- Think of a way to start the argument or to state the issues so that you make an immediate impact on the court. Set the scene. State the propositions to be made at the beginning. Use the technique of signposting by starting with something akin to the following: '*May it please the Court. I intend to develop three points in my argument. They are, one* . . .' Then proceed to deal with them in that order and make sure you tell the judges when you move on to the next point.

- Be wary of judges' questions, especially if they put analogous cases. The case they postulate may differ sufficiently to lead you to an answer that may later sink your argument for good. A qualified answer is the best defence to such a trap. '*In the situation M' Lord has put the answer would be . . . but that situation is distinguishable from the present . . .*' (You had better be ready to defend your position.)

- A powerful reply can win the appeal for your client. Use the opportunity to answer points raised in your opponent's argument that you have not yet covered and to expose bad points in his or her argument. Your reply should have been prepared in advance.

25.7.7 *Tact*

Even though the appeal may be heard in a setting that is somewhat academic, that does not mean that the judges should be given a lecture. A vulgar appeal to the emotions will not do much good in the SCA. The higher one moves up in the hierarchy of courts, the less likely it is that the case will be decided on anything other than the merits. You have to assume a working knowledge of the facts and the law of the case on the part of the judges. Criticism of the judge in the court *a quo* should be measured but tactful. An understated and reasoned approach is better than an extravagant, far-fetched and insulting harangue.

The dynamic between counsel arguing the appeal and the judges on the bench is difficult to define and difficult to predict for an individual case. There are so many imponderables. A technique or style that seems to work for most advocates and appeal benches is the 'relaxed discussion technique'. Counsel engages the judges in a discussion of the points in the case. To the onlooker it may not appear that counsel is arguing at all, but rather that counsel is helping the judges along towards the solution of a tricky problem. Counsel should be helpful to the court; this requires that, when a judge asks a question, counsel should stop speaking and answer the question immediately. Return to the argument after you have dealt with the judge's question. Belittling or ignoring the question is unlikely to be helpful to the judge, who could easily be swayed to your side with a tactful response.

Speak to all the judges, especially the ones who appear to be against you. You do not need to persuade the ones who agree with you. The job at hand is to persuade the ones who disagree with you. It is not always possible to determine who is for you and who is against you, and some judges are very adept at keeping their true views disguised. On the other hand, some judges make their

views quite plain and if they are against you, you may be in for a robust debate. If it appears that a particular judge is dead set against you, concentrate your efforts on persuading the others; a majority verdict is still a win.

When it becomes plain that a particular judge does not know the facts, or misunderstands them, or has not read the papers, counsel has to make sure they give the court the facts. Extreme tact is required in this situation. '*May I take a minute or two to recapitulate* [Page 496] *the facts which are important to the court's consideration of the issue raised by Justice X?*' may be a way to inform the judges of the facts without openly exposing the lack of knowledge or understanding of the errant judge.

Face the unanswerable proposition. '*I have no answer to that, Justice Y, but there are other points in this appeal.*' Do not argue hopeless points. Advance only good points. Keep your focus on the main point or the main thrust of the argument. One good point is all you need in an appeal. Get to that point quickly so that it does not lose its value or get buried under points of lesser value or impact. Don't get tempted into a petty argument about unimportant points; it takes the focus away from the points that really matter.

In the SCA, more than in other courts, counsel should exercise moderation in language, tone, gesture and facial expression.

25.8 The qualities of persuasion required in appellate advocacy

There are seven special qualities required for persuasive appellate advocacy, and seven deadly sins in appellate advocacy.

25.8.1 The seven special qualities of persuasion

- *The power of recall:* Counsel must be able to recall the evidence, what was written in the pleadings, where a particular document is to be found in the record, what a witness has said in answer to a question; the list of things counsel should have stored in memory, is endless. The value of the power of recall is that it allows for immediate answers to be given to questions from the bench and for a quick response to your opponent's argument.

- *A sense of relevance:* The great orator Quintilian (35–96 AD) said: '*Festinat enim judex ad id quod potentissimum*.' The judge hurries to the strongest point. The ability to see that point and to cut a path directly to it is an invaluable gift.

- *Tact*: A deft touch is required, to turn the dissenter, to deflect a point or authority against your client, to persuade the doubtful with subtlety and logic, to know when to stop.

- *Candour:* Counsel's duty to the court requires contrary authorities to be brought to the notice of the court and bad facts to be dealt with. Distinguish the contrary authorities and explain the bad facts away, if you can.

- *The ability to make it interesting:* Advocacy is the art of persuasion and the SCA is as likely as any other court to be moved by it. Elegance and wit are the tools. You can make it interesting by weaving an elegant legal argument through an ordinary set of facts or by infusing some wit into the case. Wit should be used sparingly.

- *The art of a telling reply:* It is truly an art to find a reply which in one or two sentences or submissions can dispose of the opponent's strongest points. Even a reminder that opposing

counsel has not answered the main point or points of your own argument could amount to a telling reply.

- *The ability to make your points with brevity and compression:* The SCA expects the argument to be compressed in the heads of argument and to be addressed with brevity during oral argument. Long-windedness, or 'langwijligheid' as Van der Linden put it, is the enemy of persuasion.

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25.8.2 *The seven deadly sins*

The seven deadly sins are

- failing to draft and file proper heads of argument
- failing to supply lists of authorities
- failing to state the basic propositions to be advanced at the outset
- reading long passages from the record or authorities
- failing to plan a structure which allows you to move swiftly and economically through the facts and the law of the case
- squandering the opportunity to persuade by oral advocacy, or not making the most of it
- failing to add a touch of humanity and interest to the case.

25.9 Protocol

- Counsel in an appeal to the SCA are expected to be in Bloemfontein the night before the appeal. This resolves the perpetual difficulty with counsel arriving late because their flights were delayed or because a similar *casus fortuitus* intervened.
- Counsel is expected to notify the registrar of the SCA, well in advance of the hearing, of the authorities counsel needs from the court's library. This enables the usher to collect the books for counsel and to put them next to the podium. It is customary to pay the usher a small gratuity for this service.
- There is only one podium in the SCA. The appellant's counsel and the respondent's counsel take their turn to speak from that position. The appellant's counsel sits on the right of the podium, as one faces the judges, and the respondent's counsel on the left.
- Counsel should be robed and ready in the court allocated at least half an hour before the appeal is due to be heard. The usher will take counsel through to the senior judge presiding

in the appeal to be introduced to the judge. Be ready for some small talk. Counsel is not introduced to the other judges sitting in the appeal.

- It is customary, but not obligatory, for counsel to pay their respects to judges of appeal from their (counsel's) own division, whether those judges are sitting in the appeal or not. Make sure the time is convenient to the judge. Tell the judge the news from his or her old division.

- When the appeal is called, counsel introduce themselves to the court in turn of appearance, each moving to the podium for that purpose.

- Counsel then address the judges from the podium with the appellant's counsel arguing first.