Witness statements in civil cases – show me the evidence[1]

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"…no evidential stone was left unturned, unaddressed or unpolished….It also led to some scepticism on the court's part as to whether the lengthy witness statements reflected more the industrious work product of the lawyers, than the actual evidence of the witnesses."[2]

Introduction

1. There is usually at least one. A witness of fact who, after reading his or her eloquent and compelling written statement of evidence, unravels under cross-examination and does not quite come up to brief. Occasionally the witness crashes and burns.

2. For better or worse, the written brief has long become the norm for presenting evidence in civil cases. For many experienced civil litigators, leading a witness through oral evidence in chief is a distant memory. And many younger counsel have never done so. The loss of that skill, and the consequent loss of easy familiarity with the rules of evidence, can result in witness briefs that are overworked, contain inadmissible content, and are a vehicle for argumentative advocacy.

3. How can these pitfalls be avoided? By returning to some fundamental principles. The requirements of the Evidence Act 2006 and the High Court Rules relating to written briefs are there for good reason – to ensure that witness testimony is probative, credible, and fairly and efficiently presented. Only then will the evidence withstand testing at trial and persuade the Judge.

4. Increasingly in civil proceedings, especially complex commercial cases, documentary evidence abounds. However, crucial testimony of fact is still at the heart of most trials. This paper will focus on the written testimonial evidence of lay witnesses. I will address the following topics:

   (a) The shift from oral evidence to written briefs – why the change occurred, how the use of written briefs ran amok, and how the worst excesses are being reined in;

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1 Paper presented at a "Litigation Skills Masterclass" seminar, Stamford Plaza, Auckland, 25 November 2015.
2 *Berezovsky v Abramovich* [2012] EWHC 2463 (Comm), Gloster J at [92].

(b) The content of written briefs. Above all, the evidence must be:

- *relevant*. This underlines the importance of first getting the pleadings right, and then focusing on the disputed issues as pleaded;
- *otherwise admissible*. Importantly this excludes statements of opinion and submission;
- *authentic*. This means expressed in the witness' own words, not the lawyer's words;

(c) The process of briefing witnesses. There are some good practices that should be observed to avoid any suggestion of coaching or collusion;

(d) Objecting to inadmissible content in the opposing party's written briefs. The courts are becoming less tolerant of transgressions, and more willing to exclude offending material prior to trial;

(e) Other options where there are significant factual disputes and credibility issues -- such as oral evidence directions and orders for simultaneous exchange of briefs.

The shift from oral evidence in chief to written briefs

Why the change?

5. In the 1980s, when I began in legal practice, evidence in chief in civil cases was still given orally. An informal proof of evidence would be prepared, but that remained confidential to the party and was not served. Oral testimony was elicited from the witness by non-leading questions. It was not always a straightforward task. This exchange was observed in the Invercargill High Court in a salvage claim case before the late Justice Henry:

> Mr Arthur: Now Mr Cantrick, could you please just describe, in your own words, what you recall happened that morning.
> Witness: Look, if I've told you once I've told you a thousand times what happened.
> Henry J: Mr Cantrick, I understand that you have told your lawyer what happened. But you haven't yet told me, and I would very much like to hear from you.

6. Oral evidence in chief had significant advantages. The Judge was able to evaluate the witness as the evidence unfolded, and could assess the extent of the witness' actual recollection and knowledge. The shift to written briefs in civil proceedings in the late 1980s was a radical

change.[3] A senior counsel who opposed the change recalls, with lingering indignation, being described by Tompkins J as a "dinosaur". Those supporting the innovation argued that the pre-trial exchange of written briefs would lead to greater efficiency, all cards on the table, better managed evidence, more focused cross-examination, and a more informed assessment of trial risk and settlement.

7. This wish list ultimately proved more illusory that real, as will be discussed below. But for a while the change to written briefs was warmly extolled as progressive and positive. Thomas J seemed especially content with the new regime in *CC Bottlers v Lion Nathan Ltd*[4], a 1993 case. The practice has long become standard. Both the Evidence Act 2006 and the High Court Rules now enshrine the use of written briefs.

8. Section 83(1)(a) of the Evidence Act reflects the traditional principle of orality. But s 83(1)(b), expressly allows, as an alternative, the use of affidavits or written statements in civil proceedings where the parties consent or where the rules of court permit or require. Section 83 states, insofar as relevant:

> **83 Ordinary way of giving evidence**
> (1) The ordinary way for a witness to give evidence, is –
> (a) in a criminal or civil proceeding, orally in a courtroom in the presence of –
> (i) the Judge, or, if there is a jury, the Judge and the jury; and
> (ii) the parties to the proceeding and their counsel; and
> (iii) any member of the public who wishes to be present, unless excluded by order of the Judge; or
> ….
> (c) in a civil proceeding, in an affidavit filed in the court or by reading a written statement in a courtroom, if –
> (i) rules of court permit or require the giving of evidence in this form; or
> (ii) both parties consent to the giving of evidence in this form.
> (2) An affidavit or a written statement referred to in subsection (1)(b) or (c) may be given in evidence only if it –
> (a) is the personal statement of the deponent or maker; and
> (b) does not contain a statement that is otherwise inadmissible under this Act.

9. Similarly, r 9.51 of the High Court Rules (**Rules**) states that:

> unless otherwise directed by the court or required or authorised by these rules or by an Act, disputed questions of fact arising at the trial of any proceeding must be given by means of witnesses examined orally in open court.

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[3] The use of written briefs had become common practice in New Zealand by the late 1980s/early 1990s. It became the default position under the High Court Rules in 1996 when rr 441B-441G were introduced. In England written briefs were used in certain divisions of the High Court from 1986, and they became generally used in the English courts in the mid-1990s.

[4] [1993] 3 NZLR 176; (1993) 6 PRNZ 424 (HC).

The 2013 changes to the Rules

10. The exchange of written briefs has long been the default position under the Rules.[5] In 2008 the Rules Committee initiated a consultation that eventually resulted in the 2013 reforms.[6] The Committee initially proposed to get rid of the presumption in favour of written briefs. Instead the court would have the option of directing that evidence be led "by written brief or orally or a combination of both".[7]

11. The proposal was driven by frustration over the growing excesses of written briefs:

    (a) Far from improving efficiency, preparation of written briefs consumed more time than oral testimony. This was largely due to the relentless precision with which lawyers were drafting and re-drafting these documents.

    (b) The words of the lawyer were too often substituted for the words and recollection of the witness, obscuring the evidence. This was seen as a widespread problem;

    (c) Written briefs did not focus on the relevant issues. They were far too long and invited unnecessary cross-examination.

    (d) As civil litigators became less experienced in leading witnesses, written briefs increasingly paid only lip service to the rules of evidence.

12. A return to oral evidence in chief would also have restored the opportunity for the Judges to evaluate factual evidence as it emerged at trial. However, the proposal was opposed by the Law Society, and the Bar Association's members were divided. Instead, in 2013 the much more modest changes to rr 9.1-9.11 were made.[8] The 'default' position' of written briefs remains (rr 9.7). The main change was the introduction of r 9.10, under which the court may make an "oral evidence order" where there are "significant disputed facts". A procedure was also added, in r 9.11, for pre-trial objection to inadmissible content in written briefs.

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5 Unless the court otherwise ordered: former rr 441B-441E, and former rr 9.2-9.5.

6 As from 4 February 2013 by r 20 of the High Court Amendment Rules (No 2) 2012.

7 Rules Committee Consultation Paper, "Case management – written briefs", December 2008. Where evidence was to be led orally it was proposed that a short 'will-say' statement would be served in advance.

8 Rules Committee Consultation Paper, "Proposal for reform of the rules relating to written briefs", 1 September 2009, para 10, Appendices C & D.

13. To address concerns about the way lawyers were drafting written briefs, r 9.7(4) was also introduced in 2013. It repeats and expands on the requirements in s 185(3) of the Evidence Act.[9] It reads:

> (4) Every brief-
> (a) must be signed by the witness by whom the brief is made:
> (b) must be in the words of the witness and not in the words of the lawyer drafting the brief:
> (c) must not contain evidence that is inadmissible in the proceeding:
> (d) must not contain any material in the nature of a submission:
> (e) must avoid repetition:
> (f) must avoid the recital of the contents or a summary of documents that are to be produced in any event:
> (g) must be confined to matters in issue.

14. Rule 9.7(5) was added to give the court express power to exclude infringing content:

> (5) If the brief does not comply with the requirements of subclause (4) the court, prior to or during the trial, may direct that it not be read in whole or in part, and may make such order as to costs as the court sees fit.

15. In Australia and England there are even more extensive requirements, as well as detailed practice guidelines.[10] Policing by the judiciary has also tended to be stricter.

The content of written briefs

16. When a written brief is prepared, the witness' evidence in chief is, in effect, given in legal offices instead of the courtroom. Inevitably there is a greater risk that the true recollection and words of the witness will be contaminated by the reconstruction, language and advocacy of the lawyers preparing the brief. A draft brief will often go through multiple revisions, dissected by a team of solicitors and counsel. There was certainly little restraint exercised in the early era of written briefs. As one senior counsel has observed: [11]

> they were seen as an open invitation to combine evidence, opinion and submission in the one document, and where even basic rules such as the hearsay rule could be safely disregarded.

17. The problem remains, if not as acutely. Although a Judge of the English Commercial Court was recently scathing of a witness' brief which he regarded as "part of a trend":[12]

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9 Similar requirements are also contained in r 9.76 in relation to evidence given by affidavit at trial. As to affidavits in interlocutory applications refer rr 7.29 and 7.30.

10 See, for example, the very good Western Australian Bar Association Best Practice Guide 01/2009/2011, "Preparing Witness Statements For Use in Civil Cases".

11 J A Farmer QC, "Why the Rules of Evidence Matter in Civil Cases", 2013. See also Justice Alan Robertson "Affidavit Evidence", College of Law 2014 Judges' Series.

12 *Renaissance Capital v African Minerals Ltd* [2014] EWHC 2004 (Comm), Field J at [90].

> Mr Dickson's witness statement was in large part an exercise in advocacy rather than a straightforward account to the best of his recollection of what was said and done on the relevant occasions

18. In the wake of the 2013 reforms our courts will also likely become less tolerant of this. It is therefore important that written briefs only record testimony that could otherwise be given orally, and in the witness' own words. The rules of evidence, now largely codified in the Evidence Act, are wide-ranging. I intend to focus on the more fundamental requirements of that Act and the Rules, as they are the ones most commonly sinned against in civil cases.

Relevance

19. Section 7 of the Evidence Act embodies the core principle that all relevant evidence is admissible (unless excluded under any Act) and the corollary, that all evidence that is not relevant is inadmissible. It provides:

> 7 **Fundamental principle that relevant evidence admissible**
> (1) All relevant evidence is admissible in a proceeding except evidence that is –
> (a) inadmissible under this Act or any other Act; or
> (b) excluded under this Act or any other Act.
> (2) Evidence that is not relevant is not admissible in a proceeding.
> (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

20. The test of relevance is, in terms of s 7(3), "a tendency to prove or disprove anything that is of consequence in the determination of the proceeding." The Supreme Court in *Wi v R*[13] emphasised that this is "not an exacting test". The question is whether the evidence has "some, that is any" probative tendency.[14]

21. In a civil case, at the risk of stating the obvious, the pleadings are central. The pleadings, including particulars, define and identify the issues.[15] Those issues then largely determine what evidence is relevant and therefore admissible – as well as the direction of many other aspects of the litigation, including discovery, the opening and closing arguments, the reasons for judgments and the availability of arguments on appeal. The importance of a properly formulated and succinct pleading identifying the real issues requiring resolution cannot be over stressed.[16]

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13 [2009] NZSC 121; [2010] 2 NZLR 11, Tipping J at [8].
14 Tipping J at [8].
15 *APN New Zealand v Simunovich Fisheries Ltd* [2009] NZSC 93; [2010] 1 NZLR 315, at [17] and [20].
16 "A Judge's Viewpoint: the role of Pleading", paper presented by The Hon Justice Steven Rares, Federal Court of Australia, and The Hon Justice Richard White, Supreme Court of New South Wales, the 2012 Judges' Series, 16 June 2012, pp 3-5.

22. Witness briefs should therefore be focused on the facts relevant to the issues in dispute on the pleadings,[17] and essential background. Rule 9.7(4)(g) now expressly states that briefs must "be confined to matters in issue". They should also be as concise as possible without omitting anything significant. This means ditching the popular 'kitchen sink' approach. Witness statements, especially in larger cases, are often far too long, the real issues obscured by endless detail.

23. In England, in a number of recent Commercial Court cases, the Judges have criticised "an increasing trend…for factual witness statements to get longer and longer".[18] Irrelevant evidence also creates its own mushrooming effect, as it prompts lengthy evidence in response and extensive cross-examination. If a witness statement deals with every conceivable point, opposing counsel are reluctant to leave those points unchallenged.

24. It happens even in smaller cases. In *Walker v Walker*[19], for example, Priestley J held that the wife's evidence of the husband's possible infidelity in the family car was irrelevant and had been rightly struck out by the Family Court Judge pre-trial:[20]

> The most startling portion which [the Judge] correctly struck out was evidence by the wife to the effect that whilst grooming a family car, she discovered items which suggested to her that the husband had consorted with a woman inside the vehicle. How such assertions could have been seen as relevant is hard to discern….the proposed evidence could not possibly have altered the parties' respective entitlements to relationship property.

25. Importantly, as Priestley J also pointed out, if the evidence had stayed in, "the husband would have been obliged to lead rebuttal and possibly retaliatory evidence", compounding the irrelevance.

26. Relevance is a threshold question. It is essential, as s 7 makes clear. However, relevant evidence may be otherwise inadmissible or excluded. Importantly, s 8(1) of the Evidence Act directs a Judge to exclude evidence if its probative value is outweighed by the risk that the evidence will either have an unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding. Another reason to keep out of the brief any material that is of only peripheral relevance but likely to inflame things.

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17 Evidence to prove admitted facts is irrelevant under s 7, or if having some residual probative value, may be excluded under s 8(1)(b) of the Evidence Act: *Parihoa Farms Ltd v Rodney District Council* (2010) 20 PRNZ 8, Duffy J at [11]-[13].

18 *Renaissance Capital v African Minerals Ltd* [2014] EWHC 2004 (Comm), Field J at [201]-[202]; see also *Kaupthing Singer & Friedlander Ltd v USB AG* [2014] EWHC 2450 (Comm), Andrew Smith J.

19 [2006] NZFLR 768 (Priestley J).

20 *Walker v Walker* [2006] NZFLR 768, at [15].

Opinion evidence

27. The briefs of evidence of lay witnesses are often littered with statements of opinion. An "opinion" is defined in s 4(1) of the Evidence Act as "a statement of opinion that tends to prove or disprove a fact". It may, for example, be a statement of belief or judgment, a viewpoint, or an inference or conclusion. Sometimes there is a fine line between opinion and fact. Section 23 of the Evidence Act makes it clear that all statements of opinion are inadmissible, subject to only two exceptions – those set out in ss 24 and 25. Section 25 relates to expert opinion. It does not apply to a lay witness. Section 24 does apply to lay witnesses and relates to opinions necessary for communicating what a witness perceived. It reads:

> **24 General admissibility of opinion**
> A witness may state an opinion in evidence in a proceeding if that opinion is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard or otherwise perceived.

28. Section 24 captures the common law approach to admissibility of lay opinion evidence. Lay witnesses are, for example, routinely permitted to give evidence concerning such things as apparent age, identity, speed, and a person's physical and emotional state.

29. Recently, in *Green v Green*,[21] Winkelmann J stated that for evidence to be admissible under s 24, two basic requirements must be met: [22]

- First, the opinion must be the only way to communicate effectively the information to the Judge. The information must be something that the Judge cannot otherwise infer; and

- Secondly, the opinion must be about something the witness has personally perceived, and so the factual basis for the opinion must be described by the witness as far as possible.

30. The Court of Appeal judgment in *R v Bain*[23] provides a good example. A constable who arrived at the Bain household shortly after the 111 call gave evidence that David Bain "did not appear distressed". For that opinion to be admissible under s 24, the Court said that the constable should first describe his observations factually, "for example by noting the absence of any particular sign of distress, such as crying, shaking and the like."

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21 [2014] NZHC 1991.
22 Winkelmann J at [7], referring to Mahoney, McDonald, Optican and Tinsley, *The Evidence Act 2006: Act and Analysis*, 3rd ed, 2014, at 103-104.
23 See *R v Bain* [2009] NZCA 1, William Young P, Chambers and O'Regan JJ, at [30]-[38].

31. *Roberts v Northland Regional Council*[24] involved an unusual, somewhat rustic, application of s 24. The appellant, the owner of a dairy farm near Waipu, was prosecuted under the Resource Management Act 1981 for discharging cow effluent from his two "herd homes" over a period of six days. A council employee estimated the depth of the effluent based on:

> …my knowledge and experience of how long my gumboots are and where the effluent comes to on my gumboots.

His estimate that the discharge had continued over 6 days was based on:

> …my observations of what was above the floor in the herd homes. On the volume of effluent that was in front of the floor of the herd homes, what went out the back of the herd homes and basically my knowledge of things effluent, including the fact that the industry guideline for effluent volumes from the cow is 3.4 litres per cow per hour.

32. Andrews J held that the opinion was admissible under s 24. There was factual evidence (in the form of the effluent seen, described and photographed) from which the witness properly drew an inference as to how long the discharge had continued.[25] The witness' use of his gumboots as a ready at hand measure was sufficiently reliable. He "knew the dimensions of his gumboots" and "was drawing an inference from observed facts, in light of his experience".[26]

33. But unless s 24 applies it is best to keep opinion out of the brief. In the *Green* case Winkelmann J ruled inadmissible numerous statements of opinion (and argument) in the affidavit evidence. The proceeding concerned challenges to a will and to the exercise of powers of removal and appointment. The plaintiff alleged that the late Mr Green lacked capacity and was subject to undue influence. A number of lay witnesses, who were Mr Green's friends, expressed opinions about his mental functioning and susceptibility to influence during the last few months of his life. The plaintiff objected to this evidence.

34. Winkelmann J's judgment assessing the admissibility of particular paragraphs in the affidavits is a very useful guide to what is or is not permitted under s 24. The analysis applies equally to briefs of evidence. Here are just a few examples:

- *Indeed, as I have said, Hugh was simply not a person who was able to be prevailed upon or influenced against his will.*

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24 [2014] NZHC 284.
25 At [54]-[59].
26 At [61]-[62]. Andrews J also observed that the witness' on the job experience would have been sufficient to qualify him as an expert witness in the field of farm dairy effluent (at [63]) for the purposes of s 25.

This statement was excluded because it was repetitive and was opinion evidence. It did not come within s 24 because there were other ways to communicate the relevant material, "for instance a description of Mr Green's general approach to decision-making and his personality" as observed by the witness.[27]

- *I am extremely surprised to hear this said of Hugh. Certainly when I was with him there was nothing apparently wrong or lacking with his mental functioning. This appeared to remain so right up until approximately four weeks before his death after which time I cannot comment.*

The first sentence was inadmissible. The witness' reaction to the allegations had no probative value. The rest, although opinion, was admissible as it conveyed the fact that the witness did not observe any defect in Mr Green's mental functioning. That had probative value, and there was no other way to convey that.[28]

- *His mind was sharp and adequate. Certainly I was at no time under any apprehension that he may not have had full cognitive functioning.*

Both sentences were admissible. They were descriptive of Mr Green's mental functioning in a way that could not otherwise be adequately conveyed.[29]

Submission

35. Lawyers often cannot resist using the written brief (or affidavit) as a vehicle for arguing the case. The place for this is the opening and closing submissions, not the evidence. Restraint is needed. Presenting submissions in the guise of evidence may infringe all or any of s 7(not relevant), s 8(prejudicial), s 23(opinion), s 83(3) and r 9.7(4)(c)(inadmissible), r 9.7(4)(d)(submission), r 9.7(4)(e)(repetition) and r 9.7(4)(f)(commentary on documents). In the case of affidavits r 9.76(2) applies.[30]

Argumentative statements

36. The most common sin is including in written briefs argumentative, partisan and combatant comments. In *Walker v Walker*[31] Priestley J was moved to state:

> …an affidavit is a mechanism to place relevant factual matters before the Court. It is not a device to score points, denigrate or indulge in advocacy….Given the personal and emotional underpinning of family law cases there is an understandable temptation on the part of parties to

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27 *Green v Green* [2014] NZHC 1991, Winkelmann J at [16]. The recent English case of *Re W* [2015] EWHC 2039 (Fam) also illustrates the perils of giving opinion evidence in written statements.

28 Winkelmann J at [38] and [39].

29 Winkelmann J at [14].

30 Rule 9.76 applies to affidavits used at trial. For interlocutory affidavits see rr 7.29 &7.30.

31 [200] NZFLR 768 (HC), referred to in *MacDonald v Tower Insurance Ltd* [2014] NZHC 2876, where affidavit evidence was ruled inadmissible as being "no more than submissions" (at [17],[18] & [27]).

> paint a full and self-justifying picture. Sometimes such an exercise may be therapeutic. Affidavit evidence, however, is not therapy.

37. Lawyers often embellish written evidence with expressions of surprise, disagreement, and indignation. In the *Green* case Winkelmann J ruled a number of argumentative comments in affidavits to be inadmissible. These included, for example, statements that "I completely reject this as far as I am able to say", "Those allegations on the part of Maryanne are not at all correct", "I…for my part do not accept that this would be so", and "I am very surprised at the suggestion that he was in some way improperly influenced by John and/or Frances or others…".

38. *Donovan v Graham*[32], a judicial review of a costs award made in a malicious prosecution case brought against Customs, contains some vivid examples of argumentative statements that were struck out of the second respondent's affidavits. McGechan J described them as "gratuitous, egregious and provocative". A few examples:

> That failure by the prosecution to put its case to me in cross-examination was, at the time, embarrassingly obvious. The prosecution had been ready enough to make an assertion in its opening, effectively accusing me of forgery; to repeat that assertion during the hearing; yet, in the way it conducted its case, it was not prepared to put the proposition to me on the only occasion when my answer could be evaluated dispassionately by the District Court Judge; and notwithstanding that failure…
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> In my experience, investigating Customs officers bring great pressure to bear on Customs agents and …
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> He appears to have disregarded matters which were helpful to Mr Thompson's defence.
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> The decision not to be completely candid in that matter is further evidence of the malice that underlay the conduct of the prosecution case.

39. More recently, in the English case of *Kaupthing Singer & Friedlander Ltd v UBS AG*[33], where one of the witness statements was full of argument, the Judge ordered that a revised brief be prepared limited to admissible evidence. But the revised brief still did not fully comply. This significantly discredited the witness:[34]

> Mr Brazzill's statement was not satisfactory, not least because it contained a great deal of argument and contentious comment on documents (a common problem with statements, despite the important guidance in 32.4.5 of the White Book). It was not only unnecessarily long, but it presented UBS with an unfair dilemma about what should be challenged in cross-examination. I was not willing for him to give evidence in chief by way of confirming the original statement. Accordingly, those acting for KSF prepared an amended version of the statement, which removed a good part of the more offensive comments, and I allowed it to stand as Mr Brazzill's evidence in chief so as not to disrupt the trial further.

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32 (1991) 4 PRNZ 311, McGechan J.
33 [2014] EWHC 2450 (Comm).
34 Andrew Smith J, at [14] and [15].

> I do not consider Mr Brazzill a satisfactory witness: it became clear that he really knew nothing about some matters still described in his statement after it was supposedly revised to omit what was simply his comment.

Commentary on documents

40. It is also quite common to see witness statements that largely comprise commentary, often contentious, on documents in the trial bundle, as well as long quotations from those documents. In *JD Weatherspoon v Harris,*[35] a decision of the English High Court of Justice, the "vast majority" of the brief of a Mr Goldberger, a director of the second to fourth defendants, was commentary on documents, as well as argument, and opinion. The claimant applied to strike out all but seven of 231 paragraphs. Little of substance was left. The Judge accepted that the brief was an abuse:[36]

> Mr Goldberger would not be allowed at trial to give oral evidence which merely recites the relevant events, of which he does not have direct knowledge, by reference to documents he has read. Nor would he be permitted at trial to advance arguments and make submissions which might be expected of an advocate rather than a witness of fact.

Legal propositions

41. Perhaps the most blatant form of submission in a brief is when a witness of fact puts forward legal propositions in support of the case. This might include legal principles, legislative provisions, and cases. I have even seen briefs and affidavits containing extracts from judgments as well as learned explanations about how the judgment helps the witness' case.

42. A striking example of what can go wrong when a witness' written testimony is used as a vehicle for a complex legal argument is the English case of *Alex Lawrie Factors Ltd v Morgan.*[37] Mrs Morgan was defending a claim on the grounds that she had been fraudulently induced to sign a deed of indemnity by her former husband. Her affidavit evidence included a number of sophisticated points about the House of Lords decision in *Barclay's Bank Plc v O'Brien*. She said she had studied the judgment "in some detail".

43. Well that backfired. The trial Judge concluded that it was 'incredible" to suggest that a witness with such a sophisticated understanding of the case law could have been misled. The deed of indemnity was upheld. On appeal new evidence revealed that Mrs Morgan's affidavit had been her former lawyer's work not her own, and that she had limited literacy and

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35 [2013] EWHC 1088 (Ch); [2013] 1 WLR 3296, Sir Terence Etherton, Chancellor.

36 At [39].

37 [2001] C.P. Rep. 2, Court of Appeal, Brooke LJ, Robert Walker LJ and Douglas Brown J. See also *ED & F Man Liquid Products v Patel* [2002] 1706 EWHC (QB), where Judge Dean QC was very critical of an "over-extensive" witness statement that made legal arguments.

intelligence. She had been at the bottom of her class at school, had never read a book, and could not spell. The Court of Appeal was unimpressed with what had happened. Brooke LJ said:

> The case is a very good warning of the grave dangers which may occur when lawyers put into witnesses' mouths, in the affidavits which they settle for them, a sophisticated legal argument which in effect represents the lawyer's arguments in the case to which the witnesses themselves would not readily be able to speak if cross-examined on their affidavits….Those considerations apply just as much to statements of truth under the Civil Procedure Rules as they do to affidavits.

44. This case is of course an extreme example. But lesser transgressions abound. A short but important principle should be observed: stick to the facts.

In the witness' own words

45. In my view this is incredibly important. Rule 9.7(4)(b) now expressly requires that every brief "must be in the words of the witness, and not in the words of the lawyer drafting the brief". This was inserted in 2013 to try and curb the hijacking of witness briefs by lawyers. Whilst the Judges and the Bar thought this was a significant concern, the New Zealand Law Society, surprisingly, disagreed and saw nothing wrong with this:[38]

> Cases where actual words of the witness are vital to a decision are only a small minority. In the majority of cases, a [written] statement is likely to assist rather than hinder the judicial process. Clients often do not have the skills to communicate effectively.

46. This is a surprising statement. A written brief is the witness' evidence not the lawyer's. It is meant to be a record of what the witness would otherwise say orally in the courtroom. It should record the witness' own words. It is after all *evidence.* It will, when read, become the witness' sworn testimony. The brief is different from other court documents such as pleadings, submissions, chronologies and the like. A wholly different approach should be used.

47. We have all at times gilded the lily -- improved the wording of a draft brief to look more sophisticated and impressive. But that temptation should be resisted. If a witness wants to say he "got fired", "went bust", "totalled his car", "was absolutely gutted", or "got drunk", let him. Do not change it to "was retrenched", "became insolvent", "wrote off his automobile", "was disappointed" or "became intoxicated". Although perhaps, on reflection, "intoxicated" is preferable to "drunk" (even in Australia) as this memorable exchange suggests:[39]

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[38] 2009 New Zealand Law Society submission, summarised in Rules Committee Consultation Paper "Proposals for the Reform of the Rules Relating to written Briefs", 1 September 2009, Appendix B, at [10].

[39] Transcript of High Court of Australia in *Joslyn v Berryman* S122/2002 [2002] HCA Trans 573 (8 November 2002).

Kirby J:	I just think "drunk" is a label and I am a little worried about – it is not necessary to put that label. It is just that they were sufficiently affected by alcohol to affect their capacity to drive.
Mr Jackson:	Yes.
Hayne J:	Perhaps "hammered" is the more modern expression, Mr Jackson, or "well and truly hammered".
Mr Jackson:	I am indebted to Your Honour;
Kirby J:	I do not know any of these expressions.
McHugh J:	No no. Justice Hayne must live a very different life to the sort of life we lead.
Kirby J:	I have never heard the word "hammered" before, never. Not before this very minute.

48. There are very good reasons for letting the witness speak for himself or herself:

(a) It preserves the authenticity and credibility of the evidence. The Judge will immediately detect the stilted and artificial language of the lawyer.[40] The witness' own voice will give it colour, and make it more powerful and convincing than a brief that is an exercise in refined legal drafting. Imagine changing the following statement by Sonny Bill Williams (explaining why he gave his World Cup gold medal to young Charlie Lines), from this engaging account [41]

> I was walking and doing a lap of honour with the boys and a young fella came running out and he got smoked by the security guard, like full-on tackled him. I felt sorry for the little fella. If that was a younger brother or cousin I would have given the security guard a hiding. But I just picked the kid up and took him back to his old lady and tried to make the night more memorable for him"

to this deadened version:

> I was completing a lap of honour with my team mates when a young boy ran out and was intercepted by the security guard who forced him to the ground. I sympathised with the young boy. Had that happened to a younger brother or cousin I would have communicated my displeasure to the security guard in a physical manner. But I just assisted the boy to his feet and then conveyed him back to his mother and endeavoured to make the night more memorable for him.

(b) When the witness answers questions put by the cross-examining counsel or by the Judge it will become obvious if the written evidence is largely the product of the lawyer. It may even be apparent when the witness is reading the brief, especially if the witness stumbles over the words. In one case the written brief described a fight as a "fracas". Clearly unfamiliar with this word, the witness pronounced it throughout as "frackarse". In another case the witness, a trawler fisherman, attempted to read a sentence stating that the actions of his skipper were "erratic". But he wrongly said "erotic". And there are few witnesses who are fluent in legalese -- although it is rumoured that a prominent (now

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[40] See the comments of Callinan J in *Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd* [2006] HCA 55; (2006) 231 ALR 663, at [175].

[41] http://www.theguardian.com/sport/2015/oct/31/sonny-bill-williams-world-cup-winners-medal-14-year-old-fan

retired) New Zealand Judge, when at the Bar, drafted an affidavit for a truckie who displayed an impressive mastery of Latin.

(c) It reduces the risk of lawyers coaching or 'massaging' the witness' evidence beyond the witness' genuine recollection to better suit the party's case.

(d) The witness may not survive cross-examination with the brief intact. The carefully crafted evidence may unravel when tested. The witness may even disown part of the brief under cross-examination. It is a low point when a witness says "I didn't say that, my lawyer put that in". Then further questions follow about how the brief was drafted, who did the first draft, and so on.

(e) It will be frustrating for the Judge if he or she later has the task of trying to integrate serious discrepancies between the written brief, any further evidence given orally in chief, and the evidence given under cross-examination.

49. When briefing the witness it is therefore important to let the witness do most of the talking. It is of course for the lawyer to ask all the necessary questions (preferably in an open, non-leading way, at least on contentious issues) and draw from the witness the relevant facts. In addition the lawyer plays an important role in ensuring that the witness is familiar with the relevant documents, and in determining the structure and organisation of the brief. The lawyer should also cull irrelevant or other inadmissible material. This is largely 'invisible advocacy'. The drafting and revision process should preserve the witness' words, not overly refine them. It must be the witness' own story.

50. In complex commercial cases some lawyers have a practice of reviewing the documents and then proceeding to draft the witness' statement for him or her, putting comments into the witness' mouth along the way. "The senior executives of large corporations", they say, "do not want to be bothered with all that". The witness is only invited to review the draft when it is well advanced, sometimes at the same time as counsel. That is not how written testimony should be prepared. The witness should be invited to review the relevant documents (organised by the lawyer in a logical way) to refresh his or her memory, and then an initial briefing session should follow. Only then should the lawyer prepare the first draft, and in the words of the witness as far as possible.

51. The problem with putting words in a witness' mouth is compounded when the lawyer drafts virtually identical statements for more than one witness about a specific topic. Believe it or not this has happened. It should never be done. It makes it obvious that a lawyer has drafted

the statements, and/or is highly suggestive of collusion between the witnesses (an issue discussed further below). Both possibilities seriously prejudice the value of the evidence.

52. In a decision of the NSW Supreme Court, *Macquarie Developments Pty Ltd v Forrestier*,[42] Palmer J expressed concern about the virtually identical affidavit evidence filed by two of the defendants' witnesses in relation to critical discussions. The defendant's solicitor had to give evidence about how he produced the affidavits. It emerged that he had separately briefed Gregory Forrestier, and his brother Bradley Forrestier. But the solicitor had then 'cut and pasted' the relevant passage from Gregory's affidavit into Bradley's affidavit. Palmer J stated:[43]

> Clearly, the Defendants' solicitor failed to appreciate that the evidence of each witness must be in the words of that witness and that it is totally destructive of the utility of that evidence by affidavit if a solicitor or anyone else attempts to express a witness' evidence in words that are not truly and literally his or her own

53. As the Judge also observed, where the identical evidence is due to the lawyer's own drafting, rather than any collusion, the witnesses' credit and the party's case may be unjustly damaged.

Manner in which the written brief is prepared

54. Counsel and solicitors should avoid practices that may tend to encourage coaching, collusion, or other contamination of the evidence of their witnesses of fact,[44] especially in relation to contentious issues, including:

- providing the draft written brief of one witness to another;
- telling one witness what another witness has said; or
- interviewing a witness in the presence of other witnesses of the same facts.

55. It is preferable for the lawyer to identify topics relevant to the issues that have been addressed in other witness briefs, and to ask the witness appropriate questions to elicit the testimony that the witness is able to give. Each witness should also be reminded not to discuss their evidence with other witnesses. Concerns about contamination of evidence are not limited to criminal

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42 [2005] NSWSC 674 (Palmer J).

43 At [89]. See also the comments of Judd J in *Woodcroft-Brown v Timbercorp Securities Ltd* [2011] VSC 427, at [569]-[570], where important parts of the "overworked" witness statements were in almost identical terms.

44 A different approach may be used with expert witnesses, but this paper is concerned only with witnesses of fact.

proceedings, but also arise in civil cases. At trial an order is often sought excluding witnesses from the courtroom while other witnesses give evidence.[45]

56. In the *Forrestier* case Palmer J was also concerned that the evidence of one of the plaintiff's witnesses was "mirrored word for word" in passages of another witness' affidavit, again in relation to what was said in critical discussions. There was an "inescapable inference" that those witnesses had colluded in the preparation of this decisive evidence. This, said the Judge, cast a cloud over the evidence and their credibility as a whole.[46]

Objecting to inadmissible content

57. When the other party's briefs are served, they should be scrutinised for inadmissible content. It may not matter if it relates only to formal, non-contentious or insignificant material. But otherwise counsel should object to it. The reasons for taking a strict approach were emphasised by the High Court of Australia in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*:[47]

> Written statements of witnesses, no doubt prepared by lawyers, were received as evidence in chief. Those statements contained a deal of inadmissible material that was received without objection. The uncritical reception of inadmissible evidence…is to be strongly discouraged. It tends to distract attention from the real issues, give rise to pointless cross-examination and cause problems on appeal where it may be difficult to know the extent to which the inadmissible material influenced the judgment at first instance.

58. A formal process for raising an objection with the offending party is now contained in r 9.11, one of the new rules added in 2013. It provides:

> **9.11 Compliance with the Evidence Act 2006**
> (1) Any challenge to the admissibility of a brief, in whole or in part, must be notified to the party or parties concerned within 20 working days after receipt of the brief by the challenging party.
> (2) If the issue is not resolved between counsel in a further 10 working days, notice that there is an admissibility issue must be given to the court by the challenging party.

59. Rule 9.11, with its focus on admissibility, does not appear to apply to every requirement in r 9.7(4), but in practice any notice is likely to include all grounds of objection -- under the

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45 *Reynolds v Calvert* [2014] NZHC 1975 (Dunningham J). Exceptionally, a witness who is also a party or a representative of a party may also be excluded: *Maharua Corporation v Amatal Corporation* (2004) 17 PRNZ 67 (Priestley J).

46 At [61]-[65]. It was accepted that the plaintiffs' solicitor had briefed the witnesses separately. They made the changes to their draft affidavits themselves. See the similar observations of Ward J in *Rosebanner Pty Ltd v Energy Australia* [2009] NSWSC 43 at [334].

47 [2004] HCA 52; (2004) 219 CLR 165, at [35].

Evidence Act and r 9.7(4).[48] Nor does adherence to the time frames appear to be mandatory, given that the court may exercise its exclusion powers under r 9.7(5) prior to or during trial.[49]

60. Counsel should try to resolve any dispute, and the notice provisions in r 9.11(2) may encourage cooperation. If not, counsel will then need to decide whether to apply for a ruling on admissibility before the trial, or to leave the issue until trial. The advantage of applying in advance is that it will determine whether or not evidence in response or cross-examination is needed. Without a ruling counsel may not be confident enough simply to disregard the material and leave it unanswered. The disadvantage will be the added cost, and finding time for the application to be dealt with by the court in the (often) short time before the trial begins.

61. The courts have frequently observed that the jurisdiction to rule evidence inadmissible in advance of trial is usually "sparingly exercised".[50] In the past the courts have preferred to reserve such rulings until trial. The usual reason has been that the Judge is not comfortable that, pre-trial, he or she sufficiently understands the issues and evidence. But now so much is laid out in advance – the filing of pleadings and opening submissions, the service of written briefs, and the many case management conferences. The courts seem to be becoming more receptive to excluding inadmissible material in advance, where that can fairly be done. The introduction of r 9.7(4) and the accompanying exclusion power in r 9.7(5) reinforces this trend.

62. Recently, in *MacDonald v Tower Insurance*, Dunningham J encouraged counsel to raise objections before trial, adopting the following comment of Duffy J in the *Parihoa Farms* case:[51]

> …the opposing party should not be overly deterred from objecting to such evidence in advance of the trial. Such applications impose discipline on the parties to ensure their evidence is properly admissible. Secondly, if they are successful, they will also avoid the need for evidence in response for the opposing party…

In *Parihoa* the plaintiff's application resulted in over half of the paragraphs in the offending brief of evidence being voluntarily removed by opposing counsel.

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48 As did the defendant's notice in *MacDonald v Tower Insurance Ltd* [2014] NZHC 2876 (Dunningham J).

49 Although the court's expectation will be that the time frames should normally be observed. In *MacDonald* a late application was filed by the plaintiff without the prior r 9.11 notice and Dunningham J dealt with it so as not to delay the hearing getting under way.

50 *Jarden v The Earthquake Commission* [2015] NZHC 204, Kos J at [15]; *MacDonald v Tower Insurance Ltd* [2014] NZHC 2876; (2014) 22 PRNZ 490, Dunningham J at [20]; *Parihoa Farms Ltd v Rodney District Council* (2010) 20 PRNZ 8, Duffy J at [5].

51 *MacDonald* at [20], and *Parihoa* at [6].

63. Each case will turn on its own facts and will require a judgment call. The courts may be willing to make an advance ruling on admissibility in circumstances where, for example:

(a) The impugned evidence is critical to the issue before the court;[52]

(b) The evidence is plainly inadmissible, and that assessment can be made before trial without too much difficulty. It will help if the parties have their pleadings in order and the grounds of challenge are clearly articulated;

(c) The evidence, if allowed, will have a significant impact on the scope of the other party's preparation for trial, in terms of further evidence and cross-examination, and an award of costs would not sufficiently compensate for this;

(d) The time allocated for the fixture will be exceeded if the matter is not dealt with in advance, as was likely in *MacDonald*[53] and *Parihoa Farms*;[54]

(e) The evidence, and the need to respond to it, will lead to an escalation of irrelevant issues. As Duffy J noted in *Parihoa Farms*[55] (at [6]), the issues can "mushroom unnecessarily through evidence that heaps irrelevance upon irrelevance";

(f) There has been an "intolerable accumulation" of transgressions.[56] Enough may be enough.

64. Examples of recent cases where the courts have made inadmissibility rulings shortly before trial include the *MacDonald* case and *Jarden v The Earthquake Commission*[57]. In *MacDonald* Dunningham J ruled that three of the plaintiff's eight briefs were inadmissible in their entirety, and two were inadmissible in part. In *Jarden* Kos J ruled inadmissible parts of the briefs of two experts.

65. Where a ruling is reserved until trial counsel should preferably object to the offending evidence when it is led. Judges will sometimes admit the evidence provisionally, leaving admissibility to be determined at a later point of the trial, but there is now a greater willingness to deal with objections at the time they are raised, again if that can fairly be done. Section 14 of the Evidence Act does allow the admission of evidence provisionally but only

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52 *Deutsche Finance New Zealand Ltd v Commissioner of Inland Revenue* (2007) 18 PRNZ 710 (CA), Stevens J at [61].
53 At [21].
54 At [19].
55 *Parihoa Farms* Duffy J at [6].
56 *Parihoa Farms* Duffy J at [8].
57 [2015] NZHC 204. See also *Wheeldon v Body Corporate 342525* [2015] NZHC 336 (Muir J).

subject to further evidence later being offered which establishes its admissibility. It is not intended to be used simply to defer contested evidence rulings.

66. If an objection is upheld the usual result will be to 'red line' the inadmissible passages in the brief. Or (in the case of a pre-trial ruling) the Judge may direct the brief to be edited to remove the offending material altogether.[58] The Judge may, where appropriate, permit supplementary oral evidence (in proper form) to be led at trial to plug a gap left by excluded evidence.[59]

Other options for evidence in chief

Oral evidence directions

67. Where there is a significant factual dispute or key issue of witness credibility counsel should think about other procedural options. Oral evidence has a spontaneity and authenticity often missing in pre-prepared written material. There may therefore be tactical advantages in seeking an order that oral evidence be led on critical contentious issues.

68. Rule 9.10 (also introduced in 2013) now requires the parties to bring to the court's attention, within 15 working days of service of the chronologies, any significant disputed facts. The rule states:

> **9.10 Oral evidence directions**
> (1) After the preparation and service of the chronologies of facts, the parties must bring significant facts that are disputed to the attention of the court.
> (2) The obligation in subclause (1) may be discharged at a case management conference or issues or pre-trial conference, or at another time, but must, in any event, be discharged not later than 15 working days after service of the chronologies of fact has been completed.
> (3) The court may, before the giving of evidence, and either before or at the trial or hearing, direct that evidence be given orally (an **oral evidence direction**).

69. Under r 9.10(3) the court may make an "oral evidence order". It is unclear whether the notice requirements in rr 9.10(1) and (2) are intended to be a pre-condition to an application for such an order. Arguably not. Rule 9.10(3) appears to confer flexibility as to timing.[60]

70. The effect of an oral evidence direction is that the witness cannot read out the portion of their prepared written brief that is the subject of the direction (r 9.12(1)(a) & 9.12(2)). Instead, counsel must lead the witness orally in the traditional way. This allows the Judge to assess the

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58 Refer s 91 of the Evidence Act.
59 As occurred in *Scandle v Far North District Council* [2011] NZHC 279, Duffy J at [27].
60 If necessary, an application could arguably also be made under the court's inherent jurisdiction.

witness' recollection and reliability as the evidence unfolds.[61] If there are discrepancies between the brief and the oral evidence, the witness may be cross-examined on that.

71. The fact that a brief of evidence on the disputed issue is still served (r 9.7(3)) may diminish the benefits of oral evidence. Where there is a significant contest of "pure credibility" it may be worth seeking, in addition, an order for simultaneous exchange (discussed below). This would require an early tactical decision before the service of briefs is timetabled.

72. An oral evidence direction was made under r 9.10(3) in *Angus v Ace Insurance Ltd*.[62] The Pinelands Hotel in Kawerau had partly burnt down and the case involved disputed claims under two insurance policies. The defendants alleged that one of the plaintiffs, Mr Angus, had deliberately lit the fire. That was a crucial issue, and turned on Mr Angus' credibility. The plaintiffs obtained an order (after briefs of evidence had been served) that Mr Angus' evidence about the fire be given orally and not read. The defendants, surprisingly, opposed this but it ended up giving them an advantage. Their counsel was able to address various discrepancies between Mr Angus' oral evidence and his written brief.[63]

Simultaneous exchange of briefs

73. Another way of dealing with highly contentious issues is an order under r 9.7(2) for the simultaneous exchange of written briefs. Normally of course the defendant's briefs follow the plaintiff's briefs.

74. In the early years of written briefs, simultaneous exchange was actually preferred.[64] Later, in 1996, a new r 441B created a presumption in favour of sequential service. The current r 9.7 contains no such presumption. The court has a discretion to order simultaneous or sequential service "having regard to the needs of the case". However, sequential service remains the usual practice. This has some advantages. The defendant's evidence is likely to be more focused (rather than "shooting in the dark")[65] if the defendant first sees the plaintiff's evidence. Even more so in cases where the evidence must cover multiple and complex issues and extensive documents.

75. But the provision of written briefs by one side of also gives the other side an opportunity to rehearse their response. Although unusual, an order for simultaneous exchange may well be

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61 Refer Winkelmann, Asher, Fogarty and Miller JJ, *The new High Court Case Management Regime* (NZLS Seminar, February-March 2013) at 13-14.

62 [2014] NZHC 258, Cooper J at [28] and [29].

63 Cooper J, at [29].

64 See, for example, *CC Bottlers Ltd v Lion Nathan Ltd* [1993] 3 NZLR 176; (1993) 6 PRNZ 242 (HC) where Thomas J described this as the normal rule, and declined to depart from it in that case.

65 *CC Bottlers Ltd*, at 248-249.

appropriate where, in the particular case, it is important that a witness' recollection is independent and not formulated, or even concocted, to answer the other party's evidence.

76. Thomas J recently made such an order in *Capital and Merchant Finance Ltd v Perpetual Trust Ltd.*[66] There was a dispute about whether the parties' respective counsel had entered into an oral settlement agreement. This was strongly denied by the plaintiff, and by the plaintiff's counsel. The settlement agreement was pleaded as an affirmative defence, and this was to be determined as a separate question. The defendants, who had the onus of proof on this, sought an order that the briefs of the two counsel, who were key witnesses, be exchanged simultaneously.

77. The plaintiffs opposed this, arguing that there was a risk the two briefs would "talk past each other" resulting in extensive reply evidence. Thomas J disagreed. The evidence related to a single issue: was an oral contract formed? Her Honour decided that the Court would best be assisted by each witness' separate, independent recollection of events, uninfluenced by the other's evidence.[67] The Court could equally, in the circumstances, have made an oral evidence direction under r 9.10.

Conclusion

78. Love them or hate them, written briefs are here to stay. The real problem is not written briefs per se. The problem is what lawyers put in them. Stripped of their worst excesses, written briefs can be efficient, effective and fair. The guiding principle is a simple one: let the witness tell the court, in his or her own words, what was said and done at the relevant time.

79. That is what the courts want from witnesses of fact. Evidence, not advocacy. And they are increasingly willing to enforce this through advance admissibility rulings. Where there are crucial credibility disputes the use of oral evidence directions and simultaneous exchange of briefs is also likely to increase.

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66 [2014] NZHC 3205; (2015) NZAR 228, Thomas J at [69] to [89].
67 Thomas J at [87]-[89].