

TURKSLEGAL Q&A

Giving Evidence - What to do in these circumstances?

In this edition of TurksLegal Q&A, we respond to a client's question on giving evidence.

Q: In what circumstances might an insurance professional be called to give evidence?

Anyone would be hard-pressed to find a witness who relishes the opportunity to be examined or cross-examined in court. Nonetheless, insurance professionals may be required to justify their position taken on a particular claim and assist in the presentation of an insurer's evidence to a court.

In what circumstances might an insurance professional be called to give evidence?

Due to the contextual nature of the underwriting process, underwriters are commonly called upon to give evidence to particularise their underwriting of the risk. This is typically in instances where there has been alleged non-disclosure by the insured and the insurer has exercised a remedy under s. 29 of the *Insurance Contracts Act 1984*. The underwriter will be required to justify their decision that had there been proper disclosure, they would not have underwritten the risk on the same terms or at all.

Similarly, for claims assessors, evidence may be required in cases involving opinion-based clauses or where there are allegations of breach of the duty of utmost good faith on the part of the insurer. Focus will be placed on steps taken during the claims process, and any alleged flaws in the assessment or decision.

1. Preparing to give evidence

Only evidence relevant to the issues in dispute to help decide the case will be admissible in court. The introduction of that evidence can take several forms. It might be a witness statement or affidavit or given orally by you in court. However, even if you prepare an affidavit or statement you may still be required to attend court to admit that evidence or be cross-examined upon it.

Sound preparation of your case enables you to present yourself as a good witness. You should always assume your file will be produced to a court or a tribunal. Accordingly, hard copy or electronic files should be maintained in good order so that important information is readily accessible. File notes and correspondence (both internal and external) are critically important, as is adopting a professional tone in all forms of communication.

Assessment process and decisions will be examined in hindsight. Therefore, any file notes and internal communications should demonstrate that you have:

- considered the correct question,
- considered all the evidence,
- not considered extraneous or irrelevant evidence,
- had due regard to the interests of the insured, and
- that any decision reached is reasonably open to you on the evidence.

2. What happens in the witness box?

After being sworn in as a witness, your barrister will ask questions to allow you to present your side of the case to the court. This is what is known as 'evidence in chief'. You may be presented with various documents which have been tendered into evidence, for instance an application or underwriting opinion, and asked open questions about your assessment of it.

In evidence in chief you won't be asked leading questions which prompt you to answer in a particular way i.e. when did you form the view that the claimant wasn't credible?

The reason is the court wants to hear your evidence, without manipulation.

You can then be cross-examined by the plaintiff's barrister. The purpose of this is to test the truth and accuracy of your evidence. Here there can be leading questions – taking you down a particular path. Not surprisingly the barrister will attempt to find flaws in your evidence or the documentation supporting your case.

At the end of the cross-examination your barrister may be able to 're-examine' you so as to clarify any issues arising from the cross-examination. This will provide you with the opportunity to explain any misunderstandings arising out of your cross-examination.

3. Tips for the witness box

Even the most experienced witnesses can find themselves anxious when placed in the witness box, however the following tips may assist in making the process less nerve-racking:

- Try to maintain a calm and professional demeanour,
- Attempt to answer any questions put to you during cross-examination as simply as possible, preferably with a 'yes' or 'no' response. Long rambling responses provide an opportunity for the plaintiff's barrister to open up a new line of enquiry that may not have otherwise been available to him or her,
- Do not appear evasive by not answering the question put to you, as simply talking around it will not help your case, and
- If you are asked questions about matters you do not recall it is best to simply say so rather than attempting to reconstruct the facts based on other matters known to you.

Generally, if prior to giving evidence you are well prepared and familiar with your file and the sequence of events, and you have conferenced with your counsel as to the type of issues which might arise (without being coached), then you will be well placed to present your evidence in the best possible light.

4. When does ethical preparation turn into unethical coaching?

There exists an assumption that a witness giving evidence for the benefit of one party will be inclined to please that party.

This is precisely why it is important to touch upon the fine line between thoroughly preparing a witness and the unethical coaching of a witness.

In *Re Equiticorp Finance Ltd* (1992) 27 NSWLR 391, Young J emphasised the requirement that solicitors should not advise a witness as to how particular questions should be answered (other than that the question should be answered truthfully) or suggest words which the witness should use.

Ultimately, it is imperative to emphasise the importance of neutrality and independence on the part of any witness. Lawyers should, appropriately, be restricted to preparatory activities which protect the integrity of a witness's evidence. Always keep in mind that, as a witness, your fundamental duty in the adversarial system is to provide evidence honestly and without extrinsic influence from anyone, including your legal practitioner.