

## Interviewing and conferring with witnesses guidelines

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### Interviewing witnesses

A solicitor should act fairly and honestly in interviewing witnesses and, in particular, should:

- inform a witness on whose behalf he or she acts; and
- ensure that there is no attempt to manipulate the witness's evidence.

### Interview of prospective defendants

A solicitor should act fairly and honestly in interviewing persons who are prospective defendants and, in particular, should:

- inform the person on whose behalf he or she acts;
- inform the person about the matter in which he or she is acting;
- ensure the person is aware that the solicitor is not acting or giving advice on the person's behalf;
- advise the person he or she may decline to discuss the matter if he or she chooses to do so;
- ensure that there is no attempt to manipulate the person's evidence.

### Related criminal charges

Where a witness in a civil proceeding could face criminal charges after giving evidence in the proceeding, pursuant to *State of Victoria v Villan*,<sup>1</sup> a solicitor should inform the witness that:

- the matters alleged against the witness could result in criminal charges being laid against the witness; and

- if the witness gives evidence in the civil proceeding, it could have adverse consequences for them if criminal charges are subsequently laid; and
- that the witness may wish to seek their own legal advice before being interviewed.<sup>2</sup>

### Corporations

When a party is a corporation, the solicitor for another party is prohibited from interviewing;

- the chief executive officer of the corporation; and
- any other person ("authorised person") whom the solicitor knows, or ought to know, has been given, in good faith, authority to make admissions on behalf of the corporation or to instruct the corporation's solicitors in the conduct of the proceedings.

Before interviewing an employee of the corporation whom a solicitor ought reasonably anticipate could be;

- an authorised person;
- or a person who could significantly influence decisions about the conduct of the proceedings;

the solicitor must observe the same constraints as apply when interviewing prospective defendants.

A solicitor must be careful to ensure that interviewing a witness employed by a corporation would not involve the employee in breaching any duty of confidentiality owed by the witness to the employer.<sup>3</sup>

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<sup>1</sup> [2022] VSCA 106.

<sup>2</sup> *State of Victoria v Villan* [2022] VSCA 106 [62]; [62]-[67].

<sup>3</sup> *Aq Australia Holdings Limited v Burton and Anor* [2002] NSWSC 170 (3 May 2002) per Campbell J.

## Communicating with insured parties

A solicitor must not confer or deal with any party represented by or to the knowledge of the solicitor indemnified by an insurer, unless the party and the insurer have signified willingness to that course.<sup>4</sup>

## Third parties

A solicitor should not interview an insurer or other third party who is giving instructions to a solicitor for another party.

## Opposition access to witnesses

A solicitor must not take any step to prevent or discourage a prospective witness or a witness from conferring with an opponent or being interviewed by or on behalf of any other person involved in legal proceedings. However, a solicitor may tell a prospective witness or a witness that the witness need not agree to confer with or be interviewed by anyone, and may advise about relevant obligations of confidentiality.<sup>5</sup>

## Integrity of evidence – coaching witnesses

A solicitor must not advise or suggest to a witness that false or misleading evidence should be given or condone another person doing so or coach a witness by advising what answers the witness should give to questions which might be asked. A solicitor may express to a witness a general admonition to tell the truth, question or test in conference the version of evidence to be given by a prospective witness, or draw the witness' attention to inconsistencies or other difficulties with the evidence, but the solicitor must not encourage the witness to give evidence different from the evidence which the witness believes to be true.<sup>6</sup>

## Integrity of evidence – two witnesses together

A solicitor must not confer with, or condone another solicitor conferring with, more than one lay witness (including a party or client) at the same time about any issue which there are reasonable grounds for the solicitor to believe may be contentious at a hearing and where such conferral could affect evidence to be given by any of those witnesses, unless the solicitor believes on reasonable grounds that special circumstances require such a conference. A solicitor may confer with, or condone another solicitor conferring with, more than one client about undertakings to a court,

admissions or concessions of fact, amendments of pleadings or compromise.<sup>7</sup>

## Communicating with witnesses under cross-examination

A solicitor must not confer with any witness (including a party or client) called by the solicitor on any matter related to the proceedings while that witness remains under cross-examination unless the cross-examiner has consented beforehand to the solicitor doing so or the solicitor:

- believes on reasonable grounds that special circumstances (including the need for instructions on a proposed compromise) require such a conference;
- has, if possible, informed the cross-examiner beforehand of the solicitor's intention to do so; and
- otherwise does inform the cross-examiner as soon as possible of the solicitor having done so.<sup>8</sup>

## How can we help you?

Visit the [Ethics & Practitioner Support Department's website](#).

These are guidelines only and do not have the force of law. A solicitor must comply with the *Legal Profession Uniform Law and Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* and any other applicable rules or legislation.

To discuss concerns about interviewing and conferring with witnesses, contact the Ethics & Practitioner Support Department on (03) 9607 9336.

*Approved by the President of the Law Institute of Victoria on 12 October 2022, under the Instrument of Delegation authorised by a resolution of the LIV Board passed on 19 June 2019.*

<sup>4</sup> *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 22.4.

<sup>5</sup> Ibid r 23.

<sup>6</sup> Ibid r 24.

<sup>7</sup> Ibid r 25.

<sup>8</sup> Ibid r 26.