

# The five-minute witness

A judge on the Court of Appeal in Queensland recently described disclosure in personal injury litigation as requiring the parties to have all their cards on the table: with the numbers facing up. The plaintiff's medical, social, work and family history is an open book for the defence to trawl through to obtain cross-examination material. Every aspect of the plaintiff's life is open to scrutiny and any inconsistency is open to attack.

But the same cannot be said for a supporting witness. The defence knows very little of him or her. The plaintiff is not obliged to disclose any of that person's history and, apart from a short statement or a brief opening, the witness' evidence is hardly open to challenge.

Last year at the Association of Trial Lawyers of America's (ATLA's) Annual Convention, Sidney T Marable, a lawyer from Arizona, gave an excellent paper on identifying, locating and using a 'five minute witness'. Below is an edited version of Sidney's paper:

## WHAT VALUE IS A FIVE-MINUTE WITNESS?

Hollywood has long learned and mastered what trial lawyers are slow to learn and even slower to master: short and succinct can be memorable and long lasting.



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I consider as a potential five-minute witness (FMW) any witness whose contact with my client is limited to perhaps a single activity, event, or occasion, or whose knowledge is limited to a single fact. Typically, these witnesses do not have an in-depth relationship with, or knowledge of, the client. With an increasingly mobile society, individuals know others, including neighbours, on a superficial level within a limited setting.

Watch any movie and notice characters whose single brief appearance has the sole role of moving the story along. These characters are not merely thrown in, but fit seamlessly into the sub-plot which that supports the main storyline. Their presence enhances the believability and human interest of the story.

## WHY FIVE MINUTES?

Five minutes is relatively short and forces you to be succinct. A FMW can be less than five minutes, but should be no more than five minutes.

1. It helps hold attention and interest. Audiences tire of even the most dynamic speaker if he/she speaks too long.
2. It helps to avoid boredom. Consider the last conversation you had in any informal gathering, which you did not think was boring, when the person who talked did so non-stop longer than four minutes. Watch CNN, ESPN, MTV or the weather channel. They show a reporter announcing one story and a ticker tape scrolling across the screen announcing others. People today are more accustomed to fast-moving, quick-changing information from multiple sources.

3. It breaks the monotony. Television shows about lawyers regularly investigate cases, conduct full trials with several witnesses and discuss the outcome over cocktails, all within 30 minutes, with a break after 15 minutes for commercials. People's attention span is not long.
4. It minimises meaningful cross-examination. Identifying certain individuals as your FMW forces you to emphasise only the essential evidence from the witness. A good candidate for the FMW is the person who knows only one small aspect of the story you are telling. This leaves little room for meaningful cross-examination.

## THE FMW TESTIMONY

Human interest stories hold interest. The FMW is a great way to tell portions of the human interest story. Consider a three-point approach to presenting the testimony of the FMW:

1. Establish credibility – identify the relevant background of your witness. What is the background of the witness? How long has the witness engaged in the activity? How often? Why? What good is done or benefit gained? The answers hopefully emphasise the good aspects of the activity that you can later argue apply likewise to your client, who also engages in the same activity.
2. Tell the story – have the witness explain their observations of your client or information known about them.
3. Close the door – cover information not known. Limit any meaningful cross-examination.

**SEQUENCING FMWS**

Presenting the FMW at appropriate and key intervals enhances the story:

1. Sandwich the FMW between two lengthy witnesses to keep the court engaged;
2. Bring in the FMW before recess or at the end of the day to make and emphasise a significant point;
3. Use the FMW as a lead-in to set the stage for a key witness;
4. Use the FMW to break-up the technical presentation; or
5. Give snap shot views of your client while issues of liability are still being presented.

**CHANGING THE MINDSET**

To successfully use the FMW approach necessitates a change in the mindset of the lawyer. The advent of formal discovery rules has been both a

blessing and a curse. A blessing because, in spirit, the formal discovery rules require the opposing party to turn over information. Formal discovery has become a curse because, in reality, the information turned over is often useless and the availability of formal discovery has made lawyers lazy.

**SEEKING AND FINDING FMWS**

Getting to the heart of your client's story involves the lawyer's personal involvement. Find out what gives your client personality. Rarely does an act, done regularly, go unseen. What makes him/her unique?

1. Visit the home of the catastrophically injured client. In visiting the home, you will gain a better appreciation of the personality, likes and lifestyle of the client. Go through the home, ask the story behind photos, look at the

books on the bookcases and magazines on the tables. Find out about the activities that they're engaged in.

2. Visit the home during the day and go back at night. Humans are creatures of habit. Neighbours who come out for their morning routine (gardening, retrieving their newspaper) may differ from those seen outside in the evening.
3. Read the client's diary.
4. Speak with neighbours and co-workers.

**CONCLUSION**

The human interest provided by the FMW helps to communicate to the court that your client is a genuine and likeable human being. To personalise your client in the trial enhances the prospect of a court accepting your client's evidence. **PL**



**SCHOOLS**

**Dr Keith Tronc,** Barrister-at-Law and an APLA member of long standing, who has been invited to speak at the last six APLA National Conferences, is a former teacher, school principal, TAFE teacher, university lecturer, solicitor and Associate Professor of Education. He assists numerous Australian law firms in educational litigation involving personal injuries, discrimination, bullying, sex abuse, breaches of contract, and TPA matters. Dr Tronc appears frequently in court in several States providing independent expert opinion on matters concerning education and the law. Dr Tronc has published four national textbooks and looseleaf services on schools, teachers and legal issues.

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