

BOOK REVIEW

KELLEY BURTON¹

Andrew Palmer, Proof: How to Analyse Evidence in Preparation for Trial (Lawbook Co, 2nd ed, 2010)
248 pp

Palmer developed the methods of analysing evidence in preparation for trial explored in this book based on his own practical experience as a barrister and as a teacher of evidence and proof units at the Melbourne Law School. He suggests that his work does not necessarily represent what a litigator should do in practice, or what a litigator does in practice, but rather reflects what a litigator might do in practice.² This book does not contain extracts of cases or evidentiary rules, or a comprehensive digest of the rules of evidence. Instead, it focuses on the process of preparing for trial, for example, how to prepare a chronology of the evidence for the purpose of revealing inconsistencies in evidence, gaps in evidence and weaknesses in a case.

Palmer has written this ‘how to’ guide from the perspective of a mentor, who offers advice to a less-experienced colleague on how to prepare for trial. His writing style is user-friendly and fundamental evidentiary terms are emphasised in bold. There is a worthwhile summary at the end of each chapter to highlight significant points and the chapters commonly map out an example of the method in question in a flow chart to aid understanding.

This book is primarily aimed at students and teachers of advocacy and evidence, and inexperienced litigators, who seek a greater understanding of document management in practice, particularly how to marshal the sources of evidence, develop a case theory, and prove the theory by matching evidence and mapping arguments. While there are some references to the case law, the *Evidence Act 1995* (Cth) and Victorian legislation, the book is generally not jurisdiction-specific and would be beneficial to advocacy and evidence students across the globe. This book should be on the recommended textbook list for all advocacy and evidence units, especially in the current climate where greater

¹ Senior Lecturer, School of Law, QUT.

² A Palmer, *Proof: How to Analyse Evidence in Preparation for Trial* (Lawbook Co, 2nd ed, 2010) vii.

linkages are made between learning and practice, and preparing students for the real world is aspired.

Other audiences for this book include barristers, solicitors and police prosecutors who are planning to enhance their methods for preparing for trial. Further, the book is relevant to advocates in both criminal and civil law, irrespective of whether they are representing the Crown, accused person, plaintiff or defendant.

Chapter 1 provides an overview of the methods utilised in the book. It specifies that the methods can be used as isolated tools or be used in an integrated approach and not necessarily in the sequence outlined in the book. The methods followed depend on a litigator's time, resources, preferences, as well as the needs of the case. One message that comes across first and foremost in chapter 1 is that 'preparation is the key to successful advocacy'.³ This theme is commonly echoed in other tips on advocacy.

Chapter 2 reinforces the importance of document management in the trial process, particularly knowing what documents are available and where they are located. It suggests a means for categorising documents. There is no right or wrong way of organising documents and it depends on the types of proceedings and the litigator's preference.

Chapter 3 recommends that a litigator prepare a chronological inventory of information based on events, procedures or investigations. The purpose of a chronology is to record inconsistencies in the evidence, identify weaknesses in a case, or help structure an interview with a witness or client. A chronology may be given to the courts as part of 'submissions or supporting material'.⁴ Chronologies should contain the date, time and description and be cross-referenced to the sources of evidence.

Investigative thinking is examined in chapter 4. It is defined as 'the identification of possible theories or hypotheses, and the search for evidence that will support or eliminate those theories'.⁵ The chapter emphasises three steps in investigative thinking as:

- **abduction:** the imagining of a hypothesis or working theory of the case that provides an explanation of the evidence currently available to us;
- **retroduction:** the identification of 'tests' that might confirm or disprove the hypothesis;
- **investigation:** the carrying out of the above 'tests' through the application of appropriate investigative techniques.⁶

Information should be marshalled according to the sources of evidence (for example, real evidence, documentary evidence and testimony), scenarios, clues, legal rules or factual issues. The boundaries between the methods appear to be blurry. A prosecutor or

³ Ibid 1.

⁴ Ibid 79.

⁵ Ibid 28.

⁶ Ibid 38.

plaintiff, who bear the onus of proof, should prioritise the legal rules approach because if there is no evidence for an element of an offence or action, there is no case to answer.

While evidence texts universally assert that a case theory needs to be developed, they do not explore the nuts and bolts of developing a case theory. Chapter 5 of this book fills this gap. A case theory refers to an event that has legal consequences, for example, an 'accused murdered the deceased'.⁷ In this example, the criminal law (substantive law) breaks the case down into elements of the offence of murder (the facts in issue). A theory is the story (material facts) that satisfies the case. When developing a theory, the following issues should be considered:

1. Is the theory consistent with the client's instructions?
2. Does the theory fit within the elements of the substantive law?
3. Does the theory account for all of the evidence?
4. Is the theory supported by evidence?
5. Is the theory plausible in the sense it is consistent with common views and expectations?
6. Is the theory simple?
7. Are you offering alternative theories that undermine the main theory?
8. Can the theory be succinctly expressed with clarity?
9. Is the theory flexible enough to cope with changing circumstances, for example, a hostile witness or evidence that is ruled inadmissible?

In addition to developing a case theory, advocates should anticipate their opponent's case theory.

Chapter 6 continues with the theme of theory and specifically how to match direct and circumstantial evidence to the theory. Direct evidence requires a witness to give testimony of their actual observation whereas circumstantial evidence requires facts in issue to be inferred. Arguments may be based on direct or circumstantial evidence, and a litigator should be aware if the evidence combines in a corroborative, contradictory, conflicting, convergent or linked manner. The arguments to be made in a closing address can be mapped by the following three methods: prose (draft of closing address); chart (diagram); and outline (point form). Palmer outlines six common mistakes with charting at the end of the book.

Chapter 7 examines testimonial evidence, real evidence and documentary evidence. With regard to testimonial evidence, it suggests an advocate may make arguments about bias, motive, previous convictions, expertise, opportunity, demeanour and memory. The admissibility of real evidence hinges on authenticity and accuracy while documentary evidence centres on accuracy and contemporaneity.

This chapter also focuses on circumstantial evidentiary issues such as requiring chains of inferences to link evidential evidence to the main facts in issue, making inferences based on generalisations, the standards on which links in chains and strands in cables need to be

⁷ Ibid 43.

proved, and the best ways of handling alternative explanations. This chapter raises the concepts of negative evidence, for example, where an accused person exercises their right to silence, and missing evidence, for example, where an accused person destroys evidence.

The hearsay rule, opinion evidence and similar fact evidence are canvassed in chapter 8 and the discussion is appropriate for those students who are struggling to understand these essential concepts. A more detailed exploration of these concepts can be found in the case law, legislation and other evidence texts on the market.

Chapter 9 reviews how to develop a trial book, which includes court documents, opening address, outline of key points to adduce from the witness, copies of statements made by a witness, copies of documents that are relevant to the credibility of witnesses, copies of documents that witnesses will be asked to authenticate, list of opponent's likely witnesses, substantive law, outline of submissions to be made about the admissibility of evidence where there is likely to be a dispute and draft closing address.

Teachers of evidence and advocacy will be drawn to the 'Notes' section, which appears after chapter 9. This section outlines how evidence is taught and assessed at the Melbourne Law School. The students are provided with detailed briefs of evidence (approximately 100 pages) and they complete a case analysis (50% of their marks) and an admissibility analysis (50% of their marks). The assessment task is authentic and it better prepares students for the role of an advocate in the real world. Many examples of briefs of evidence and sample answers are readily available at www.evidence.com.au under the 'sample analyses' link. The examples predominantly relate to commonwealth drug offences and teachers who assess the *Evidence Act 1995 (Cth)* may aspire after them. This website sets a high benchmark for other evidence and advocacy teachers, but will undoubtedly encourage teachers to reflect on their own assessment practices, and may in some cases, even be a driving force for enhancing authenticity in this discipline.

The 'Notes' section is followed by an appendix, which offers a sample analysis of evidence based on a decided case. Palmer utilises a decided case because it can be presented in the book in a more succinct format and all evidence is finalised from the beginning, which is not the case in practice. The sample analysis omits the chronology and factual theory. More in depth sample analyses are available at the website referred to above.

To take a continuous improvement approach to this book, the author could insert an index of case names and statutory authorities because while it is agreed that legal authorities are not the core of the book these indexes are convenient tools for readers. The content of the book could be reflected upon and additional guidance could be provided on how to:

- draft interrogatories;
- interview clients and witnesses;
- use private investigators;
- grasp the concept of coincidence reasoning;

- plan appropriate questions for witnesses in examination-in-chief, cross-examination and re-examination (particularly knowing how to frame leading and non-leading questions and when they are appropriate in the trial process);
- make timely objections against an opponent's questions or a witness' answers (particularly the grounds upon which objections can be made); and
- distinguish expert opinion evidence from quasi-expert opinion evidence and lay opinion evidence.

Canvassing these topics would widen its appeal as a universal resource for the community of advocates and my evidence students. The book certainly takes an innovative and practical approach by concentrating on the process rather than legal authorities and is a welcome contribution to the discipline of evidence.