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Précis Paper

Common Issues with Expert Witnesses

Many issues can arise during the process of commissioning an expert witness. This discussion covers all stages, including selection of an expert, drafting and settling expert witness reports, examination-in-chief, cross-examination and joint conferences of expert witnesses.

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- Joint conferences of expert witnesses

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Common Issues with Expert Witnesses

1. In this edition of BenchTV, Hugh Selby (barrister) and Ian Benson (AR Conolly & Co) discuss the common issues which arise during the process of commissioning an expert witness, covering selection of an expert, drafting and settling expert witness reports, examination-in-chief, cross-examination and joint conferences of expert witnesses.

Finding the right expert

2. The first question to consider is whether or not you really need to bring in expert witnesses into litigation that you're running.
3. Should the answer be yes, it is necessary to search for the right expert who is fit for purpose. Therefore, it is important to know the right questions to ask when trying to ascertain the best expert or experts for the litigation.
4. One way of finding the right person is to ask other lawyers who have had similar problems.
5. If you are uncertain about who to contact, you can get in touch with an Expert Opinion Services provider, such as Unisearch at UNSW, who will help you get in touch with the right expert/s for your case.

Initial contact with potential expert witnesses

6. When first making contact with an expert, you may find that the questions which you intended to ask may not necessarily be the touching on the right issues. Therefore, before anything is in writing it is best to have a chat, face-to-face or over the phone, discussing the facts of the case, and let the expert/s help you work out what actually are the real issues of expert opinion that you need, so that when you write your commissioning letter, it already reflects what you've gained from these useful conversations.
7. The reason this must be done before anything is written down is that despite the law being mostly settled with regards to client professional privilege regarding communications with potential experts and experts, there is still some doubt regarding how far that extends, which leads into issues about calls for documents during litigation or how you comply with discovery rules. The best way to prevent avoidable harm is not to put anything in writing until you are reasonably confident that you have found the right expert/s and have worked out the correct issues with which they can help you.
8. As part of due diligence you need to make inquiries to ascertain whether or not your expert/s are fit for purpose. Ask them where else they have given advice, check with the people to whom they gave that advice whether they were happy with the outcome; you may need to call for a transcript to see what occurred in previous cases.

9. Some experts may be better engaged as so-called dirty or black experts, meaning that they are partisan experts who you pay to help you develop your case, but you never get them to author a report or appear in the witness box.
10. It is better to spend money upfront carrying out these checks rather than come unstuck down the line.

Reaching a financial agreement

11. A financial agreement must be reached with the expert at the very outset, not only the gross amount, but also how they charge and when they're paid.
12. It must be remembered that it is the client who is liable for the expert's fees. However, if you do something which objectively entails that the expert thinks you are guaranteeing their fee, then you and your firm will be liable for those fees. This can become important if, for example, your client becomes insolvent or bankrupt during the course of the engagement. For this reason, it is important that you put it in writing that the client is responsible for the fees.
13. You will have funds in your trust account in order to meet the anticipated tax invoices from the expert and be able to pay those within 7 days.
14. It is also important to explain early the time frame for the advice to be given, and experienced experts will always ask about this. It is incumbent upon the litigation lawyer to engage an expert such that they will definitely have more than enough time to get both their draft report and, after it has been looked over, the final settled report, completed within that time frame.
15. There may also be a report in reply. If you are the initiating party and you have filed your report first, the other side then file something. When that comes back, your expert may need to put on a report in reply. All of this needs to be in accord with the rules about the filing of such expert reports in the jurisdiction in which you are working

The expert witness code of conduct

16. The code of conduct must be raised in the very first conversation that you have with the expert, as everything that they do must be in accordance with the code. In NSW, this can be found in Schedule 7 of the Uniform Civil Procedure Rules, and outside of that in the various practice notes of courts around Australia.
17. Although the length of the document varies according to who is the author in each jurisdiction, the fundamentals never change. They are as follows:

    i. The expert's fundamental duty is to the court, not to you or your client, which puts them in a very different position to any other witness.
    ii. They must set out in their report what data you actually gave them, together with what data they wanted and you couldn't supply.

iii. They must set out the methodology that they followed and why they followed it.

iv. They must express their conclusions along with all appropriate qualifications arising out of limitations to data, their methodology and their analytics.

18. If an expert arrives in court and is unaware of the code of conduct, it does not follow that their report would be excluded and there are single instance decisions to that effect.
19. But if your expert has no knowledge of the code of conduct, it's a significant weighting issue which is adverse to you and your client's interests.
20. The code of conduct also provides the expert with a useful template to work by, especially if they are fit for purpose but do not have any prior litigation experience.

The expert's duty to the court

21. One the more interesting issues which can arise out of the expert's duty to the court is that when they write their report, it is served to the other side who may reply with new information to which your expert wishes and needs to respond. When your expert is in court, the leave of the court is sometimes required to ask the necessary additional questions.
22. If the expert has expressed to lawyers on either side that there are particular limitations to the report that they want to bring to the court's attention, and if the lawyers fail to do this, the expert then has an obligation, quite unlike any other witness, to inform the presiding judicial officer, (in the absence of the jury if there is one), that the questions have not been asked that they believe are needed in order to make use of their expertise.
23. Such an observation by an experienced witness to a judge could lead to embarrassment for either or any party in the courtroom.
24. A way in which this might occur is a scenario where an expert has been given data and has written a good report, but after it has been filed and served another report then comes back in response, and it is clear that the opposing expert had the benefit of data which the original expert did not have. Then the original expert says that they want to write a report in reply and their lawyer tells them not to bother, it isn't important. The expert then says they want to bring this out in court, and their lawyer tells them to leave it to counsel. So when they get into court and there is leave for extra examination-in-chief, and the counsel does not raise those issues at all, at that point to expert has the obligation to inform the trial judge that what has been presented to the court is not their view.
25. It is important to get on top of this at an early stage, particularly because the codes of conduct tell the expert that they have an obligation to make a report in reply, but the codes don't set out any specific mechanism for how they are to achieve that if their lawyers do not give them the opportunity.

The importance of *Makita v Sprowles*

26. The case of *Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705* is one which litigation lawyers should reread and use as a checklist for all of the fundamental requirements for engaging an expert witness, and contains basic insights into such things as whether or not the expert that you are putting in front of the court us properly qualified, as covered off by the provisos in the *Evidence Act 1995 (Cth)*, and having established that, whether you have gone beyond their expertise, which is a common failing.
27. You must not ask an expert for an opinion on something which is outside of their area of expertise.

Timetables and progress reports

28. It is important to stay in touch with your experts to make sure that they are following their timetable. You do not want to have to go into court and ask for an adjournment or to vacate a hearing date because the expert report that you requested has not arrived on time.
29. In addition to being proactive and diarising, you can ask for progress reports asking exactly where they are, which people they have interviewed, what tests they have done, what records they have reviewed, and why any of this has not been done and how long it will take.
30. However, these are not to be interim reports which lawyers can alter. You can make suggestions as to how a certain turn of phrase could be improved, but you must not change the expression of an opinion in such a way that it deviates from its original meaning.

Settling an expert report

31. When you settle an expert report, you can settle it for clarity of communication, for instance point out that something as expressed cannot be included as it is inadmissible hearsay and you don't want to risk anything as a result of that, so you have it rephrased so that the inadmissible material is not there
32. However you must never attempt to censor, direct, control or reframe what the expert has reported.

The persuasive influence of expert reports

33. Most experts have never been to court, because their report together with other information has persuaded both sides that a settlement outside of court was the best outcome.
34. For this reason, an expert needs to understand that they have multiple audiences for their report, of whom the judge and jury are the very last.

35. Therefore, you as the commissioning lawyer have to be able to both understand the report and be persuaded by it, and client must also see the value in it.
36. The moment it is filed you want it to have such an effect on your opponent and their lawyers that they throw up their hands, and in order to achieve that the report has to come across as the well-reasoned, well-based opinions of a highly credible person who will withstand any cross-examination about both their credibility and their message.

Phrasing and organisation of the report

37. The table of contents that you generate for an expert report must suggest to the reader the nature of the argument to be presented by the author of the report as the reader skims them.
38. Where there are visuals, be they photographs, diagrams, maps or anything else, they should be placed in the text right at the point where they are mentioned so that the reader is immediately presented with all of the details in one place.
39. It must be remembered that if any labels are put on those visuals, they must be neutral. You can assist the expert to do that, and it can be done by reminding them that their duty is to the court and the information must be entirely impartial in their presentation.
40. Don't use a font size less than 12, always use one-and-a-half spacing, only number the paragraphs with whole numbers.
41. It is recommended also that you leave a 4 or 5 cm margin on the right hand side of the page so that any user of the expert's report can write their notes on it and refer back to that.
42. When filing and serving the expert's report, remember to comply with the rules of the jurisdiction you are in as to whether things are attachments or annexures and what time frames you have to work with.

Examination-in-chief

43. Some courts say that if it's an affidavit based jurisdiction or report based jurisdiction you have to have the leave of the judicial officer before you can ask examination-in-chief. The adverse consequence of that is that if you bring your expert in and simply ask for their name, address, occupation, whether they have authored the report, checked it, and say it is true and correct, you will not have given your expert the opportunity to settle into the role of expert before they are turned over to the opposition for cross-examination.
44. Therefore, you should always look to see whether there are any topics in your expert's report that credibly lend themselves to asking the presiding officer to allow you to ask some additional questions which better settle your expert into their role, and start to establish a rapport between the expert and the court. Remember that your expert's obligation is to the court, and your's is to make them able to perform that duty.
45. If your expert has qualifications to make in response to the report in reply, you must be upfront about this during evidence-in-chief, it must not be left to cross-examination.

Cross-examination

46. When preparing for cross-examination, think about what kind of answers your expert is likely to give. If a person gives short or long answers outside of the courtroom, it is likely that they will answer in the same way when in court.
47. It is best to just to tell the expert, just as you would any other witness, "Listen to each question, think about it. If you need more time to think, sip some water and think while you're sipping, and then answer the question that you were asked, not the question that you wanted to be asked".
48. Experts need to be rehearsed by their litigation representative to answer questions during cross-examination. Many experts object to being required to give simple yes, no, I don't know answers, because it is unfair. They need to know that when they are asked a forced-choice question in cross-examination which is not really fair, they should say words to the effect of 'Would you like me to explain?'
49. The cross-examiner does not usually want an explanation, however the expert saying this acts as a guidepost which tells you and your counsel exactly what topics you can take up in re-examination without having to ask for a conference with the expert beforehand.
50. It also relieves the stress that the expert is feeling if they know that you are listening and will bring up these points in re-examination.
51. Whether or not a party is entitled to a conference with the witness before re-examination is traditionally at the discretion of the presiding judge and depends on a variety of factors, such as how long it was going, what should have happened.
52. Witnesses should always assume that they won't get an opportunity for an informed conference between the end of cross and the start of re-examination.

Joint conferences of expert witnesses

53. Many judges work on the basis that issues should be narrowed as much as possible, and that that should be done during pretrial.
54. By way of a pretrial order, experts can be ordered to confer. This was a mechanism developed by Sir Laurence Street when he was Chief Justice of New South Wales. The experts are told to confer and report what they agree on and what they disagree on. It is only the latter which can be brought up in cross-examination.
55. An advantage of this is that when experts get together, they often find that when they have a common set of facts to work with as opposed to the customised set given to them by their respective lawyers, they find that that have little, if any, disagreement. This has the great advantage of narrowing the issues.
56. Concurrent expert evidence, also known as hot-tubbing, is at the discretion of individual judges.

57. From the point of view of an expert or a litigator, the potential problem with concurrent evidence, as it can also be with compulsory conferences without lawyers, is that you may have an expert who is very knowledgeable in their field, but is subject to being browbeaten by other experts or expert qua lawyers. This must be factored in to your choice of expert.

BIOGRAPHY

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Hugh Selby is a barrister practising in criminal law for both defence and prosecution. With former Justice Terry Buddin SC he runs the University of Wollongong's LLM Criminal Practice. With Ian Freckelton QC he edits 'Expert Evidence', published by Thomson Reuters, where you can find not just the law but also some 75 areas of Expert Opinion.

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BIBLIOGRAPHY

Cases

Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305; 52 NSWLR 705

Legislation

Uniform Civil Procedure Rules 2005 Pt 31 Div 2 (NSW)

Evidence Act 1995 (Cth)