Expert Witnesses and Expert Advisors

‘...where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence’ – Civil Evidence Act 1972, Section 3.

There is an important distinction between instructing an expert to provide evidence in court proceedings and instructing an expert solely in an advisory capacity.

Expert witness
- The primary function of an expert witness is to provide the court with his independent expert opinion on an issue based on the information provided by those instructing him. Permission of the court must be obtained to use an expert witness
- When applying for permission, you must provide the court with an estimate of the costs of the proposed expert evidence and identify not only the field in which expert evidence is required, but also the issues which the expert will address. If possible, you should also identify your proposed expert by name
- Sometimes expert evidence can be relevant to establishing the primary facts of the case (as distinct from issues of opinion arising from those facts) e.g. the bare condition of a road (fact) compared with the significance of that condition (opinion) The expert’s evidence relating to primary facts may have to be incorporated into an additional factual witness statement, to be exchanged with other factual witness statements
- An expert witness is required to give independent and impartial expert evidence to the court. His primary duty is to assist the court; this overrides any obligation to the instructing and/or paying parties
- In large and/or complex cases the court may allow each party to instruct their own expert to provide expert evidence on an issue or particular issues. If expert evidence is needed in more than one area of expertise, the courts will allow the appointment of more than one expert witness for each party, provided the cost of this is proportionate to the value of the dispute. For example, in a construction dispute where the ceiling of the building has collapsed, there may be the need for expert evidence from an architect, and separate expert evidence from a roof constructor. The expert evidence must, however, be necessary to resolve the proceedings and the cost proportionate to the amount in dispute
- In large or complex disputes the court may make an order for opposing parties’ expert witnesses to give their evidence concurrently, as opposed to sequentially. This practice is colloquially known as “hot tubbing”
- The court also has the power (and is likely to do so in less complex or lower value cases) to order a ‘single joint expert’, who will be appointed and instructed jointly by the parties involved in the dispute. A single joint expert has an overriding duty to the court. In less complex disputes the court may appoint a single joint expert who is instructed by both parties
- The court (or the parties) can also dispense with the need for expert evidence at all
- The material instructions given to an expert witness must be included in the expert’s report
- If the court decides that an expert witness has not established his independence and/or has not complied with his overriding duty to the court and/or failed to comply with any aspect of the court of rules governing expert witnesses, then this may result in a party being unable to rely on its expert evidence and possibly costs being awarded against the party relying upon the expert
- The expert witness’s fees may be payable by the losing party to the dispute.

Expert advisor
An expert advisor, sometimes also known as an independent expert, can be appointed by a party to assist in the formulation and/or preparation of a party’s claim or defence. He has an overriding duty to those instructing him and not the court, but this will normally include an obligation to the client to explain both the strength and weaknesses of both sides.
- In larger and more complex cases, it is usual for the parties to employ expert advisors to liaise with the court’s appointed expert witness and use the expert advisor as a ‘sounding board’
- Instructions given to an expert advisor will invariably be privileged from disclosure and therefore not disclosable to the other party
- In some circumstances, if there is only a small pool of experts in the particular field where the court-appointed expert is required, the expert advisor can move to being a court-appointed expert advisor, provided that he understands his new role as independent expert and his overriding duty to the court. If this happens, then a new set of instructions will be provided to the expert (which are disclosable)
- The fees incurred as a result of appointing an expert advisor are unlikely to be recoverable from the other party, even if the other party is ordered to pay your costs.
Advice Note

Expert Witnesses and Expert Advisors

Instructions and privilege

- It is important to note that the expert witness is required to set out all material instructions in his expert reports. Such material instructions are not protected by privilege.
- Instructions to an expert advisor, who is then subsequently appointed as a court-appointed expert, will usually be privileged from disclosure to the other party. However, to safeguard against such instructions being disclosable, new instructions should be provided to the expert in his role as court-appointed expert witness.

Independence of the expert

- It is usual for court-appointed expert witnesses to be completely independent of either party. Although the court can permit employees (or related persons) of a party to be an expert witness (if that is where the appropriate level of expertise lies), the employee-turned-expert must comply with his overriding duty to the court.
- When choosing an expert, a party must refrain from ‘expert shopping’. Whilst it is permissible for parties to change their experts, the permission of the court is needed and the court may require the party to produce the original expert witness’s report to the court and the other party.
- Whilst the parties can identify the issues to be dealt with in experts’ reports, it must be the expert witness who drafts his expert report. Parties and their expert witnesses can get into trouble if substantial parts of the expert report had been drafted by the instructing party and/or his lawyers.

Discussions between experts

- Experts will meet to discuss the issues in dispute, either by agreement or following a court order. They will produce a joint statement setting out the extent of any agreement between them and the points of, and short reasons for, any disagreement.

Expert Evidence at trial

- Oral expert evidence can only be given at trial with the court’s permission.
- Experts no longer have immunity from suit for breach of duty. It is still not possible, however, for an opposing party to bring a claim against an expert.

How to choose the right expert?

- By reference to matters such as areas of expertise, professional and academic qualifications and level of indemnity insurance, your lawyer will help choose who should be an expert advisor and/or expert witness. The search should begin early in the proceedings, particularly if it is a multi-party case. There should be discussion with the opponents to discover whether a single joint expert can be appointed.

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