

EXPERTSDIRECT



How Best to Brief an Expert Witness

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Overview

- How best to brief an expert: cardinal rule of “radio silence”; issues of privilege; horses for courses
- How involved should lawyers be in assisting experts to draft their reports
- At what stage to retain an expert
- Briefing for conclaves
- Briefing for the final hearing

How best to brief an expert – the cardinal rule of “radio silence”

- The first goal: “Do no harm”.
- At early stages, the instruction questions can be misleading.
- At early stages of proceedings, the matter has not yet “shaped up”.
- The wrong question can lead to an undesirable answer.
- Experts just want to solve the world’s problems, they often express – in writing – preliminary views.
- Keep in mind: cost; client’s budget; new or existing expert; discovery etc.

How best to brief an expert – Radio Silence

How issues of privilege impact on how to brief:

- *New Cap Reinsurance Corp Ltd (in liq) v G S Christensen [2008] NSWSC 93;*
- *IO Group Inc v Prestige Club Australia Pty Ltd (No 2) [2008] FCA 1237;*
- Why remove ants from your feet, with a shot gun?
- Should instructions be written? If not, why not? If so, why so?
- Why create discoverable correspondence at early stages?

Horses for courses: different types of experts and how to brief them

- The client is entitled to the best service it can get;
- The best product is almost always the product of robust debate between lawyer and expert; and
- Minimal interaction v extensive collaboration:
 - Medical doctors
 - engineers

How involved should lawyers be in assisting experts to draft their reports

It is perfectly legitimate for lawyers to assist experts in the drafting exercise, so long the focus is restricted to matters of form [see the cases at the end of the paper].

The degree of involvement of the lawyer depends on a range of matters that need balancing, including:

- a. Degree of complexity of the report;
- b. Degree of formality required;
- c. Quantum at stake in the litigation;
- d. How willing the expert is to work with the lawyers;
- e. How experienced the expert is at report writing;
- f. How experienced is the Solicitor in the particular field;
- g. The degree of urgency.

How involved should lawyers be in assisting expert to draft their reports (Cont.)

Justice McDougal, writing extra curially in *An Overview of the Evidence Act Keynote Address prepared for the Young Lawyers Annual One Day CLE Seminar 20111 : Evidence Act* (viewed www September 2014) said that the lawyer's role ought be as follows :

- (i) Identifies the field of specialized knowledge and the expert's training, study or experience;
- (ii) Identify the precise question on which the expert is to opine;
- (iii) Identify the facts (assumed, or known to the expert) on which the opinion will rest;
- (iv) Show the reasoning process, which in turn
 - (a) shows how the expert's specialized knowledge has been applied or used;
 - (b) shows the rational links , or steps , from premises to conclusions ; and
 - (e) sets out the expert's opinion on the question.”

At what stage to retain an expert

- Do you really have a choice? i.e. Is the report required for an interlocutory matter e.g. security for costs?
- Hope springs eternal:
 - does one wait to see if the matter will settle? Or
 - will the very fact of having retained an expert, assist with achieving settlement?
- Be realistic: what is the budget?
- Is the matter in the Technology and Construction List of the NSW Supreme Court or equivalent?
- Other factors

Briefing for conclaves

A conclave is a meeting of experts, pursuant to the rules of the Court or Tribunal. There are practice notes which stipulate what can and cannot occur.

The NSW UCPR PN is in Sch 7

DISCUSS:

1. Application of Code
2. General duty to the court
3. Duty to comply with court's directions
4. Duty to work co-operatively with other expert witnesses
5. Experts' reports
6. Experts' conference

Briefing for the final hearing

Prior to the final hearing, the expert ought meet in a timely manner with instructing solicitor and counsel, so as to:

Distil the issues that remain in dispute;

- (a) Assist counsel meet the opponent's case by e.g. pointing out any mistakes in the opponent's report/s;
- (b) Identify in general terms the lines of cross examination that might be anticipated of that expert by opposing counsel;
- (c) Identify any further evidence that may be required . Hence, meeting in a TIMELY fashion is CRUCIAL, so as to avoid objections based on prejudice.

Briefing for the final hearing (cont.)

Embarrassment will be avoided if the expert resists asking :

“How should I answer that question?”

because the most any counsel ought say to that is:

“In accordance with the truth and your conscience.”

Part of this preparation process is to discuss:

- a) What occurs in re- examination, and be prepared for this;
- b) The order in which counsel will cross examine, if there are multiple parties; and the stage at which the Judge might seek clarifications.

Case Summaries

- *New Cap Reinsurance Corporation Ltd (In Liq) & 1 Or v Renaissance Reinsurance Ltd* [[2007\] NSWSC 258](#), White J
- *Matthews v SPI Electricity Pty Ltd & Ors and SPI Electricity Pty Ltd v ACN 060 674 580 & Ors (formerly Utilities Services Corporation Ltd)* [2013] VSC 33 (13 February 2013)
- *Australian Securities and Investments Commission v Southcorp Ltd* ([2003\] 46 ACSR 438](#); [[2003\] FCA 804](#))
- *Traderight (NSW) Pty Ltd (ACN 108 880 968) & Ors v Bank of Queensland Limited (ACN 009 656 740) (No 14) and 13 related matters* [[2013\] NSWSC 211](#))
- *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424
- *Jango v Northern Territory of Australia (No.2)* [2004] FCA 1004
- *Dasreef Pty Ltd v Hawchar* (2011) 85 ALJR 694 (is a report based on the expert's study, training or experience - if not, not admissible).

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