



# EXPERT EVIDENCE

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# Introduction

- Practical and ethical considerations that arise in briefing or in acting as an expert in courts and tribunals.
- Strategies to:
  - Enhance the probative force of expert reports and expert evidence; and
  - Avoid common pitfalls that arise in preparing and leading expert evidence.

# The Goal – to get the expert's evidence in and accepted.

- Where a case calls for expert evidence, the goal is for the expert's evidence to be admitted and accepted (given weight).
- Achieving these dual goals will depend partly on the interaction between the expert and the lawyer(s) tasked with briefing the expert and settling the expert report.

# What is Expert Evidence?

- Expert opinion evidence is an exception to the rule against opinion evidence at common law and under the *Evidence Act 1995* (Cth) and (NSW).
- Section 79 states:
  - If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.
- See Victoria (s79, *Evidence Act 2008* ), Tasmania (s79, *Evidence Act 2001* ) and the ACT (s79, *Evidence Act 1995* ).
- For common law antecedent see *Clark v Ryan* (1960) 103 CLR 486 at 491 per Dixon CJ.

# Who can be an expert and on what?

- In order to be admitted expert evidence must be relevant and must not be excluded pursuant to the judicial discretions contained in the Evidence Act;
- The expert must have specialised knowledge;
- The specialised knowledge must be based on the person's training, study or experience;
- In selecting an expert the aim is to match as closely as possible the specific specialised knowledge of the expert with the particular questions upon which expert evidence is relevant in the relevant proceedings.

# The Expert's Duty

- The expert's overriding duty is to assist the court/tribunal on matters that fall within the expert's area of expertise.
- The expert's duty to the court/tribunal prevails over any duty to the person or party by whom the expert was retained.
- The duty was developed under the common law and has been largely codified by court issued guidelines for experts in state and federal courts and tribunals.
- It is essential that regard be had to the particular rules of court or expert code that is applicable in the particular jurisdiction in which the expert is called to provide a report or give evidence.

# Lawyer's Role

- Lawyers have a role to play within proper ethical boundaries in:
  - Identifying the issue(s) upon which expert evidence is likely to assist the Court/Tribunal;
  - Selecting an expert with appropriate expertise;
  - Adequately briefing the expert (both initially and as the evidence develops);
  - Carefully and precisely framing the questions upon which the expert is asked to opine;
  - Ensuring the expert's opinion is expressed in such a way as to be admissible so that it is both received into evidence and also given weight.

# The Lawyer's Duty

- Lawyers owe a duty to the court or tribunal and in observing this duty, they should seek to ensure that an expert's report is the product of the expert's specialised knowledge and in a form which is admissible and useful to deciding the issues in dispute upon which expert assistance is required.

Harrington-Smith v State of Western Australia  
(No. 7) (2003) 130 FCA 424 at [19]

*"Lawyers should be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions expressed); but in relation to their form, in order to ensure that legal tests of admissibility are addressed"*

# Generic Inclusions in the Expert Report

- The letter of instructions and list of the materials briefed to the expert;
- A comprehensive statement of the expert's relevant training, study or experience;
- A statement acknowledging the expert's agreement to be bound by any applicable expert code of conduct or practice note in the relevant jurisdiction; and
- Any qualification without which the report would be incomplete or inaccurate.

# Protecting and maintaining an Expert's Independence and Impartiality

- It is good practice to assume that all communications between the expert and the instructing solicitor will be available for scrutiny by both the opposing party and the Court or Tribunal.
- Lawyers play a critical role in ensuring the evidence is in proper form, addresses the real issues and is based on facts or assumptions likely to be proved in the case.
- Responsibility for writing the report and for forming the opinions expressed therein must remain with the expert.

# The process of obtaining expert evidence

- Choosing an expert;
- Briefing an expert;
- Reviewing the draft report;
- Consultation between experts.

# Choosing an Expert

- Know precisely what question(s) are to be the subject of expert evidence;
- Ensure that the expert's training, study or experience will cover the issues upon which expert evidence is sought;
- Consider by what process the expert will be required to give evidence;
- Preliminary meeting to assess the expert's qualifications and credibility.

# Briefing the Expert

- Brief early;
- Brief expert code/guidelines for the relevant jurisdiction;
- Include a numbered, customised and clear statement of assumptions of fact (that are capable of proof in the proceedings);
- Precisely formulate the questions upon which the expert is asked to opine;
- Consult with the expert if necessary to formulate the facts and assumptions, the questions and the materials to be included in the brief;
- Assume all communications with the expert will be available for scrutiny by the opposing party and the court/tribunal – take care to protect and foster the expert's independence.

# Reviewing the Draft

An Expert Report should:

- Acknowledge the expert's agreement to be bound by the relevant expert code or guidelines;
- Attach the letter of instruction;
- Identify the relevant field of specialised knowledge and the expert's relevant training, study or experience in that field;
- Identify the precise questions upon which the expert has been asked to opine;
- Identify the facts or assumptions on which the opinion is based;
- Transparently set out the reasoning process including:
  - How the expert's specialised knowledge has been utilised;
  - Each of the steps from premises to conclusion in the reasoning.
- Clearly state the expert's opinion in response to each question posed;
- Include any qualification without which the report would be incomplete or inaccurate.

# Consultation between Experts

- In the process of giving expert evidence there are a variety of contexts in which the experts retained by the parties may be required to interact with each other or a single expert may be required to interact with the separate lawyers engaged to act for each of the parties;
- The expert or experts may be required to produce a further report or statement as part of that consultation or interaction;
- The same skills that inform the writing of an admissible and persuasive expert report are applicable to the expert's work in the consultative process;
- The instructing lawyers and the experts involved should ensure that:
  - Questions or issues are carefully and precisely framed;
  - The expert's opinion as to whether he or she agrees or disagrees is expressly stated;
  - The expert's reasoning is clearly exposed and expressly relates back to the expert's specialised training.

# Common Pitfalls

- The lawyer provides assistance that extends beyond form and encroaches on substance;
- The expert defers to the instructing lawyer in relation to the substance of the report;
- Expert fails to include reference to material relevant to the opinion expressed and to which the expert has had access;
- Expert fails to include a qualification without which the report is inaccurate, incomplete or misleading;
- The lawyer fails to provide lawyer with revised assumptions as the evidence in the case unfolds;
- The expert does not fully and clearly expose the expert's reasoning process in the report;
- The reasoning includes speculation, unsourced assertion or sweeping generalisation.

# Source Material

- In compiling this presentation I have drawn on the following materials which I highly recommend by way of further reading:
  - The following speeches delivered by Justices of the Supreme Court of NSW (available on the Court's website):
    - The expert's lament – The Hon. Justice Bergin CJ in Eq.
    - Overview of the Evidence Act – the Hon. Justice White.
    - Some thoughts on calling expert evidence – The Hon. Justice McDougall.
    - An overview of the Evidence Act - – The Hon. Justice McDougall.
    - Cross-examination of experts – The Hon. Justice Pembroke.
    - Expert witness immunity: continuing relevance – The Hon. Justice Garling RFD.
    - Concurrent expert evidence: reflections and development - – The Hon. Justice Garling RFD.
- Blake & Gray, "Can counsel settle expert reports?", Bar News, Summer 2012-2013.

## A note on this presentation

- This presentation focused on practical considerations that arise in the context of briefing or acting as an expert in a court or tribunal. While based on a review of the law of evidence relating to expert opinion evidence, this presentation is necessarily generalist in its approach. It is not intended to be tailored to the specific circumstances of any particular case and should not be relied upon as such.
- Most of the principles discussed will be of some relevance to litigation in most Australian jurisdictions but important differences do exist between the court rules in the various State and Territory Supreme Courts and care should be taken to review any particular expert evidence in an individual case by reference to the specific circumstances of the case and against the rules applicable in the particular jurisdiction.