The Practitioner's Guide to Briefing Experts

1ST EDITION

THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

UNSW SYDNEY

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Expert Opinion Services

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ABOUT THIS PUBLICATION

NSW Young Lawyers is a professional organisation and division of the Law Society of NSW. It has more than 15,000 members, with membership free for all NSW lawyers (solicitors and barristers) under 36 years of age and/or in their first five years of practice, and law students. NSW Young Lawyers is comprised of a number of Committees, each specialising in an area of law. This publication has been written by members from a range of our Committees.

The aim of this publication is to provide a general overview of briefing, or instructing, experts from the first point of deciding whether an expert is needed up to expert conclaves and concurrent evidence. Those who have assisted with this publication have referred to legislation, rules of court, practice notes and their own experiences to ensure that each chapter acts as a "go-to" guide.

Without each member volunteering their time to ensure this publication will follow in the steps of our well-received series of Practitioner's Guides, and be the thorough guide that it is, publications like this would just not be possible, and I thank you.

We hope that this is a publication that the profession will find useful and a handy resource for those practitioners who will ever need to brief an expert witness. NSW Young Lawyers does, of course, provide a disclosure that this is merely a guide, not advice, and it is your responsibility to ensure you have properly informed yourself.

It would be remiss of me not to mention that you should become involved in NSW Young Lawyers by joining one or more of our Committees, via their email lists, and following us on social media.

Finally, I would like to thank Unisearch Expert Opinion Services (Unisearch) for their assistance in completing this Guide. Unisearch has been incredibly supportive of NSW Young Lawyers and assisting us with this Guide is just another fine example of their support.

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CHAPTER 1:
WHEN IS AN EXPERT NEEDED?

Expert witnesses have an important role to play in Court proceedings where scientific, technical, or other specialised knowledge may assist in the understanding of evidence or facts in issue.

It is important for lawyers and experts to understand their respective duties with regards to expert evidence.

When determining whether a matter requires expert evidence, lawyers should first ask themselves the fundamental question of whether an expert is needed at all. Will instructing an expert and obtaining their opinion assist the trier of fact by providing specialised knowledge that the ordinary person would not know, or which is likely to be outside the experience of a Judge or jury.

Is it admissible?

Before the decision is made to instruct an expert, it is important to consider whether the evidence to be adduced will be admissible.

Under the Uniform Evidence Acts,[1] evidence, whether expert or otherwise, is only admissible if it is relevant (s 55)[2] and even if it is, it may still be excluded (ss 135 or 137) or allowed for a limited purpose (s 136). Simply because a fact is in issue does not necessarily mean an expert is required to give an opinion. The evidence of an expert must also comply with certain requirements under the Uniform Evidence Acts and the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**), which will be discussed in a later chapter.

In most jurisdictions there are examples of experts who have been appointed, no doubt at great expense to the parties, in circumstances where their evidence has been wholly unnecessary because it did not go to a fact in issue.

In a family law case, the Court ordered the husband pay the wife's costs, on an indemnity basis, in the sum of $331,000 and criticised his unnecessary use of experts noting:[3]

> *the husband required the wife to be examined by his three experts, only to find that there was virtually no dispute between any of them and the wife's own experts.*

In an estate matter, again ordering indemnity costs, the Court criticised the use of expert reports in the proceedings:[4]

> *[the matter] was an accountant's nirvana. … the intricacies of each option that were laid out in excruciating and labyrinthine detail in [the expert's] report … Unfortunately none of it was necessary for the proceedings. None of it was useful. None of it facilitated the resolution of the real issues in dispute, namely the questions of construction arising out of … the will.*

Sometimes, picking the right expert is not picking one at all. It is useful to remember that if the Judge or jury can form their own conclusions, without help, the opinion of an expert is likely to be unnecessary.[5]

---

1 Those particularly relevant to practitioners are the *Evidence Act 1995* (Cth) and Evidence Act 1995 (NSW). The Uniform Evidence Acts apply to the Courts of the Commonwealth, NSW, Victoria, Tasmania and the ACT.

2 The other rules of admissibility of evidence, such as hearsay, tendency and coincidence, may then be raised to object to the admissibility of that evidence or to limit the purpose of that evidence.

3 *Bodilly & Hand (No. 2)* [2012] FamCA 734 at [207] (Loughnan J).

4 *Mark Gerard Ireland as Executor of the Estate of the late Charles Stuart Gordon v Sandra Jane Retallack & Ors* (No 2) [2011] NSWSC 1096 at [16] (Pembroke J).

5 *R v Turner* [1975] QB 834 at 841 (Lawton LJ).

In order to adduce expert evidence, a party must be able to demonstrate:[6]

- there is a field of 'specialised knowledge';
- there is an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert;
- the opinion is 'wholly or substantially based on the witness's expert knowledge';
- to the extent that the opinion is based on facts, that:
    - if the facts were 'observed' by the expert, that they have been identified and admissibly proved by the expert; and
    - if the facts were 'assumed' or ' accepted' that they have been identified and proved in some other way;
- the facts observed or assumed by the expert form a proper foundation for the opinion; and
- the opinion logically follows from the information on which it is stated to be based.

A 'consultant' expert

In matters where expert evidence is one of the key factors that will affect the outcome of the case, some practitioners will make use of an additional 'consultant' expert. This expert provides a second opinion, and can help frame the questions, assumptions and identify deficiencies in the draft report.

It is best to keep communications with a consultant expert confidential (see **Chapter 6** for an explanation of when privilege applies).

6 *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705 at [85] (Heydon JA).

CHAPTER 2: FINDING AND CHOOSING THE RIGHT EXPERT

Directions for expert evidence

Before briefing any expert, it will generally be necessary to advise the Court and obtain directions regarding the proposed expert evidence. The exact requirements vary between Courts:

1. In NSW Courts subject to the UCPR, a direction must be obtained from the Court before expert evidence is adduced, except in professional negligence cases.[7]
2. In Federal Courts exercising family law jurisdiction, expert evidence can only be adduced with the Court's permission, except by an independent children's lawyer.[8]
3. While directions are not strictly required for expert evidence in the Federal Courts dealing with other types of matters, parties are nonetheless obliged by practice note to confer upon (and inform the Court of) the approach to be taken to any expert evidence at "the earliest opportunity", so that the Court may manage that proposed evidence.[9]

7 *Uniform Civil Procedure Rules 2005*, r 31.19. Supreme Court Practice Notes SC CL 7.
8 *Family Law Rules 2004*, r 15.51.
9 Federal Court Practice Notes, Expert Evidence Practice Note (GPN-EXPT), cl 6.1.

Single expert orders

When obtaining orders about proposed expert evidence, the Court will generally expect the parties to have considered whether the case is one where evidence can be given by a "single expert". That is, rather than each party briefing an expert (who might be expected to support that party's position), a single expert can be briefed jointly to assist the Court.

Although "adversarial" expert witnesses are still widespread, the Courts encourage the use of single experts where possible. For example, both the UCPR and the *Family Law Rules 2004* (Cth) **(Family Law Rules)** expressly state that their purpose is to enable single experts to be used where practicable without compromising the interests of justice.[10] Parties seeking orders for separate experts should come to the Court prepared with reasons as to why that is appropriate.

What kind of expert do you need?

In order to locate a suitable expert witness, it is first necessary to determine what kind of expert witness is required. This generally means formulating, at least at a high level, the questions or issues on which the expert will be required to express an opinion.

For example, in a dispute over payment for construction works it is unhelpful to brief a quantity surveyor (who specialises in the valuation of works) if the real dispute to be determined is one relating to the soundness of the works (which may require a structural engineer).

In some cases it may even be necessary to brief multiple experts to give opinions across multiple areas of expertise. Identifying this at an early stage will minimise the number of experts ultimately briefed by choosing experts with the right combination of expertise.

Finding an expert

Experts can be found by reviewing online search results, university databases and reported cases. If an expert is conflicted out or unavailable, they may be able to recommend another expert in their field. Once there is a shortlist of experts, research their background, qualifications and cases where they have given evidence. This information should be presented to the client for instructions, along with reasons for recommending one expert on the shortlist.

10 *Uniform Civil Procedure Rules 2005*, r 31.17; *Family Law Rules 2004*, r 15.42.

The assistance of an external expert opinion service provider, such as Unisearch Expert Opinion Services, can also provide access to an extensive panel of highly qualified academic and renowned industry leaders drawn from universities, commercial enterprises and independent consultancies.

Selecting the expert

Once a potential expert has been identified and initial contact made (discussed further in the next chapter), consideration should be given to the following questions in deciding whether to go ahead with briefing that expert:

1. Did the expert understand the potential brief when it was discussed with them and in particular did they show a good grasp of the issues on which they will be required to give an opinion?
2. Was the expert able to express themselves clearly, particularly on issues within their expertise when you spoke with them? It must be remembered that an expert is not an advocate for a party, but their effectiveness will depend on their ability to clearly and persuasively communicate their opinion to the Court.
3. Was the expert easy to deal with and someone you can see yourself building a rapport with? Given the importance of communication and cooperation between an expert and their instructing lawyer, this is a factor that can be of real significance.
4. Had the expert given expert evidence before? While by no means essential, if the expert is familiar with the process of giving expert evidence then it will naturally make the task easier for you. If their evidence was given in a case that went to a reported judgment, it may also be possible to discover from that judgment how their evidence was viewed by the Court.


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CHAPTER 3: INITIAL CONTACT WITH THE EXPERT

When making initial contact with the expert (and before significant costs are incurred) it should be determined whether the Court will admit the expert's opinion under the exception to the opinion rule (Uniform Evidence Acts, s 79). The expert must have:

1. Specialised knowledge; and
2. That specialised knowledge must be wholly or substantially based on their training, study or experience.

Keeping the above requirements in mind will ensure the right expert is selected.

Specialised knowledge

Specialised knowledge is not defined in the Uniform Evidence Acts and is instead defined in common law. There are two relevant questions:

1. Is the subject matter such that a person without experience would be able to form a sound judgment on the matter without assistance from a witness possessing specialised knowledge?
2. Is the subject matter of the opinion part of a body of knowledge or experience and sufficiently organised or recognised to be a reliable body of knowledge or experience?

Unfortunately, what suffices as a field of expertise has not been settled in Australia and new and developing knowledge will continue to pose difficulties, particularly if those new areas have not yet received "general acceptance".

There is an ongoing debate as to whether the area of "facial mapping" and "body mapping" is an area of "specialised knowledge". This is where facial and body features are mapped, usually from photographs or CCTV, to identify people. In Tang,[11] the NSW Court of Criminal Appeal considered whether the new science of "facial mapping" and "body mapping" was an area of specialised knowledge. The Court ultimately found the expert's opinion was not based on specialised knowledge as her reasoning process was inadequately explained. While the expert's opinion was not allowed for the purposes of positively identifying the accused, she was allowed to give evidence as an "ad hoc" expert about the similarities in photographs without making a positive identification. Showing just how quickly an emerging area of knowledge can be considered "specialised knowledge", only a few months later the same expert's "facial mapping" opinion evidence was found to be specialised knowledge and admissible.[12] However, the issue arose in a recent High Court decision[13] involving a professor in anatomy acting as expert for the prosecution in a criminal case, where identity was in issue. The expert reviewed CCTV footage of the incident and recordings of the accused in the police station, concluding there was a "high degree of anatomical similarity". However the Court held the expert's opinion was not based wholly or substantially on his specialised knowledge, but based on a subjective impression of what he saw when he looked at the images. The Court held the evidence should not have been admitted, quashed the conviction and ordered a new trial.[14]

11 *R v Hien Puoc Tang* [2006] NSWCCA 167.
12 *R v Jung* [2006] NSWSC 658.
13 *Honeysett v R* [2014] HCA 29.
14 Although this decision is said to be of limited relevance: Andrew Roberts, 'Expert Evidence and Unreliability in the High Court: *Honeysett v The Queen*' on *Opinions on High* (3 September 2014) <http://blogs.unimelb.edu.au/opinionsonhigh/2014/09/03/roberts-honeysett<

Based on training, study or experience

If the proposed expert has "specialised knowledge" it must still be determined whether it is based on their training, study or experience. While it will be obvious in certain professions, for example, medical practitioners, civil engineers, accountants and registered valuers; other areas of expertise can be more problematic.[15]

This difficulty has led to the use of "ad hoc" experts: a person who has acquired expertise through experience, without any formal training or qualifications.[16] For example, in *R v Leung* [1999] NSWCCA 287, a qualified interpreter was permitted to give evidence of voice comparison and voice identification, not because he had specialised knowledge based on training or study, but because of his experience of listening to the recordings multiple times and becoming familiar with the accents, languages and voices on the tapes. Recent examples are *Morgan v R* [2016] NSWCCA 25 and *Nguyen v R* [2017] NSWCCA 4. In both cases the Court held that police officers who had listened to hours of intercepted telephone calls involving the appellants were ad hoc experts and their voice identification evidence was held to be admissible.

15 Gary Edmond, "Specialised Knowledge, the Exclusionary Discretions and Reliability: Reassessing Incriminating Expert Opinion Evidence" [2008] *UNSWLawJl* 1.
16 *Butera v Director of Public Prosecutions (Vic)* [1987] HCA 58; (1987) 164 CLR 180.

In practical terms, it is important to canvass the following areas as part of the initial contact with any proposed expert:

1. Briefly explain the nature of the proceedings to ensure the expert understands the context of their possible role, and confirm whether the expert has a conflict of interest (see further detail below).
2. Explain the issue(s) they may be asked to opine on. Is it within their area of expertise?
3. If yes, what training, study or experience do they have in the area?
4. Have they given expert evidence in similar proceedings? Were there any issues with their evidence, for example, were they found not to have "specialised knowledge"? If there are any concerns, the expert can be asked for a list of reported cases they have given evidence in so you can see how they fared in the trial process.
5. Are there any limitations on their expertise and will more than one expert be required? For example, a forensic accountant valuing a business or the company shareholdings may first require a valuation of real estate, stock, livestock or plant and equipment. A good expert will know their limitations.
6. If the matter has already been allocated a hearing date, are they able to complete the report in the timeframe and will they be available for cross-examination? It may also be worthwhile asking the expert, if based outside the jurisdiction for example, if they will insist on giving evidence by telephone or audio-visual link.
7. What are their costs? While cost is often a client's primary concern, it should not take precedence over experience. Under-qualified experts, while initially cheaper, may lead to delays and further costs down the track.

The instructing lawyer may also wish to provide the expert with the pleadings, the expert reports served by other parties in the matter and a list of assumptions, in advance of the initial contact. The initial contact with the expert is usually by way of conference, in person or by telephone.

Conflict of interest – ask the expert

It is important to confirm as early as possible that the proposed expert does not have a conflict of interest that could affect their ability to provide an opinion in the matter. Before a detailed letter of instruction is sent to a prospective expert, they should be given the names of all parties to the proceedings (including your client and any third parties who could give rise to a conflict) and asked to confirm in writing that they have no

current or previous connection with those parties.

If the expert does have a connection with one or more party, ask them to disclose the nature and extent of each connection, and whether the expert believes it amounts to a conflict of interest. If the expert believes their connection does not amount to a conflict, the instructing lawyer should nonetheless form their own opinion on the issue and obtain instructions from their client before proceeding with briefing the expert.

CHAPTER 4:
THE DUTIES AND RESPONSIBILITIES OF AN EXPERT

"The primary duty of the expert is to the Court."[17]

Common law duties

At common law, the duties and responsibilities of expert witnesses in civil cases are succinctly set out in *Makita (Australia) Pty Ltd v Sprowles*:[18]

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation ...
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise ... An expert witness... should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

17 Justice Robert McDougall, An overview of the Evidence Act Keynote address prepared for the NSW Young Lawyers Annual One Day CLE Seminar 2011 at [49].

18 *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705 at [79] (Heydon JA).

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

Code of Conduct

In both NSW and the Federal Courts (other than in family law), these common law duties are now repeated and expanded upon in the Expert Code of Conduct, with which all expert witnesses in civil cases are required to comply. The Code is set out in identical fashion by the UCPR in NSW,[19] and by practice note in the Federal Courts.[20]

Experts must, as part of their report, acknowledge that they have read the Code of Conduct and agree to be bound by it. Failure to do so will render the report inadmissible.[21] However, if the failure is inadvertent, generally the expert may cure this defect by swearing that they complied with the relevant Code of Conduct during the writing of the report.[22]

While the Code of Conduct does not apply in family law, Divisions 15.5.4 to 15.5.6 of the Family Law Rules provide for substantially similar obligations to the Code of Conduct, and experts are required to confirm in their reports that they have read those provisions of the Rules.[23]

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19 *Uniform Civil Procedure Rules 2005*, Sch 7.

20 Federal Court Practice Notes, Expert Evidence Practice Note (GPN-EXPT), Annexure A.

21 Justice Robert McDougall, An overview of the Evidence Act Keynote address prepared for the NSW Young Lawyers Annual One Day CLE Seminar 2011 at [68]; *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2009] NSWSC 49 at [46]; *Yacoub v Pilkington (Australia) Ltd* [2007] NSWCA 290 at [59].

22 *Hodder Rook & Associates Pty Ltd v Genworth Financial Mortgage Insurance Pty Ltd* [2011] NSWCA 279 at [63] (Young JA).

23 *Family Law Rules 2004*, r 15.62.

CHAPTER 5:
LETTER OF INSTRUCTION

The first formal piece of correspondence with the chosen expert is usually by way of a detailed letter of instruction.

Instructions and questions

The letter of instruction should provide a background to the matter and the nature of the dispute. Outline the instructions and questions clearly. A summary or list of factual assumptions (see below) may also be included, in which case the questions should refer to specific facts. If an opinion is sought that is contingent on an answer to an earlier question, that should be specified in the question. As an example:

7. Does the security system at Long Bay Correctional Facility meet the Standard Guidelines for Corrections in Australia? Please include your reasons for your conclusion.

8. If your answer to Q7 is "No", what steps could management have taken to meet the Standard Guidelines for Corrections in Australia?

Summary of facts/assumptions

The list of assumptions the expert is asked to rely on when preparing their report must be drafted with great caution and care. At common law, the admissibility of expert opinion evidence depends on proper disclosure and proof of the factual basis of the opinion. If the expert does not properly disclose the facts or assumptions upon which their opinion is based, or the facts or assumptions are not capable of proof, the very foundations of the report will be challenged and the evidence may be held inadmissible. Even if accepted without objection, a failure to prove the factual basis of the opinion will affect the weight given to the opinion by the decision maker.

Given the nature of Court proceedings, it is rarely possible to prove every fact before the expert prepares an opinion. For that reason, both principle and common sense dictate that facts proved are not required to correspond with complete precision to the propositions upon which the expert's opinion is based. It is also possible for an expert to rely on assumptions; however, they must be stated explicitly.

It is also important for the reader of the report (at this stage, usually you as the instructing solicitor) to have a clear understanding of the facts relied on by the expert as you may be required to establish the relevance[24] of the opinion evidence before it is accepted by the Court as being admissible.

The summary or list of factual assumptions should include a source for each fact. Some practitioners provide a list of facts and a list of assumptions; some provide a list that mixes both. The decision is a question of style and what suits the particular case.

Qualifications

Inform the expert that they must include their qualifications and experience in the report. This is often done by including the expert's long form resume as an annexure to the report.

List of documents

Enclose a list of documents provided to the expert. It is useful to include the document title, date, and document ID (if any). It is also useful to have a clear referencing system so the expert can mirror the referencing of documents in their report and ensure there is a coherent link between the report and the letter of instruction.

24 Namely that, if accepted, it could rationally affect the assessment of a fact in issue in the case.

All information which may have a significant bearing on the opinions formed by the expert must be provided to the expert.[25] However, carefully consider the volume of reading required and only include material that is directly relevant to the issue(s) the expert has been instructed to provide an opinion on as this can constitute a large part of the expert's fees. Relevant information provided to the expert should be in chronological order.

Addressing ambiguity

Inform the expert that they must include any plausible alternative conclusions or interpretations of data in their report, along with their opinion on those alternatives.[26]

Uncertainty

Inform the expert that they must include any qualifications or limitations that apply to their opinions and conclusions. In particular, if the expert cannot form a conclusive opinion for any reason, they must state this.[27] The expert must also clearly state if something is outside their area of expertise.

Reliance on others

Where the expert relies on the work of others or delegates tasks, the expert must either (a) review the work and the source documents to form their own opinion, or (b) identify in the report the extent of their reliance.[28]

Code of Conduct

Enclose the relevant Expert Code of Conduct, with a note that the expert must (a) read the Code, (b) familiarise themselves with the Code, and (c) explicitly include in their report that they understand the Code and agree to be bound by it. In a family law case, the expert should be given these instructions in respect of the relevant divisions of the Family Law Rules, rather than the Code of Conduct.[29]

25 *Ian Leslie Bush v R* [1993] FCA 361 at [45] (Drummond J, Davies and Miles JJ agreeing).
26 NSW Young Lawyers The Practitioner's Guide to Civil Litigation, Chapter 26 (2014, 4th ed).
27 NSW Young Lawyers The Practitioner's Guide to Civil Litigation, Chapter 26 (2014, 4th ed).
28 NSW Young Lawyers The Practitioner's Guide to Civil Litigation, Chapter 26 (2014, 4th ed).
29 *Family Law Rules 2004*, r15.54 and 15.63.

Timeline

Set out the schedule of events and deadlines that apply to the expert, including the deadline for the report, the date ordered by the Court for filing and/or serving the report, the date for filing and/or serving any reports in reply, the date of any conclaves or joint reports, and the trial date (if it is to be a long trial, the range of dates which the expert may be called to give evidence).

Fees

Confirm the agreed fee structure with the expert, the timing they can expect payment, and the invoice/billing requirements. Occasionally experts will prepare reports on a no win, no fee basis; some have argued that this practice is unethical and poor practice, as it provides a financial incentive to express opinions of a particular kind.[30]

Speak before sending

Before sending the letter of instruction, speak to the expert and run through the draft letter (and in particular the proposed questions). The expert might have suggestions for how the letter could be improved such as the technical focus and nuanced wording of the questions. It is much better to have those suggestions before the letter is sent.

Sample letter of instruction

An example of a letter of instruction, to provide guidance on what can be included, can be found at https://www.unisearch.com.au/resources/letter-of-instruction.pdf

30 Dr Ian Freckelton QC and Hugh Selby, Expert Evidence: Law, Practice, Procedure and Advocacy (2013, 5th ed) at [5.0.11], citing NSW Law Reform Commission, Report 109 - Expert Evidence (2005) at [9.20]-[9.35].

AN EXPERTS' PERSPECTIVE TO EFFECTIVELY ENGAGING AND MANAGING EXPERTS

- Engage in pre briefing discussions to generate relevant questions
- Provide a clear Letter of Instruction including a summary of the circumstances of the case
- Provide relevant information in a chronological order
- Ensure documents are unzipped to assist the expert copy and paste from the documents
- Have telephone contact with the expert to enhance communication and feedback
- Educate the expert to fully understand the brief, the code of conduct and their role
- Have conclaves guided by an independent mediator, provide experts with a list of issues in dispute and educate experts in how to deal with other experts

COMMON EXPERT GRIPES

- Biased and "loaded" questions
- Requests for comment on legal or responsibility issues before the factual aspects of the case have been properly defined
- Requests for response to a narrow set of forensically structured questions that ensue that the wrong questions have to be answered and exclude wider and more important issues
- Incomplete briefing documents to deliberately bias the opinion
- Unrealistic time frames and last minute panics
- Jumbled and irrelevant documents
- Poor quality photographs
- Closed ended questions and questions that presume the answer
- Asking the expert to comment on matters that are of a legal nature
- Asking loose questions with a very wide scope
- Last minute briefings and muddled questions in expert conclaves

CHAPTER 6: COMMUNICATION WITH THE EXPERT

Sending a letter of instruction is never the totality of the communication between an expert and the lawyer briefing them. Amongst other things, it will typically be appropriate:

1. To discuss the questions that will be included in the letter of instruction (ideally before the letter is finalised and sent);
2. For the expert to obtain clarifications or further instructions during the course of their retainer;
3. For the expert and lawyer to discuss the expert's preliminary views before they prepare a draft report (since there is risk in leaving that discussion until later); and
4. For the lawyer to discuss the expert's draft report with them, and assist them in finalising that report.

While such communication is essential to the preparation of a useful expert's report, it also needs to be carefully managed. In particular, careless communications could come out in discovery, and be used against the expert and the parties involved in the litigation.

Privilege

An expert will often express preliminary views before the issues in dispute have been narrowed and prior to detailed information being provided. There is nothing necessarily wrong with them doing so – it will often be of assistance to the instructing lawyer – but if those preliminary views are expressed in writing there is the risk that they could be subject to discovery.

If, as is often the case, the expert's views change as they gain a better understanding of the matter, any inconsistency between their preliminary and final views may be used in cross-examination to undermine the expert's final report. However, this risk can be mitigated by understanding what material is and is not discoverable, so as to ensure that potentially sensitive information (such as the expert's preliminary views) are not put in a discoverable form.

A discovery application and the tender of evidence can be resisted on the ground of privilege. In determining whether particular documents or communications are privileged, a two-step test will be applied:[31]

1. First, the party asserting a document to be privileged must prove that to be the case; and
2. Second, if the other party asserts that privilege has been waived, then it bears the onus of proving that to have occurred.

When does privilege arise?

Even though an expert is not a legal advisor, communications with them will often fall within the scope of legal professional privilege. There are, in essence, two aspects to that privilege, being:

1. "Legal advice privilege" which operates to protect confidential communications between a lawyer and client, and confidential documents (regardless of who created them), which came into being for the *dominant purpose* of providing legal advice to the client;[32] and
2. "Litigation privilege" which operates to protect confidential communications with third parties, and confidential documents, which came into being for the *dominant purpose* of the client being provided professional legal services relating to an Australian or overseas proceeding.[33]

31 *IO Group Inc v Prestige Club Australasia Pty Ltd (No 2)* [2008] FCA 1237 at [2] (Flick J).
32 Uniform Evidence Acts, s 118.
33 Uniform Evidence Acts, s 119. See also s 120 where a party is unrepresented.

As expert reports are typically prepared for the purposes of litigation, and litigation privilege is the broader of the two aspects (specifically extending to confidential communications with third parties), it will generally be the basis for any claim for privilege over an expert's report. Litigation privilege is not exclusive to experts – the same privilege applies to confidential communications with any prospective witness.

As can be seen from the above definitions, the availability of privilege in a particular communication or document turns entirely upon its dominant purpose, which must be considered on a case-by-case basis. Usually:[34]

1. The initial letter of instruction to the expert will be privileged, as it was created by the lawyer for the purposes of their client's litigation. However, as addressed below, that privilege will likely be waived once the report is relied upon.
2. Privilege generally attaches to communications between the lawyer and expert (or the client and expert, if applicable), since they will tend to have the same purpose.
3. Privilege does not attach to working papers, field notes, and similar documents generated by an expert in the course of preparing their report, because those documents are prepared for the expert's own purposes.

Draft reports

Of particular complexity, and deserving separate mention, is the question of whether a draft report prepared by an expert will be privileged. The answer will depend on the dominant purpose for which the draft was prepared:

1. If the expert prepared the draft for their own purposes, either as part of their thought process or simply as part of working towards their final report, then the draft will not be privileged even if it is communicated to the instructing lawyer.[35]
2. On the other hand, if the expert's dominant purpose in preparing the draft was to be able to put it to their instructing lawyer for comment or discussion, such a report will generally be privileged.[36]

34 *Australian Securities and Investments Commission v Southcorp Limited* [2003] FCA 804 at [21] (Lindgren J).
35 *Ryder v Frohlich* [2005] NSWSC 1342 at [11]-[12] (Barrett J).
36 *New Cap Reinsurance Corporation Ltd (In Liq) and 1 Or v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at [34] (White J).

Given that both of these purposes will often be present, and the fine distinction between them, it will often be very difficult to prove which purpose is dominant for a particular report.[37] As the onus lies with the party asserting privilege, if the expert's purpose in creating the draft cannot be proven then the report will not be privileged (though a lawyer's feedback to the expert upon the report may still be privileged).[38]

All of the above means that while privilege may be able to be claimed over a draft report if the expert is specifically instructed to prepare it for the lawyer's comment in the first instance, there is still the real risk that privilege could be disputed. Even if the draft is ultimately held to be privileged, it may only be after a lengthy and costly hearing on the issue.

When will privilege be waived?

As a starting point, the Harmonised Expert Witness Code of Conduct (which applies in the Courts of the Commonwealth and NSW)[39] requires any expert report to identify all of the facts upon which the expert's opinion has been based,[40] and attach or exhibit to the report any documents that record instructions given to the expert or materials the expert has been instructed to consider.[41] Accordingly, in practical terms, privilege in instructions to an expert will be lost once the expert's report has been served, because those instructions will accompany the report.

The position in respect of other communications, such as comments upon an expert's draft report, is more complicated. In summary:

1. The Uniform Evidence Acts provide for privilege to be lost where the client consents to disclosure, or acts in a way "inconsistent" with the maintenance of privilege.[42]
2. Such an inconsistency will arise if the communications have influenced the expert's report and it would be unfair to allow reliance on it without disclosure of the communications.[43]

37 As recognised in *New Cap Reinsurance Corporation Ltd (In Liq) and 1 Or v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at [35] (White J).
38 *IO Group Inc v Prestige Club Australasia Pty Ltd (No 2)* [2008] FCA 1237 at [9]-[13] (Flick J).
39 As well as Victoria, ACT and Tasmania.
40 Harmonised Expert Witness Code of Conduct, clause 3(d).
41 Harmonised Expert Witness Code of Conduct, clause 5.2(c)(i).
42 Uniform Evidence Acts, s 122.
43 *New Cap Reinsurance Corporation Ltd (In Liq) and 1 Or v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at [53] (White J).

3. This is a balancing exercise, with it being necessary for the final report to be influenced "in a substantial sense" for waiver to arise – merely giving feedback on issues of style and admissibility will not waive privilege even though in a literal sense it may affect the contents of the report.[44]

4. The mere fact that a draft report shows that the expert changed their views, over time, of their own accord, will not cause the draft to become discoverable, as experts are entitled to change their views as they consider a matter over time.[45]

Accordingly, care must be taken to ensure that when providing feedback on the contents of an expert's report, that feedback is limited to matters of form. To do otherwise, aside from being potentially improper conduct, runs the risk of waiving privilege with the result that those communications can then be used to undermine the expert's report at trial.

Waiver by disclosure to third parties

Sharing privileged material with an insurer or litigation funder will generally not amount to a waiver of that privilege – so long as the material is genuinely shared for the purposes of the litigation to which it relates.[46]

However, privilege may be lost by disclosing material to an insurer who has not accepted an insurance claim in the hope of convincing them to accept it, as that conduct is not the use of the material for the purposes of the litigation and is inconsistent with the maintenance of privilege.[47]

Reports obtained in non-privileged circumstances

The summary of the law set out above reflects the position where an expert's report has been obtained for use in a court governed by the Uniform Evidence Acts. However, reports may be obtained under other circumstances.

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44 *Shea v TruEnergy Services Pty Ltd (No 5)* [2013] FCA 937 at [60]-[61] (Dodds-Streeton J).

45 *Linter Group Ltd v Price Waterhouse (a firm)* [1999] VSC 245 at [16] (Harper J); *New Cap Reinsurance Corporation Ltd (In Liq) and 1 Or v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at [52] (White J).

46 See for example *Hastie Group Ltd (in liq) v Moore* [2016] NSWCA 305 at [59]-[60] (Beazley P and Macfarlan JA) considering disclosure to prospective litigation funders.

47 *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 2)* [2014] FCA 481 at [80]-[82] (Bromberg J).

Where no proceedings are on foot

Sometimes a party may obtain an expert's report about an issue to determine its potential liability even when there are no legal proceedings on foot. Such reports are at risk of being discoverable (even if never served), because litigation privilege is only available if legal proceedings are on foot or there is "a real prospect of litigation, as distinct from a mere possibility" though "it does not have to be more likely than not".[48] For example:

1. Where an insurer instructs an adjuster to investigate a claim, but no threats of litigation have yet been made and no lawyers have been briefed, that adjuster's report is unlikely to be privileged.[49]
2. Where a lawyer is instructed to engage an expert for their client, but the expert's report is to be used not only for contemplated litigation, but also for the client's other purposes, then unless the litigation can be proven to have been the dominant purpose, privilege will not arise.[50]

That is not to say privilege can never be established without imminent legal proceedings, or even without lawyers retaining the expert. As an example, where an insurer urgently retains an expert investigator to investigate a fire, while also separately arranging lawyers, that investigator's report may be privileged if it can be shown the dominant purpose of the report was for the lawyers to advise on the insurer's potential liability, attracting legal advice privilege even though there was no threatened litigation that could support litigation privilege.[51] However, such claims of privilege will be closely scrutinised, to ensure the lawyer is not being used merely as a conduit to justify a claim for privilege.[52]

Tribunal proceedings

A further circumstance where privilege may not be available is where an expert is briefed for tribunal proceedings, such as the Administrative Appeals Tribunal (**AAT**). It has been held that, due to the manner in which litigation privilege is defined in the Uniform Evidence Acts, litigation privilege is not available in respect of communications relating to proceedings before a tribunal not bound by the rules of evidence (of which the AAT is one).

48 *Visy Industries Holdings Pty Ltd v Australian Competition and Consumer Commission* [2007] FCAFC 147 at [30]-[31] (Weinberg J).
49 *Brunswick Hill Apartments Pty Ltd v CGU Insurance Limited* [2010] VSC 532.
50 *Perry & Anor v Powercor Australia Limited* [2011] VSC 308.
51 *Samenic Limited (formerly Hoyts Cinemas Limited) & Anor v APM Group (Aust) Pty Ltd & Ors* [2011] VSC 194.
52 *Samenic Limited (formerly Hoyts Cinemas Limited) & Anor v APM Group (Aust) Pty Ltd & Ors* [2011] VSC 194 at [23] *(Mukhtar As.J).*

This means that all communications with an expert retained for such proceedings are at risk of being discoverable, not only in those proceedings but in later proceedings before other Courts.[53]

Reports in parenting proceedings

Where an expert's report is obtained for a parenting case (whether before or after the start of the case), it must be disclosed to the other parties to the case – the Family Law Rules expressly override legal professional privilege for such reports.[54]

Mitigating risk

In practical terms, the simplest way to mitigate the risk of documents being discovered by the opposing party and used to undermine an expert's report is to simply ensure that where instructions or views are put in writing, they are in a considered form that will not cause harm if disclosed.

This can be achieved by a structured approach to communication between the expert and lawyer, where issues are discussed and clarified orally before being put in writing. In particular:

1. Before issuing the letter of instruction, the lawyer should speak with the expert, discuss with them the instructions to be given, and also explain the importance of preserving privilege in communications and documents to the extent possible. While the expert should not be pressed to give premature commitments to how they will approach their engagement,[55] this meeting can and should be used to refine the proposed letter of instruction and ensure the right questions are being asked.
2. Similarly, to the extent the expert needs further instructions during the course of their retainer, that should be discussed by telephone first to ensure the expert's requirements are properly understood. As with the letter of instruction, this ensures that what is put in writing will give the expert the information they need, while avoiding the danger of a hastily sent email that might cause harm if discovered.

53 *Ingot Capital Investments Pty Ltd & Ors v Macquarie Equity Capital Markets Ltd & Ors* [2006] NSWSC 530.
54 *Family Law Rules 2004*, r 15.55.
55 Such conduct being criticised in *Phosphate Co-Operative Co of Australia Pty Ltd v Shears* [1989] VR 665 at 680 (Brooking J).

3. The expert should be warned, and should keep in mind, that their working papers will ordinarily be discoverable, and they should assume they will be seen by the opponents who may one day cross-examine them. Accordingly, the expert should not rush to record unsettled views or uncertain propositions in their working notes, in terms that might be able to be used to undermine their final report(s).

4. When the expert believes they have identified the opinion they are going to give, they should discuss their views with the instructing lawyer first – aside from issues of privilege, this will allow the instructing lawyer an opportunity to ensure the expert has addressed the questions asked of them and not misapprehended any key issues. Given the importance of this stage, it is a discussion well worth having in conference.

5. When draft reports are prepared, they should be shared under cover of separate email chains, which make it clear that they are being provided for the instructing lawyers' comment and assistance in settling. Incomplete drafts should not be circulated as a means of showing what further instructions are required, lest that support an argument they have taken on a non-privileged purpose.

6. When the lawyer requests or suggests changes to a draft report, they should ensure their changes are limited to matters of form – if the expert's conclusions are to be tested that is best done in conference, by way of probing questions. Not only will that reduce the risk of the communications being discoverable, but it also reflects the lawyer's ethical obligation.

None of the above is to suggest that telephone calls or meetings should be used to try to covertly pressure an expert into changing their views – such conduct is inappropriate, unprofessional, and if uncovered, is certain to destroy the credibility of the expert's report.

However, there is nothing improper about discussions with an expert before committing instructions to writing – indeed it is the simplest way to avoid embarrassing mistakes through miscommunication, while providing the added advantage of reducing discovery issues. As one author has put it, keep radio silence, at least until you know what you want to say![56]

56 Sydney Jacobs, Briefing Experts (Oct 2014), 2-4.

Subpoenas and discovery

As material in an expert's working papers and communications can be used to undermine their final report, those documents will often be sought in discovery and a subpoena issued for the expert's files.

Discovery

Where a party is ordered to discover communications with an expert, the party must disclose the existence of those communications, and then (if appropriate) specify the circumstances under which any privilege is claimed to arise.[57] The existence of that privilege must then be confirmed by way of the affidavit verifying the list of discovered documents, which in New South Wales must specifically attest to the facts alleged to give rise to the relevant privilege.[58]

Merely claiming "legal professional privilege" over broad classes of documents is not sufficient compliance with this obligation - a party asserting privilege must do so by way of "focused and specific evidence".[59] While failure to strictly comply with this obligation at the time of an initial claim for privilege is not fatal to the claim, it may have costs consequences, and at the very least will not win favour with the Court.[60]

Subpoenas to experts

Where an expert is served with a subpoena for their records relating to an engagement, they must comply with the subpoena. It is the client (as the party claiming any privilege) that can assert that privilege, not the expert.

Where an expert is served with a subpoena, they should notify their instructing lawyer, and provide copies of the documents they anticipate producing in response to the subpoena. This will allow the lawyer, in conjunction with the expert, to identify which documents are privileged, prepare a schedule identifying the basis of the privilege claims, and see that the privileged materials are produced in a separate packet to which access will be objected.[61] Unlike discovery, it is not necessary to immediately prepare an affidavit verifying these claims for privilege,[62] though any claims for privilege should naturally be limited to what can ultimately be proven.

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57 *Uniform Civil Procedure Rules 2005;* r 21.3; *Federal Court Rules 2011* (Cth), r 20.17.

58 *Uniform Civil Procedure Rules 2005;* r 21.4; *Federal Court Rules 2011* (Cth), r 20.22.

59 *Bailey v Department of Land and Water Conservation* [2009] NSWCA 100 at [19]-[37] (Tobias JA); *Barnes v Commissioner of Taxation* [2007] FCAFC 88 at [18] (Tamberlin, Stone and Siopis JJ).

60 *Bailey v Department of Land and Water Conservation* [2009] NSWCA 100 at [41] (Tobias JA).

61 The Courts are grappling with correct procedure in such circumstances following the decision of *Hancock v Rinehart (Privilege)* [2016] NSWSC 12, but at the time of writing, the procedure being followed is that set out above.

62 See the procedures for the making of access orders, and objections to access, in Supreme Court of NSW Practice Note SC Gen 19, and Federal Court Practice Note GPN-SUBP.

The reason that a conference will generally be necessary is because (as set out above) the availability of privilege will depend upon the expert's dominant purpose in preparing a given document, which may not be easy to ascertain for many documents in an expert's file.

To the extent the expert incurs material personal expense in responding to the subpoena, the expert can seek an order for the payment of those costs by the party that issued the subpoena.[63]

Enforcement of privilege

If a claim for privilege has been made and is disputed, that claim for privilege may be tested by way of:

1. An application for an order for particular discovery of the allegedly privileged documents, in the case of discovery; or
2. An interlocutory hearing to determine the appropriate access orders in respect of a subpoena.

In either case, as set out previously in this chapter it will be for the party asserting privilege to prove its existence by way of "focused and specific evidence",[64] and (if applicable) for the party seeking access to establish any waiver of privilege.[65]

While the exact evidence required to establish privilege will naturally depend on the circumstances, as a general proposition, affidavits should be obtained from the people who created the documents in question, confirming their purpose in creating each document. In the case of materials generated by an expert, this will typically mean obtaining an affidavit from the expert confirming that the materials were for the purpose of obtaining their instructing lawyer's comment upon a draft report. Where such evidence is given, it is likely to be decisive.[66]

63 *Uniform Civil Procedure Rules 2005;* r 33.11; *Federal Court Rules 2011* (Cth), r 24.22.

64 *Bailey v Department of Land and Water Conservation* [2009] NSWCA 100 at [19]-[37] (Tobias JA); *Barnes v Commissioner of Taxation* [2007] FCAFC 88 at [18] (Tamberlin, Stone and Siopis JJ).

65 *IO Group Inc v Prestige Club Australasia Pty Ltd (No 2)* [2008] FCA 1237 at [2] (Flick J).

66 See *New Cap Reinsurance Corporation Ltd (In Liq) and 1 Or v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at [30] and [37] (White J).

In considering a claim for privilege, the Court may also look at the documents the subject of the claim. For example, this might be done where there are only a small number of communications in dispute, and the key issue is whether those communications are likely to have substantially affected the expert's report such that privilege has been waived.[67] However, parties claiming privilege cannot assume that the Court will agree to such inspections, and must ensure their affidavit evidence standing alone is sufficient to establish the privilege.[68]

The implied undertaking

A further but separate issue that experts, lawyers, and litigants must all be aware of when dealing with expert evidence (or, indeed, any evidence in litigation) is the obligation commonly known as "the implied undertaking".[69] The implied undertaking is a rule of law that states that, where a person receives a document as a result of a Court's compulsory process in legal proceedings, that person cannot use the document for any purpose other than those proceedings, without the leave of the Court, and at the very least, unless and until it is read in open Court. This obligation extends to materials obtained by discovery, subpoena, orders for service, or any other Court process.[70]

As an example, if an expert report is prepared for the purposes of litigation and then served on the opposing party in accordance with a Court order requiring its service, any person who then receives that report must keep it confidential. If a person discloses the report's contents publicly (for example, for political reasons) then they may be held in contempt of Court for breaching the implied undertaking.[71]

67 As in, for example, *Sprayworx Pty Ltd v Homag Pty Ltd* [2014] NSWSC 833 at [68] (Harrison AsJ).
68 *Bailey v Department of Land and Water Conservation* [2009] NSWCA 100 at [2] (Allsop P).
69 Also known as the *Harman* obligations from *Harman v Secretary of State for the Home Department* [1983] 1 AC 280.
70 *Hearne v Street* [2008] HCA 36 at [96] (Hayne, Heydon and Crennan JJ).
71 As in *Hearne v Street* [2008] HCA 36 at [96].

As a matter of practice, an expert will normally be bound by obligations of confidentiality preventing them from making such use of material given to them for the purposes of preparing a report. However, there are two significant differences between an expert's obligation of confidence and the implied undertaking:

1. Because the obligation of confidentiality is generally owed to the client, the client can also release it. However, the implied undertaking is a duty owed to the Court, and cannot be released by the client (or even the opposing party).[72] So, even if the client approves an expert publicly disclosing material given to them, if the expert is aware that material was obtained by way of discovery or other Court process from another party then it cannot be disseminated.
2. Where an expert's obligation of confidentiality will generally be enforceable under civil proceedings (at best), a breach of the implied undertaking can amount to a contempt of Court. This may lead to criminal sanctions, even if there was no conscious intent to breach the obligation to the Court.

For these reasons it is especially important for experts (and any other person involved in litigation) to ensure they do not disseminate or otherwise use material obtained in the course of litigation for any purpose other than that litigation – it not only could have professional repercussions, but criminal ones too!

However, in so far as parties to litigation are concerned, disclosure of material (for example, an opponent's expert report) can be given to the party's insurer for the purposes of a claim,[73] or to a litigation funder for the purpose of assessing the merits of the case,[74] since those purposes are sufficiently linked with the proceedings to be legitimate.

72 *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316 at 321-322.
73 *Cadence Asset Management Pty Ltd v Concept Sports Limited* [2006] FCA 711 at [6] (Finkelstein J).
74 *QPSX Limited v Ericsson Australia Ltd (No 5)* [2007] FCA 244.

CHAPTER 7:
THE EXPERT REPORT

"It is permissible for the practitioner to assist the expert as to form, but impermissible to influence the content."[75]

In an effort to avoid any sense of impropriety and influence over the expert, there is a tendency for lawyers to be too cautious when briefing an expert. The Courts have held that lawyers can, and should, be involved in the preparation of expert reports.[76]

When reviewing expert reports, the role of the lawyer is limited to assisting the expert with the form of their report, identify any areas of the report that require clarification and ensure the admissibility of the report.[77] Lawyers can discuss draft reports with experts and request changes to the report to ensure it is admissible, however the lawyer should be careful not to influence the substance or opinion of the expert.[78]

75 Justice Robert McDougall, An overview of the Evidence Act Keynote address prepared for the NSW Young Lawyers Annual One Day CLE Seminar 2011 at [52].
76 *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)* [2003] FCA 893 at [19] (Lindgren J).
77 *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)* [2003] FCA 893 at [27] (Lindgren J).
78 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 at [231] (Wilcox J).

Queries on an expert's opinion in a draft report

It is not uncommon for an expert to prepare and provide to the lawyer a draft report. The lawyer may have queries regarding the opinion expressed by the expert, especially in circumstances where the opinion is unfavourable to the lawyer's case. Lawyers should exercise caution when questioning an expert's opinion in a draft report. Lawyers need to be conscious that they are not compromising the integrity of the expert's evidence,[79] nor suggesting to the expert what their opinion should be. Lawyers should also keep in mind that a draft report can be called upon by other parties and may need to be disclosed (see the discussion in the previous chapter).[80]

If the lawyer is facing an adverse opinion in the expert report, they should review their letter of instruction and ensure the expert has taken into account all the relevant documents and facts (either assumed or known). The lawyer should consider:

1. Whether the expert was provided with all the relevant documents?
2. Was the expert asked the correct questions?
3. Is the expert qualified and experienced enough to express an opinion on the issue(s) in question?
4. What facts did the expert rely upon in reaching their opinion?
5. Is the expert's opinion based on theory that is accepted within their particular professional community?
6. Has the expert considered the opinions in any reports served by the other parties to the proceedings?
7. If the expert has overlooked an important document, misunderstood a material fact or made an error, the lawyer may note the error or omission and request the expert review the report in light of that information.

79 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 at [231] (Wilcox J).

80 See *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (Ruling No. 8)* [2014] VSC 567, which examined the due process for amending an expert's report and the potential liability of the instructing lawyer. It is important to clearly note changes between reports, and why the changes were made.

When reviewing a draft report the lawyer should be careful not to re-word the expert's evidence or add to the expert's evidence. In *Universal Music Australia v Sharman Licence Holdings*, the expert allowed the lawyer to include in the report information which the expert was unaware of and had not seen when he performed his testing. The Court held that the expert's evidence had been compromised.[81]

How to draft an expert report (for experts)

There is no readily available template for experts when preparing a report for the Court. Expert reports may take a number of forms, depending on the subject matter, however the most basic requirements are that the report is written and the expert has identified and agreed to be bound by the relevant Code of Conduct and rules.[82]

The expert should prepare their report in a format that clearly articulates their opinion and the assumptions and information on which that opinion is based, making the information accessible to the target audience. The expert must also remember their target audience may be unfamiliar with the topic of their report. Experts should avoid unnecessary jargon and consider how they may present the information in an easy to understand manner (for example, the use of diagrams or pictures where relevant). Where it is unavoidable to use technical terms, the expert should include a glossary, ideally referenced to the accepted industry or professional standard.

For lengthy reports, the expert should provide a brief summary at the beginning of the report. A table of contents and headings may also make the report easier to read. Clearly dividing the report into relevant sections will also assist the target audience in understanding the report.[83] Courts have also suggested that expert reports use short numbered paragraphs in a similar style to an affidavit.[84]

The expert should ensure all statements in the report are properly attributed to the source, whether this be a written source or oral statement by an informant.[85] Where possible, separate sections of the report should deal with questions of fact and questions of opinion. If the expert's specialised knowledge has come from training or study, Courts have also suggested that the expert include a list of their positions in the report along with any relevant publications.[86]

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81 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 at [231] (Wilcox J).

82 See Justice Robert McDougall, An overview of the Evidence Act Keynote address prepared for the NSW Young Lawyers Annual One Day CLE Seminar 2011 at [68] where his Honour noted failure to subscribe to the code of conduct will render the report inadmissible.

83 See *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)* [2003] FCA 893 at [29] (Lindgren J).

84 See *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)* [2003] FCA 893 at [29] (Lindgren J).

85 See *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)* [2003] FCA 893 at [30] (Lindgren J).

86 See *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)* [2003] FCA 893 at [31] (Lindgren J).

Adherence to rules and practice notes

As discussed in **Chapter 4**, the expert is expected to acknowledge and comply with the Court Rules and practice notes of the particular Court. The expert may be given a copy of those Rules and practice notes as part of their brief. It is essential that the expert read the rules included in their brief as the rules may differ slightly across Courts.

In the Supreme, District and Local Courts, the expert must comply with:

- UCPR, Schedule 7 - Expert Witness Code of Conduct;
- UCPR, rule 31.23 - Code of Conduct;
- UCPR, rule 31.27 - Experts' Reports; and
- UCPR rule 31.29 - Admissibility of expert's reports

Experts in the Federal Circuit Court (Family Law and general federal law) are expected to adhere to:

- *Federal Circuit Court Rules 2001* (Cth), rule 15.07; and
- Expert Evidence Practice Note (including the Harmonised Expert Witness Code of Conduct and Concurrent Expert Evidence Guidelines).

In the Family Court the expert must comply with Divisions 15.5.4, 15.5.5 and 15.5.6 of the Family Law Rules 2004.

Expert witnesses preparing a report for Family Court proceedings should pay attention to the requirement that their report be verified by an affidavit which is sworn or affirmed by the expert.[87] The affidavit must state that the expert:

- has made all inquiries they believe necessary and appropriate and there are no relevant matters omitted from the report unless otherwise specifically stated in the report;
- the expert believes the facts in the report are within their knowledge and are true;
- the opinion expressed by the expert are independent and impartial;
- the expert has read and understood Divisions 15.5.4, 15.5.5 and 15.5.6 of the Family Law Rules and has used their best endeavours to comply with them;

87 *Family Court Rules 2004*, r 15.62.

- the expert has complied with the requirements of any professional Code of Conduct or protocol; and
- the expert understands their duty to the Court and has complied with it.[88]

What to look for in expert report (for lawyers)

After receiving an expert report, lawyers should carefully check the report to ensure it is in admissible form, it addresses all the relevant issues and questions from the letter of instruction and the expert has clearly demonstrated, in plain English, how they have reached their opinion.[89] When lawyers are checking the report, lawyers should consider:

- whether the expert identified their field of specialised knowledge, training, study or experience (and, if the latter whether they have included a list of their positions in the report and/or their resume attached to the report);[90]
- whether the expert identified the precise question on which they have been instructed to give an opinion;
- whether the expert identified the facts (and stated if they are assumed or known to the expert) on which the opinion is based;
- whether the report is clear and easy to understand (especially for the target audience);
- whether the report writer demonstrated a clear reasoning process, applying their specialised knowledge and demonstrating the steps taken to reach their conclusions;
- whether the expert made any statements which should be attributed to another source;
- whether the report contains an acknowledgement that the expert has read, adhered to and agreed to be bound by the relevant Code of Conduct and rules; and
- whether the report complies with the rules of the Court.

It is also helpful for the lawyer to check the report for basic formatting and spelling errors which may detract from the readability of the report.

88 *Family Court Rules 2004*, r 15.62.
89 *Box v Minister for Health* [2013] WADC 30 at [74].
90 *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)* [2003] FCA 893 at [3] (Lindgren J).

CHAPTER 8: EXPERT CONCLAVES AND CONCURRENT EVIDENCE

Most jurisdictions have rules specifically dealing with the conduct of cases involving competing experts, making provision for joint conferences, joint reports and how the experts will be cross examined.[91]

For matters involving expert evidence, it is not uncommon to find a number of experts engaged either by one party, or multiple parties to the proceedings. In these circumstances, there will be competing expert opinions on key issues in the proceedings.

Where this occurs, the parties may seek directions from the Court for:

- an expert conclave; and
- concurrent evidence.

In some jurisdictions, Courts have the power to make directions for either concurrent evidence or an expert conclave to occur independent of the parties' wishes. Expert conclaves and concurrent evidence are distinct concepts.

91 See for example, *Uniform Civil Procedure Rules 2005*, r 31.24; *Family Law Rules 2004*, Part 15.5; *Federal Court Rules 2011* (Cth), r 23.15.

Expert conclave

An expert conclave refers to a meeting which occurs between experts, usually of a similar discipline, without lawyers present. Such a meeting, or 'conclave', occurs after each expert has prepared their own expert report, and these reports have been exchanged. An expert conclave is held between experts to distil the key issues in dispute between the expert reports and for the experts to prepare a joint expert report.

An expert conclave must occur within the parameters of the rules of the relevant Court or Tribunal. If an expert conclave is being considered, check the rules of the relevant jurisdiction.[92]

For example, the Expert Code of Conduct contained at Schedule 7 of the UCPR includes both a duty to comply with a Court's direction to confer with another expert and provide a joint report setting out the matters on which the experts agree, disagree and the reasons for those views, together with obligations regarding the conferencing of experts (i.e. expert conclaves).

Expert conclaves require significant preparation and planning, and the process will include:

- In the lead up to a conclave, each expert will need to be provided with the other relevant expert reports.
- The lawyers will then prepare a list of issues or list of key questions. This process can be time consuming and contentious, so sufficient time should be set aside for the parties to crystallise and agree on a confined list of issues or questions.
- The parties may wish to arrange for the expert conclave to take place at an independent location, for a specified period of time. Depending on the nature of the expert evidence, and the length of the respective reports, a sufficient period of time should be allowed for the experts to conclave. Where time permits, the expert conclave should be scheduled as far in advance of the filing date for the joint expert report as the experts are likely to require that time.

92 These are usually found in the practice note for that particular jurisdiction.

- It is not uncommon for an expert conclave to be assisted by an independent moderator. As the lawyers for the parties are not permitted to be involved in the expert conclave, a suitable independent moderator can be appointed to keep the experts on track, and ensure that the experts use the time available appropriately to finalise their report. Lawyers may wish to consider using an experienced barrister to perform the role of an independent moderator. An additional benefit of having an independent moderator includes that the parties can approach the moderator and vice-versa when clarification is required, or for an update regarding timing, without concern that they will be influencing the process.
- At the conclusion of the expert conclave, the experts will have produced a joint expert report, in which they address the key list of issues/questions. The joint expert report should clearly identify the areas of agreement, disagreement and the reasons for those views.

Concurrent evidence

Concurrent evidence, also known as "hot-tubbing", has been described by McClellan J as "essentially a discussion chaired by the Judge in which the various experts, the parties, the advocates and the Judge engage in a cooperative endeavour to identify the issues and arrive where possible at a common resolution of them."[93]

Consider any rules or practice notes which apply to the jurisdiction regarding the use of concurrent evidence.

In practice, concurrent evidence occurs after the expert conclave. Essentially, concurrent evidence will involve the experts sitting in the witness box at the same time (or appearing via videoconference or teleconference if permitted by the presiding member). The trier of fact, and the lawyers of the parties to the litigation if allowed in the jurisdiction in which the matter is being heard, will then put to each expert the same question in order to understand that expert's opinion in relation to that question. This can appear to be a repetitive, tedious process, however it is important that the experts address the same questions in order to adduce their expert opinions in relation to those issues.

93 P McClellan, "New Method with Experts – Concurrent Evidence" (2010)(1) 3 *Journal of Court Innovation* 259 at 264.

The benefits of concurrent evidence include:

- a reduction in court time;
- a reduction in costs (including both expert fees and the legal costs associated with additional hearing time);
- an opportunity for the key issues of agreement or disagreement to be distilled in a clear manner which assists both the Judge's and the parties' understanding of the key issues;
- preventing (in most cases) the opportunity for an expert to focus on immaterial matters, as the expert needs to deal with the question posed by the Judge or the lawyer;
- avoiding cross-examination that draws out the hearing by focusing on immaterial or irrelevant matters as the experts are required to address questions on key issues from the Judge or presiding member; and
- improving the quality of the expert evidence provided to the decision maker as the expert opinions are free from the constraints of the adversarial process, where experts only answer questions as posed by counsel in cross-examination.[94]

Lawyers should ensure that they are aware of the processes that a particular jurisdiction, Judge or presiding member adopts for concurrent evidence.

Lawyers may wish to prepare their experts for an expert conclave and concurrent evidence by ensuring that the expert is aware of the key matters in dispute between various expert opinions.

94 P McClellan, "New Method with Experts – Concurrent Evidence" (2010)(1) 3 *Journal of Court Innovation* 259 at 264.

USEFUL RESOURCES

- Dr Ian Freckelton and Hugh Selby, Expert Evidence: Law, Practice, Procedure and Advocacy (2013, 5th ed)
- Unisearch Expert Opinion Services website www.unisearch.com.au
- NSW Young Lawyers The Practitioner's Guide to Civil Litigation, Chapter 26 (2014, 4th ed)
- Sydney Jacobs, Briefing Experts (Oct 2014)
- Justice Robert McDougall, An overview of the Evidence Act Keynote address prepared for the Young Lawyers Annual One Day CLE Seminar 2011 at [47]-[70]
- Dr Ian Freckelton, Dr Prasuna Reddy, and Hugh Selby, Australian Judicial Perspectives on Expert Evidence: An Empirical Study (1999)
- Dr Kristy Martire, "Judicial Attitudes toward Expert Evidence" (April 2016) (https://www.unisearch.com.au/documents/JO88102-Literature-Review-Judicial-Attitudes-toward-Expert-Evidence.pdf, accessed 15 September 2017)
- Donald Charrett, "Getting the most out of expert witnesses – Lessons from the Victorian Bushfires" (2015) 161 *Australian Construction Law Newsletter* 10

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