

Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia

Practice Direction

This replaces the Practice Direction on Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia issued on 11 April 2007.

Practitioners should give a copy of the following guidelines to any witness they propose to retain for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based on the specialised knowledge of the witness (see - **Part 3.3 - Opinion** of the *Evidence Act 1995* (Cth)).

M.E.J. BLACK
Chief Justice
6 June 2007

Explanatory Memorandum

The guidelines are not intended to address all aspects of an expert witness's duties, but are intended to facilitate the admission of opinion evidence (footnote #1), and to assist experts to understand in general terms what the Court expects of them. Additionally, it is hoped that the guidelines will assist individual expert witnesses to avoid the criticism that is sometimes made (whether rightly or wrongly) that expert witnesses lack objectivity, or have coloured their evidence in favour of the party calling them.

Ways by which an expert witness giving opinion evidence may avoid criticism of partiality include ensuring that the report, or other statement of evidence:

- (a) is clearly expressed and not argumentative in tone;
- (b) is centrally concerned to express an opinion, upon a clearly defined question or questions, based on the expert's specialised knowledge;
- (c) identifies with precision the factual premises upon which the opinion is based;
- (d) explains the process of reasoning by which the expert reached the opinion expressed in the report;
- (e) is confined to the area or areas of the expert's specialised knowledge; and

- (f) identifies any pre-existing relationship (such as that of treating medical practitioner or a firm's accountant) between the author of the report, or his or her firm, company etc, and a party to the litigation.

An expert is not disqualified from giving evidence by reason only of a pre-existing relationship with the party that proffers the expert as a witness, but the nature of the pre-existing relationship should be disclosed. Where an expert has such a relationship the expert may need to pay particular attention to the identification of the factual premises upon which the expert's opinion is based. The expert should make it clear whether, and to what extent, the opinion is based on the personal knowledge of the expert (the factual basis for which might be required to be established by admissible evidence of the expert or another witness) derived from the ongoing relationship rather than on factual premises or assumptions provided to the expert by way of instructions.

All experts need to be aware that if they participate to a significant degree in the process of formulating and preparing the case of a party, they may find it difficult to maintain objectivity.

An expert witness does not compromise objectivity by defending, forcefully if necessary, an opinion based on the expert's specialised knowledge which is genuinely held but may do so if the expert is, for example, unwilling to give consideration to alternative factual premises or is unwilling, where appropriate, to acknowledge recognised differences of opinion or approach between experts in the relevant discipline.

Some expert evidence is necessarily evaluative in character and, to an extent, argumentative. Some evidence by economists about the definition of the relevant market in competition law cases and evidence by anthropologists about the identification of a traditional society for the purposes of native title applications may be of such a character. The Court has a discretion to treat essentially argumentative evidence as submission, see Order 10 paragraph 1(2)(j).

The guidelines are, as their title indicates, no more than guidelines. Attempts to apply them literally in every case may prove unhelpful. In some areas of specialised knowledge and in some circumstances (eg some aspects of economic "evidence" in competition law cases) their literal interpretation may prove unworkable. The Court expects legal practitioners and

experts to work together to ensure that the guidelines are implemented in a practically sensible way which ensures that they achieve their intended purpose.

Guidelines

1. General Duty to the Court (footnote #2)

- 1.1 An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.
- 1.2 An expert witness is not an advocate for a party even when giving testimony that is necessarily evaluative rather than inferential (footnote #3).
- 1.3 An expert witness's paramount duty is to the Court and not to the person retaining the expert.

2. The Form of the Expert Evidence (footnote #4)

- 2.1 An expert's written report must give details of the expert's qualifications and of the literature or other material used in making the report.
- 2.2 All assumptions of fact made by the expert should be clearly and fully stated.
- 2.3 The report should identify and state the qualifications of each person who carried out any tests or experiments upon which the expert relied in compiling the report.
- 2.4 Where several opinions are provided in the report, the expert should summarise them.
- 2.5 The expert should give the reasons for each opinion.
- 2.6 At the end of the report the expert should declare that "[the expert] has *made all the inquiries that [the expert] believes are desirable and appropriate and that no matters of significance that [the expert] regards as relevant have, to [the expert's] knowledge, been withheld from the Court.*"
- 2.7 There should be included in or attached to the report; (i) a statement of the questions or issues that the expert was asked to address; (ii) the factual premises upon which the report proceeds; and (iii) the documents and other materials that the expert has been instructed to consider.
- 2.8 If, after exchange of reports or at any other stage, an expert witness changes a material opinion, having read another expert's report or for any other reason, the change should be communicated in a timely manner (through legal representatives) to each party to whom the expert witness's report has been provided and, when appropriate, to the Court (footnote #5).

- 2.9 If an expert's opinion is not fully researched because the expert considers that insufficient data are available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report (footnote #5).
- 2.10 The expert should make it clear when a particular question or issue falls outside the relevant field of expertise.
- 2.11 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports (footnote #6).

3. Experts' Conference

- 3.1 If experts retained by the parties meet at the direction of the Court, it would be improper for an expert to be given, or to accept, instructions not to reach agreement. If, at a meeting directed by the Court, the experts cannot reach agreement about matters of expert opinion, they should specify their reasons for being unable to do so.

footnote #1

As to the distinction between expert opinion evidence and expert assistance see *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171 per Allsop J at [676].

footnote #2

See rule 35.3 Civil Procedure Rules (UK); see also Lord Woolf "Medics, Lawyers and the Courts" [1997] 16 CJC 302 at 313.

footnote #3

See *Sampi v State of Western Australia* [2005] FCA 777 at [792]-[793], and *ACCC v Liquorland and Woolworths* [2006] FCA 826 at [836]-[842]

footnote #4

See rule 35.10 Civil Procedure Rules (UK) and Practice Direction 35 – Experts and Assessors (UK); *HG v the Queen* (1999) 197 CLR 414 per Gleeson CJ at [39]-[43]; *Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd* [2000] FCA 1463 (FC) at [17]-[23]

footnote #5

The "*Ikarian Reefer*" [1993] 20 FSR 563 at 565

footnote #6

The "*Ikarian Reefer*" [1993] 20 FSR 563 at 565-566. See also Ormrod "*Scientific Evidence in Court*" [1968] Crim LR 240.