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Expert Opinion

Guideline

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1 Purpose

1.1 This Guideline provides explanatory information about being an Expert Witness.

2 Introduction

2.1 Subject matter experts sourced from the University are expected to be committed to the ethics, values and integrity that working at the UWA requires. These same values must be upheld when you are involved as an expert in a legal matter.

2.2 Providing an expert opinion will take you outside the normal experience generally found in consulting. Expert opinion can be noted as a different class of consulting with special rules applying. These rules will determine your suitability as an expert and the admissibility of your evidence.

2.3 Only 2-3% of all legal cases actually reach court but given how much litigation is occurring, the courts are busy. Despite the low rate of cases reaching the court, acting as an expert witness requires an additional set of considerations.

2.4 Your initial involvement as an expert in a legal matter will undoubtedly be via the provision of an expert opinion. This guideline will focus on your role and the issues to consider when formulating your opinion.

3 Role and Requirements of an Expert in a Legal Matter

3.1 The court has specific guidelines and rules that cover your actions, behaviour and any written reports that you provide. These are detailed in a “code of conduct” that you will be provided with should you be engaged to act as an expert. Each state of Australia has its own code, plus there is a “Federal Code” and various “Tribunals”. The codes are very similar in wording, but all have the same objective; as an expert, your paramount responsibility is only to the court.

3.2 The codes do not apply to medical evidence for personal injuries.

3.3 To act as an expert there must be a requirement for a recognised field of specialised knowledge (the expertise). This concise area of knowledge is to assist the court resolve the dispute.

3.4 Your opinion must be limited to your area of expertise. Should aspects of the dispute require another field of expertise or is beyond or outside your level of expertise, it is essential that you qualify yourself to the lawyer/court, stating the area(s) that your expertise is limited to.

3.5 As the expert you must show by way of either: training, experience or study that you are an expert in that field. You must demonstrate why and how you are an expert.

3.6 Regardless of who engages you and how much they will pay you, your opinion is provided for the benefit of the court. You are responsible and accountable for providing independent assistance to the court. Your function is to educate and inform the judge, jury or tribunal.

3.7 You are not to consider yourself part of the litigation or defence team and cannot advocate for either party.

3.8 As the expert you must be able to state the facts upon which your opinion is based and how you reached that opinion. If there are assumptions behind the facts and opinion, they must be stated and verified to support the opinion. The assumptions themselves must be proved by admissible evidence.

3.9 The lawyer that has engaged you will provide a letter of instruction and supporting documents that you are to use in forming your opinion. They may also instruct you in relation to facts that you are to assume (if any). You must acknowledge these in your report.

3.10 If you introduce new or additional information in support of your evidence, then the rules of evidence will also apply to that information. You must discuss this new or additional information with the lawyer who engaged you to assess its admissibility.

3.11 If the matter goes to court the opposing party are entitled to subpoena all the records and information that you have been provided or have had access to; this extends to emails. It is essential that you maintain good record keeping and ensure that you have full and complete version control on all reports. You must be able to line up chronologically all correspondence and report versions.

3.12 The party engaging you (the lawyer) is entitled to review the form and content of the expert report to ensure clarity, integrity and admissibility. The expert must work co-operatively with the lawyer to achieve that. However, the lawyer must not influence or direct the opinion of the expert where it will change the substance of the expert's opinion.

3.13 If you are acting for a party in a dispute and you are contacted by the opposing party's lawyer (you may be unaware of who the opposing party is represented by), it is important that before you agree to review a brief that you find out the matter name and who the lawyer is acting for. If you are briefed by both parties, you will be excluded in providing evidence to either party.

4 The Written Report

4.1 The code also contains information about what must be included in your written report. Use the code as a check list for what to include. The suggested form of the report, which includes the requirements of the code of conduct, is as follows.

4.2 Executive Summary

(a) Keep in mind who the potential readers of the report are, it may not be another technical expert like yourself. It is important that the reader, be it a judge or jury, can easily comprehend and be directed towards the key elements and findings of the report. The message you wish to communicate must be clear to a layperson.

(b) Focus on the evidence and methodology used to form your opinion, do not just repeat the conclusion. What were the critical issues, assumptions and facts that lead you to form your opinion. Try to limit your summary to a page, maximum of two pages.

4.3 Code of Conduct Acknowledgement

(a) You must acknowledge at the beginning of the report that you have been provided with a copy of the code (whichever one applies) and that your report complies with the code. You may wish to attach the code provided as an annexure to the report.

4.4 Statement of Qualification and Experience

(a) You must also provide a statement in support of your status as an expert that covers your qualifications, training and experience, demonstrating why you are an expert. It is good practice to also attach your CV to your report.

4.5 Materials Relied on to Form Your Opinion

(a) You must include a list of all the documents you have been provided to consider, and upon which your opinion is based.

(b) You must make reference to any evidence that may have been acquired via verbal discussion; note who you spoke to and the time and place that this information was acquired. If a site visit has been conducted, also note the time, location and who attended.
(c) The letter of instruction provide by the lawyer must be included as an annexure to the report. If the letter of instruction includes facts you are to assume, reiterate them in this section of the report.
(d) If all the documented materials are not substantive you may be able to attach them as an annexure to the report. If the amount is substantive, provide the list only as an annexure to the report.

4.6 Other Contributors to Your Report

(a) Where you require tests or experiments to be conducted by a third party, you need to disclose the qualifications of the person and methodology used in the conduct of such tests. For example, a NATA accredited lab conducted a test in accordance with an international standard.
(b) If it is a joint report, more than one expert, the details of the other experts must also be provided.

4.7 Introduction

(a) Summarise your understanding of the matter that you have been engaged to provide an opinion on, and who you are acting for.
(b) Provide a brief summary of the matter in question.

4.8 Main Content – Methodology

(a) The main body of the report requires you to set out your factual findings and any assumptions you have relied on to form your opinion.
(b) Explain the rationale and reasoning behind this information so the reader can clearly see the relevance of the issues you have identified.
(c) This information is to be separate from your actual opinion. Do not hesitate to explain technical terms and meaning for items that may be unfamiliar to the layperson. Use diagrams, a glossary of terms and photographs if appropriate.

4.9 The Opinion

(a) Extracting the reasoning from the previous section, provide and explain the opinion(s) you have formed. Explain it in sufficient detail so that the process of how you arrived at your opinion can be clearly seen. Please note that two experts can look at the same facts and assumptions and arrive at a different opinion, in the end it is just an opinion.

(b) In arriving at your opinion, there is an expectation that you have made all reasonable enquiries to ensure you have all the information and data necessary for you to reach your opinion(s). Should this not be the case and there are aspects of the matter that need additional research and investigation, you must qualify your report by stating the limitations you have experienced.
(c) If aspects of the matter or specific questions in the letter of instruction fall outside your area of expertise, you must also qualify your report.

4.10 Conclusion

(a) Summarise as succinctly as you can the logic and process you engaged in to arrive at your opinion and what those opinion(s) are. Use simple easy to follow language that will engage the reader.

4.11 Final Declaration

(a) The code requests that you make a declaration at the end in your report which should be worded as follows —
    i. “I [name] have made all inquiries which I believe are desirable and appropriate and that no matters of significance which I regard as relevant have, to my knowledge, been withheld from the Court.”

4.12 Additional Aspects

(a) Have a cover page for your report that clearly identifies —
    i. the matter name;
    ii. your name, title and qualification;

iii. the UWA reference number (usually a Trim code);
iv. the client's reference number;
v. if the report is a draft or final report; and
vi. finally your signature (only if a final document).

(b) Include an index for the contents of your report.

4.13 Finalising the Report

(a) When you have finished your report, do not issue your report as a final and signed version. It is important that the lawyer and the end client have the opportunity to review your report for content and admissibility. Ensure that the report is clearly, on the front, in the header or footer, and at the end, marked as "Draft". At this stage the lawyer does not have to disclose your report to the opposing party as evidence. Should the contents of your report not favour the lawyer's client, it may never be issued.

(b) However, once the report is finalised and signed, it has to be issued to the opposing party as evidence. Even if it does not favour the lawyer's client. You must seek from the lawyer their confirmation for the report to be finalised.

4.14 Subsequent Information and Opposing Party Reports

(a) At the completion and submission of your report, you may be asked to review additional evidence or reports from the opposing party. In those instances, do not go back and rework your original report to include or accommodate this information. Always issue a new report as a supplementary report. The new report would make reference to the preceding report and would not need to recover all the issues previously discussed. The focus would be on the new information and the reasons and impact it has on your opinion. If there is no change to your opinion or if you disagree with the information provided, you would set out your reasons for your position.

(b) If this new information changes your opinion or view on any material matter, you are obliged to disclose without delay this change via your supplementary report. Please note this should be treated as an extra and variation to the original scope for work and should be the subject of a new fee proposal for your services.

5 Providing Your Opinion – Acting as an Expert Witness

5.1 Most litigation is settled before reaching court and this is done via the use of expert reports. However, you may be called upon to attend court where you would testify your evidence under cross examination. The approach to attend court may be done via two main routes —

(a) the lawyer openly approaches you and requests you attend court on a certain date; or

(b) you receive a subpoena to attend court (a court order).

5.2 A Subpoena may be for —

(a) documents only;

(b) you personally only; or

(c) both you and the documents.

5.3 The subpoena will be stamped with a court seal and can be issued 5 days before your appearance, and for medical experts, 21 days. You are obliged to attend.

5.4 Fees (hourly rates) for your possible attendance should have preferably been specified during the original engagement. You may actually receive a subpoena from the opposing party. In those instances, your client (lawyer) is still responsible for your fees. You are not expected to provide your services for free. The court itself does not cover your costs outside of travelling to and from the court.

5.5 At this stage, you are entitled to reasonable expenses so record keeping of your time is important. Your engagement can be quite fragmented for example by telephone discussion, meetings with the lawyers, reading documents, travel time, waiting at court time and appearance in court time. All needs to be recorded as you will easily lose track of the time spent.

6 Primary Obligations as an Expert Witness

6.1 Your obligation when appearing as an expert witness falls in three main areas.

6.2 Truth

(a) The justice system is based on the premise that each witness who takes the oath to tell the truth will actually do so. If you do not tell the truth, you will be committing a criminal offence, referred to as “perjury”. The court may impose a punishment on you should you be found to not tell the truth.

(b) You are required to tell the truth regardless of the impact it may have on the case of your client. Failure to provide the truth may lead to inconsistencies in your evidence and subsequently a lack of conviction in the evidence that you may provide. Do not be evasive in your answers to questioning, this is considered to be similar to failing to tell the truth and goes to undermining your credibility.

6.3 Fairness

(a) You are required to present your evidence fairly, without distortion, embellishment and exaggeration. These aspects may impact your credibility as a witness.

6.4 Accuracy

(a) The final obligation is you must be accurate with the evidence you provide. Deliberate omissions can lead to misinterpretation and / or failure to correctly comprehend your evidence.

7 Appearance in Court

7.1 You should liaise with the lawyer as to what to expect and what you need to prepare for before your appearance.

7.2 Be familiar with the case proceedings: the statements of claim and defence.

7.3 Respect and politeness to the judge is important. When the court is in session bow to the Judge on entering the court, ask the Judge for permission before you do anything, i.e. take a seat, access any materials you have with you, asking for a drink of water, or to go to the bathroom.

7.4 Always refer to the judge as “Your Honour”.

7.5 You should dress smartly but conservatively.

7.6 Be familiar with your own report and have it with you. Should you need to refer to it to check something, do not hesitate to ask the judge for permission to do so.

7.7 Do not be afraid to take notes for issues that you may feel need clarification or further explanation when the opportunity arises.

7.8 When answering questions given by a barrister, provide your answers to the judge and or jury, look directly at them not the barrister. It is the judge and or jury that you are there to assist not the barrister. Communication is more effective if you speak directly to them. Do not use gestures as these may be missed.

7.9 When answering a question specifically answer only that question. Three steps —

i. listen to the question;
ii. answer that question;
iii. stop.

7.10 If an answer can be correctly answered with just a yes or a no, use it. Never volunteer unnecessary information.

7.11 Some questions from a barrister may be confusing and unclear, do not hesitate to ask for clarification. If it is a long question with a number of components, do not hesitate to ask for the question to be repeated or re-phrased, and again take notes on the components required to be answered.

7.12 Do not be combative or confrontational with the barrister.

7.13 Stay calm and do not let the barrister provoke or intimidate you. Control your temper.

7.14 Do not be rushed in providing your answers, take your time to consider your response.

7.15 Should a barrister cut you off when you are answering a question, seek permission from the judge to complete your answer.

7.16 The language you use is important, avoid slang and colloquial sayings. Explain technical terms in layperson language, use plain English. Your audience is not an expert in your field.

7.17 Speak with confidence and certainty, do not use words or expressions like "..I think.." "…I believe that…" "…it may be…" "…to the best of my knowledge…". It will affect your credibility as a witness.

7.18 While in court and provided with new evidence that changes your opinion, make a concession if required. You would be seen as a helpful witness, failure to do so may harm your credibility. New evidence does not necessarily mean your existing opinion is wrong or that the new evidence is correct. Make your own assessment and seek leave to consider the information if necessary. However, if the information or the question provided is not evidence but hypothetical, avoid guessing and speculative answers.

8 Experts Conference or Conclave

8.1 In the event that the court cannot reach a decision in a matter, due to opposing expert's evidence, the court may direct the experts to an "Experts Conference".

8.2 The experts would be required to meet without the lawyers present.

8.3 At the meeting the experts are required to endeavour to reach agreement on material matters. A joint report would be provided to the court specifying the matters agreed and the matters not agreed. The report would also detail the reasons for non-agreement.

8.4 The expert must still exercise their independent professional judgement and cannot be directed by the party retaining them to withhold or avoid agreement.

9 Hot Tubbing

9.1 Hot Tubbing has become widespread in Australia although it is a relatively recent development. It is a practice where experts give their evidence concurrently, they are sworn in together. It normally occurs after the Expert's Conference and is designed to isolate the areas of disagreement between the parties. The areas of dispute identified in the joint report are the basis for the agenda in the court, where it essentially becomes a discussion on the issues in dispute.

9.2 The Judge initiates the discussion by questioning the experts, the experts can ask questions of each other, and the lawyers can then question each of the experts. It narrows the area of dispute and allows the parties the opportunity to test the other expert's evidence.

Legislative Context

Relevant Legislation or Regulations
University of Western Australia Act 1911 (WA)
University of Western Australia Statute (2020)

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