By Bruce Smith

Practical tips for dealing with expert witnesses

Expert Experts[1] surveyed experienced expert witnesses across a wide range of fields. They were asked what feedback they would like to give lawyers. Some very consistent themes emerged relating to fundamental matters. The key responses are summarised below.

INSTRUCTIONS

The quality of the instructions influences the quality of the opinion and report.

The quality of the report you get will reflect the quality of your instructions.

Poorly considered or inadequate instructions were ranked as the most persistent and significant issue by the experts surveyed. Carefully considered and drafted instructions are a necessary prerequisite to obtaining a quality report.

Inadequate instructions will hamper the best efforts of the most diligent and capable expert; even the most highly qualified and skilled expert may produce something effectively useless if the instructions are very poor. Clear instructions are essential to obtain a high-quality report.

The aim of the engagement

State the aim(s) of the engagement as clearly as possible and be willing to speak with the expert.

If you can state succinctly the proposition or question that would ideally appear at the beginning of an expert report, you are likely to get a report that meets that aim. Failure to state the aim clearly is likely to result in a report that does not meet these objectives.

If you are uncertain of the aim of the engagement and cannot convey clearly and precisely the issues in the case, and what questions or matters the expert has been retained to address or illuminate, the likelihood that the expert will stumble upon and address these issues is slim at best. A useful report will be the exception rather than the rule and, if it eventuates, it will be the result of luck not skill.

Sometimes the initial role of the expert is investigative and needed to help determine and scope the expert questions (as often happens in accident or incident investigation or other areas requiring forensic analysis). In such circumstances, a broader statement of the aims that acknowledges this fact is more likely to allow the expert to assist you to refine and define the issues than would a very narrow statement of aims at that early stage.

Where you wish to pose very narrow questions, it is beneficial to provide background information as a context for those questions to make it clear to the expert that the strictures being placed upon them are appropriate. Without that context, many experts will have concerns about their capacity to comply with Code of Conduct requirements (that their report not be misleading by omission), and feel obliged to make a statement to that effect, or to the effect that if left to their own devices they would have considered and investigated matters other than those they have been asked to address.

The instructions and associated questions constitute the questions-in-chief that would be asked in court to elicit an expert's evidence. Therefore, these should ideally be crafted with the same level of care that would be used in formulating those questions in court.

If the case is complicated, arrange to hold a short conference, including by telephone or Skype, with the expert after they have had a chance to consider the instructions and material provided and before they embark on preparing their report. Many potential issues can be avoided by an early, 10-minute conference.

Assumed facts and factual disputes

Specifically list all of the 'facts to be assumed', distinguish them from 'background' information, and clarify which if any facts are to be assumed where inconsistent factual propositions are contained in the material provided.

It is apparently common for an expert to provide a report relying on all of the facts referred to in a letter of instructions only to be told subsequently that some of the >>

statements of fact were provided merely as 'background' or 'context' and should not be relied upon.

Similarly, witness statements and other documents containing inconsistent factual statements are provided with no guidance as to whether any of the statements of fact are to be treated as assumed facts, and if so which ones. This is particularly likely to lead to confusion if there is no statement of assumed facts in the instructions.

Consequently, experts are regularly required to amend draft reports or provide supplementary reports based on quite different assumed facts. This can have a significant impact upon both the opinion and the cost of the report.

Use a heading such as 'Assumed Facts' or 'Facts to be Assumed' and then specifically list all of the facts the expert is to assume. Do that even if those facts are set out or referred to elsewhere in the instructions when providing an overall picture or other comment. The assumed facts do not need to be in a list form. A narrative statement of the facts to be assumed can be equally useful. The point is that the expert must be easily able to identify and record in their report all of the facts that are to be assumed.

Acknowledge factual disputes rather than trying to hide them.

Where there are assertions of fact contrary to the facts to be assumed, it saves time and addresses potential ethical concerns if such disagreements are acknowledged in the letter of instructions.

A simple statement to the effect that there are contested facts on a number of issues, and that an opinion is sought based only on the facts which the instructing party asserts should be accepted and which are set out as the 'assumed facts', will usually deal with this issue. However, it may be better to set out the contested factual issues fully for the expert at the time they are instructed of the facts to be assumed.

Many experts are wary of a situation where they know there are likely to be disputed facts and they are not made aware of the potential disputes. Further, not knowing what the contested factual issues are or may be can put the expert at a disadvantage when they are later asked to deal with them in a conclave or in evidence.

Documents

Think of every suggestion you have ever had from counsel about preparing a brief and apply that to your expert brief.

Start with a list of documents so that the expert knows what they are supposed to have. It is surprising how often the critical documents are said not to have been provided because, for example, they were identified as important and extracted from the original subpoenaed or discovered document bundles and then not separately copied and provided.

Have someone sort the documents as best they can and extract duplicates. While it is often part of the expert's function to review technical and other documents to determine what they contain and whether it may be relevant, having an expert review jumbled piles of subpoenaed and discovered documents with multiple copies of each document is inefficient and expensive – particularly where the documents are voluminous.

Documents in an electronic format, which allows text search and extraction and electronic mark-up, are easier to use and save time and costs.

Photographs provided in JPEG or similar file formats allow the image to be viewed on large screens at high definition. That can significantly increase an expert's understanding and ability to provide an opinion. On the other hand, a black and white photocopy of a photograph is rarely useful and is often misleading.

Oral opinion

An oral opinion is a preliminary opinion.

An oral opinion provided without the disciplined process of writing and reviewing a written report is necessarily a preliminary opinion, and potentially subject to change. Many experts will not provide them and those who do will generally advise that the opinion is purely preliminary.

Fees

Require a clear fee agreement from the expert.

For the same reasons you have one with your client: it saves a lot of anguish down the track.

CONCLAVES

Agree and write down the rules, have a neutral moderator and venue, and have your expert assist in identifying the issues and drafting the questions for the conclave.

Conclaves are an area where stories about the process descending into costly, frustrating and pointless farce abound.

Conclaves have enormous potential to save time and costs by clarifying and significantly narrowing the issues. In practice, that potential is apparently only rarely achieved because the process is uncertain and often unsupervised.

Most lawyers apparently advise the expert that there is a set of clearly accepted practices for the conduct of a conclave. Unfortunately, those clearly accepted practices appear to vary significantly from lawyer to lawyer and firm to firm. The absence of clear, long-standing practice means that conclaves are often a source of concern and confusion for experts and result in poor or very sub-optimal outcomes.

A statement of agreed rules is essential. A form of standard directions for the conduct of conclaves, perhaps with options addressing the common problems that could be agreed or ordered, would greatly assist the process.

Common problems apparently include:

- one expert being told they cannot communicate with their lawyers while another is being told that they can, with each acting according to their instructions;
- lawyers providing new material to one expert to take directly to a conclave without first serving the material;

- competing lists of questions or directions from each side;
- questions or directions which make little or no sense even to the expert retained by the party asking the questions;
- arguments about electronically recording the conclave at the insistence of one expert or another or on the instructions of one lawyer or another;
- the practical difficulties in co-ordinating the process of drafting and then settling a joint report or statement during or after a conclave which accurately reflects the areas of agreement and disagreement, and any other matters requiring a record;
- some experts declining to take a position on the basis that they need further time to consider an issue, and the issue of agreement or disagreement and reasons remaining unresolved due to a failure to arrange a follow-up conclave;
- one set of lawyers turning up and insisting on listening when the other lawyers are not present;
- all lawyers being present and unduly interfering in the process, including arguing about what is and is not acceptable and who is and is not unduly interfering in the process;
- arguments about the venue in the absence of a neutral meeting place, and inadequate venues and facilities;
- aggressive or arrogant experts seeking to overbear their peers in a closed conclave; and
- arguments about whether the direction to endeavour to reach agreement requires the experts in conclave to 'negotiate a settlement' of the expert issues, by each agreeing to concede some issues despite their genuinely held opinion, in order to reach a 'consensus position' which no expert believes represents the true position, to save the lawyers and courts from settling or deciding the issues.

An independent moderator appears to be a key factor in achieving a useful outcome, except in simple cases involving only two experts and very narrow issues. The moderator may be able to address and overcome many of the above issues by co-ordinating the experts and liaising with the lawyers to resolve process disputes. A moderator should either be an independent lawyer, or an expert with experience in the expert witness process.

MULTI-DISCIPLINARY REPORTS AND ISSUES

Do not expect your experts to co-ordinate multi-disciplinary or interlocking reports.

When a single issue crosses fields of expertise so that a multi-disciplinary report, or reports, which must overlap and interlock to cover the field, are required, it is unwise to ask one of the experts to be responsible for co-ordinating that process. The involvement by one expert in the preparation of another expert's report needed to interlink with their own is fraught with peril and is more likely to lead to reports that are not useful and do not fully cover the issue.

The process needs to be co-ordinated. An independent expert familiar with the field who is not providing an opinion may be able to assist in co-ordinating the various expert opinions required, but will still require instruction and supervision.

HEARING

Check availability before setting a matter down for hearing; consider telephone evidence where it is available; and properly confer with the expert prior to calling them to give evidence.

It is difficult to cancel an overseas holiday on one week's notice. Calling an expert 10 days into a trial after a brief conference from 9.25am to 9.40am is unlikely to allow them to perform adequately.

OTHER EXPERTS

Don't assume your expert will think the other experts are crooks just because they disagree.

The seven leading experts on Australian law sitting, from time to time, as the High Court of Australia, regularly disagree on fundamental matters of principle without it being assumed that any of them is dishonest. That despite the fact that the law is a purely constructed field, so that the range for genuine disagreement is far narrower than in scientific or other fields where there are still many unknowns and the state of knowledge is constantly changing. Similarly, commentators who follow their work are often able to predict accurately how these legal experts will divide on a particular issue, because of their previously expressed views, without it being assumed their opinions can be bought.

Just as one such judge would not take kindly to other judges with different views being referred to as hacks or frauds because of a *bona fide* disagreement, so too with experts and their professional peers. The apparently common assumption that experts generally hold dismissive views of their peers on the other side of an argument, and are therefore usually comfortable hearing them disparaged as charlatans and guns-for-hire, is misplaced. An expert's perception that a lawyer views any expert not in agreement with their current client's case with contempt is not likely to facilitate a good working relationship. ■

Note: 1 Expert Experts Pty Ltd is a company specialising in identifying appropriate experts and facilitating efficient and effective communication between solicitors and experts: www.expertexperts.com.au. The survey was carried out across August and September 2013. The feedback summarised in this article is limited by space to the matters said to be the most consistent and significant across many fields.

Bruce Smith *is a barrister at Jack Shand Chambers, Sydney.* **PHONE** *9233 7711* **EMAIL** *BSmith@jackshand.com.au. He is a director of Expert Experts.*