

Expert Evidence

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Issues for discussion

- What is an expert witness?
- Rules governing expert evidence
- An expert's duty
- Admissibility of expert evidence
- What sort of expert?
- Experts and legal privilege
- Experts in the Court and VCAT

What is an expert witness?

- An expert witness is a person whose evidence is not confined to facts observed but whose opinion evidence is received by the Court as admissible evidence of the opinion given.
- Section 79 states –
 - If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.*
- Expert evidence is used to provide reliable material upon which the Court or Tribunal can rely in the resolution of a dispute.
- Experts must work within the area of their expertise.

Rules governing expert evidence

The admissibility of expert evidence is strictly controlled both by legislation and by expert witness codes of conduct.

Form 44A to the *Victorian Supreme (General Civil Procedure) Rules* 1996

VCAT Practice Note – PNVCAT 2: Expert Evidence

Form 44A

The Victorian Supreme Court guidelines incorporate features common to most jurisdictions:

- *A person engaged as an expert witness has an overriding duty to assist the Court impartially on matters relevant to the area of expertise of the witness.*
- *An expert witness is not an advocate for a party.*

Expert's Duty

The idea of the expert's overriding duty to the Court is not new.

1. Expert evidence the independent product of the expert
2. An expert witness should provide independent assistance to the Court
3. An expert witness should state the facts or assumption upon which their opinion is based.

Expert's Duty

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. Where an opinion is not properly researched this must be stated.
6. If an expert witness changes his or her view this should be communicated immediately.
7. Reference to photographs, plans, calculations, must be exchanged at the same time as the reports.

Admissibility

Evidence of expert opinion will only be admissible when:

- “(a) it is relevant;
- (b) the witness has specialised knowledge based on his or her training, study or experience;
and
- (c) any opinion is wholly or substantially based on that specialised knowledge.”

What sort of expert – Diagnostic or Opinion?

A person who is an expert in a particular field will be engaged to assist a party to a dispute either –

- at the fact finding, investigation or diagnostic stage (“diagnostic expert”); or
- when an anticipated dispute has arisen or there are proceedings on foot (“opinion expert”).

Experts and Legal Privilege

A statement made by a diagnostic witness in draft will not be documents that can be called upon for production in Court or in the Tribunal.

BUT

Statements and documents prepared by an opinion expert **will be** documents that can be called for in the Court or Tribunal.

Instructing an Expert Witness

Instructions to expert opinion witnesses are not only not the subject of legal professional privilege, and are matters which are required to be disclosed by the expert in his or her report.

Does the report comply?

Before reports are exchanged or filed they should be reviewed to ensure:

- the opinion is one based on the witness's expert knowledge;
- assumed facts can be proved; and
- the witness has explained how his or her field of "specialised knowledge" has been used to produce the opinion.

The Opinion Expert is not part of the team – keeping the expert independent

The expert should not be -

- “Sounded out” for opinions before they have been formally engaged.
- Excessive communications between the expert and the lawyers should be avoided
- Lawyers must not have a role in forming the responses which must be those of the expert.
- Tactical discussions should not take place in the presence of the expert
- Experts must have first formed their own opinions and committed them to writing before any conference between experts on the same side occurs
- The views of the experts must not be pressured nor seen to be pressured by the client or its representatives.

The expert not an advocate

If the expert takes on the role of advocate it is unlikely the opinions of the expert will be relied upon. They are more likely to be regarded as tainted, opinions expressed without regard to the expert's over-riding duty to the Court

Experts in the Court and VCAT – what can be expected from the opposing party

Production of file may be required.

Cross Examination

- Qualification
- Basis of Opinions
- Area of expertise

Conclusion

Experts must remember their duty to the Court.

Experts must maintain their independence.

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