

# Expert Witnesses



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## Introduction

This guide provides a general introduction to the use of experts in court proceedings. The rules governing expert evidence are found in Part 35 of the Civil Procedure Rules, Practice Direction 35, the Court Guides and the Guidance for Instruction of Experts in Civil Claims published by the Civil Justice Council.

This guidance will highlight the main points you need to know, consider issues often encountered and offer some practical tips.

## What is an Expert?

An expert is an individual who possess special experience, skills or qualifications which make them particularly knowledgeable in a certain field and who provides their opinion on matters within their expertise for the purpose of court proceedings.

## Why do you need an Expert?

The general rule is that opinion evidence is inadmissible in court proceedings. Those actually involved in the events giving rise to the proceedings can only give evidence as to the relevant facts surrounding the dispute. However, in many instances the court will also need to hear from someone who can speak with authority as to their opinion on the technical issues which go to the merits of each party's case. The judge is, after all, a lawyer and may not, for example, know how much the shares of a company are worth, the correct range and valuation for a particular property, how a particular patent specification should be interpreted or what the standard practice is in any given business. It is in respect of these sorts of issues that the court may wish to receive the assistance of an expert witness to help it determine the dispute.

## Permission Required

No party may call an expert to give evidence in court without the court's permission. If you wish to rely on expert evidence the first thing that you must do is to identify the precise discipline in which expert evidence is required. You must be able to justify to the court why expert evidence is needed. If it cannot be justified, you will not be given permission to adduce the expert's evidence. Additionally, if you want the expert to give oral evidence at trial rather than simply by way of written report, you will need the court's permission for this. You will have to provide the court with an estimate of the costs involved as well as the issues the experts will address. It is advisable, in any event, to identify the expert at an early stage. In some cases, such as those alleging professional negligence, it is generally not advisable to issue proceedings without the supporting opinion of an expert.

## The Identity

Once you have ascertained that you need an expert, you will need to identify the individual who is going to be your expert. The identity and independence of the expert is crucial and great care must be taken to ensure that the right person is appointed. Early consideration of the identity of the expert is especially important where the area of expertise is one which is highly specialised and involves a limited number of individuals. The expert should be carefully vetted.

## Vetting the Candidates

The expert must have the appropriate qualifications, knowledge and experience. It is also important to try to find out whether the proposed expert has any "skeletons in the closet" which might cause embarrassment at the trial.

For example, has the expert ever been sued and been found to be in breach of their duty? Have they previously given expert evidence and been criticised by a judge? Have they ever published a paper which adopts a contrary opinion to the evidence which they are now giving and which is central to your case? The first you hear of such problems should not be when the other side starts to cross-examine your expert at trial.

## No Previous Experience Required

While it is not essential for the expert to have previously acted as an expert or given evidence in court, the expert should be fully informed as to what will be expected of them. It is important for the expert to understand exactly what they are taking on when agreeing to act as an expert. It is also useful to ask to see some of the expert's written work prior to engaging them. The expert will have to produce a report which must be clear and understandable. It may also be sensible to ask for some references if the expert is not known to you or your lawyers.

## Independence

While each party appoints and pays for an expert, it is wrong to see the expert as "yours" i.e. someone who should and will do exactly as you ask. The expert's overriding duty is not to you, the person who pays them, or even to the instructing lawyer. It is to the court. The expert is there first and foremost to help the court by providing an



objective view. The expert is not a “gun for hire” and pressure should not be exerted on the expert to give particular opinion. If it is, it is likely to backfire on you.

Prior to appointing the expert, you should ensure that they are independent and have no actual or potential conflict of interest. You should check whether they or their firm/company have, or ever have had, any connection with any of the parties to the dispute. If there is any suggestion of a connection it could affect the impartiality of the expert and their credibility as an independent expert could be undermined. Given the need for independence, it will usually be inadvisable to appoint someone who works in-house or with whom you have, or had, a close working relationship. Such an expert is likely to be criticised for not being independent, even if they are in fact giving their own honest opinion of what they believe to be true.

A good way to test the expert’s independence is to ask them if they would say anything different if they were being instructed by the other party.

## Testing your Expert

It is important to meet with the expert prior to or shortly after instructing them so that the reasons on which they base their opinion and the position of the other party are properly understood. At that meeting it is useful to ask some testing questions of the expert to see how they will bear up under cross-examination. If they cannot stand up to someone from their “own side”, it is unlikely that they will be able to stand up to a barrage of cross-examination at trial. Such questioning is however not to be aimed at undermining the expert’s independence. If the expert properly considers the matter, understands the points being made and they can gently and persuasively stand firm, you will know you have made a good choice.

## Availability

You will also want to make sure that the expert has sufficient time to be able to devote to the tasks that will be required of them. It is important to ascertain that the expert is available at all key times, in particular during the run up to the exchange of their report and immediately thereafter to comment on the other side’s report, and to prepare for and attend trial.

## Payment

It is not possible to agree terms of payment with the expert which are contingent upon the outcome of the case. To do so would undermine the expert’s independence and overriding duty to the court.

## Single/Joint Expert

While it is usual for each party to appoint its “own” expert, the court can decide that there should be one single joint expert who will be instructed by both parties. The court commonly orders there to be single joint experts in lower value cases, where the cost of having two experts would be disproportionate. In higher value cases, the court may order there to be a single joint expert if the issue on which evidence is sought is seen as non-central or non-controversial, e.g. where an inspection, test or experiment is required.

## Instructing an Expert

Once the expert has been identified and has agreed to act, they will need to be formally instructed.

The letter of instruction is important. It should clearly set out the facts of the case and the issues which the expert will need to address in the report. It is sometimes advisable to try and agree what those issues are with the other side in advance of instructing the expert. The court will not be impressed if the parties’ experts address different issues in their reports.

## Written Report Required

An expert will be required, in advance of the trial, to set out their opinion in the form of a written report. In order to write the report, it is important to ensure that the expert has had access to all relevant information and documentation. The expert should be provided with all of the parties’ Statements of Case and all disclosure documents and witness statements which are relevant to the issues the expert is to give their evidence upon.

In their report, the expert must clearly set out all material instructions which they have received and in response to which the report was written. This includes all instructions given in the letter of instruction to the expert, and all material instructions given thereafter, whether in writing

or orally. Where parties are instructing separate experts, where practicable they should seek to agree the form of instructions to be provided to the experts and ensure that they receive the same factual material.

To underline the importance of the expert’s independence, the expert must state in their report that they understand their duty to the court (as opposed to the instructing party) and they have complied with that duty. The report must also end with a statement that the expert believes that the opinions expressed in their report are complete and true.

## Exchange of Reports

It is usual for both parties to exchange their experts’ reports simultaneously once they have been finalised. In certain limited circumstances, it may be possible to persuade the court to order sequential exchange.

## Meeting of Experts

It is likely that the court will require the experts to meet either shortly before or after exchange of their reports, on a without prejudice basis. The aim of this is to see whether the experts can agree any of the issues and, in respect of those issues which they cannot agree, to ascertain their reasons for disagreeing.

While the substance of the discussions between the experts cannot subsequently be referred to by the parties at trial unless all parties agree, the court will want to know if the experts were able to agree any of the issues and if so, what issues they were. The court will also want a summary of the reasons why they were not able to agree the other outstanding issues. Any agreement of issues unfavourable to your position is likely to result in problems for your case.

It is often advisable that neither the parties nor their lawyers attend the experts’ meetings. The experts must be allowed to get on with the job which the court expects them to do.

While the temptation may be to try to fetter the expert before they meet with the other side’s expert, this must be resisted. It is not for the parties to tell the experts what view they must hold or what they must and must not agree with the other side’s expert.

In principle, you will not be bound if the expert reaches an agreement with which you are not comfortable. In practice, however, you will have very little room to manoeuvre. This is another reason why it is important to select your expert carefully. You do not want your expert to be telling you one thing for many months on which you base your case, only to find that your expert buckles under pressure from the other side's expert

### Hot-tubbing

Since 2013 the court has had the power to order that experts give their oral evidence concurrently, rather than sequentially. This is commonly known as "hot-tubbing" and has proved popular with many judges. Hot-tubbing gives the judge the opportunity to address experts on particular topics or issues at the same time. It also allows experts to comment directly on an opposing expert's view, and can often save trial time. By its nature, hot-tubbing leads to the judge adopting a more inquisitorial approach.

### What if your expert does a volte face - is there anything you can do?

Following a decision of the Supreme Court in 2011, expert witnesses no longer have total immunity from being sued in relation to anything they do or say when acting as an expert. In practice, however, you will only have redress against your expert if they act in a manner in which no reasonably competent expert would have acted and you suffer loss caused by that behaviour.

However, generally speaking, if your expert suddenly changes their tune half way through a case, there is very little in the way of redress that you can obtain. This emphasises the importance of selecting the right expert in the first place.

### Experts can take the initiative and call for help

If for any reason you do not give the expert the information which they believe they need in order to be able to fulfil their obligations as an expert, the expert is able to write to the court to ask for help. However, you should receive prior notification that the expert intends to do this. As a result, you should be able to right any problem which may have arisen.

### Practical Tips

- Consider early on what type of expert is required.
- Identify the expert as early as possible.
- Ensure the court gives you permission to call the expert you appoint.
- Take care when appointing your expert. The outcome of your case may well depend on the quality of the evidence given by the expert.
- Ensure that the expert is and is allowed to remain independent.
- Test the expert's evidence at an early stage to understand the basis of their opinion so you are not taken by surprise.
- Ensure that all relevant documentation is provided to the expert.

#### For further information on this subject please contact:

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