The role of the expert witness in the adversarial legal system

Roy G Beran

So often we hear the legal profession berate expert witnesses as “hired guns” whose bias is for sale. While this may be relevant to a small minority of “experts”, the majority do their job with integrity and in an ethical fashion. An advocate for a proposition will not call a witness to support a claim if it is clear that the witness holds an opposing view. It follows that the bias emanates from the lawyer, not the witness. A witness without a formed view cannot truly claim to be an expert, as the expert should have sufficient knowledge to form an opinion. Once that opinion has been expressed and justified, the lawyer will select the most persuasive and cogently constructed opinion with which to convince the court. The expert witness must commence the assessment without bias or favour; must collect her or his history and examination of the relevant material; evaluate all the facts and evidence provided for scrutiny; seek additional material where there appears to be a deficiency; and draw on all of these data to formulate an opinion in response to questions posed by the instructing lawyer. The expert need not support or refute the stance proposed by the lawyer but the lawyer will only use those opinions favourable to the lawyer’s case and hold the remainder as privileged where even that option prevails. It follows that the role of the expert is to provide a well-prepared analysis; it is the lawyer who is paid to be biased.

INTRODUCTION

All too often expert witnesses are described as “hired guns” whose “expertise” is sold to the highest bidder. They are considered biased and a blight on the legal process which relies upon their contribution to assist the court. Such contribution is considered depreciated, thereby casting aspersions upon all expert witnesses who are tainted by the acts of a few.

Experts provide the court with the advantage of technical knowledge that is not widely available to a lay community. It is important that such knowledge be provided on the basis that it is not tailored to meet the needs of one, or other, side within the adversarial system.

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4 Cooper and Neuhaus, n 1.

5 Anderson et al, n 1; Australian Medical Association, Guidelines for Doctors Acting as Expert Witnesses (1997), (2009) 17 JLM 133
Having accepted that the special skills of the expert should not be used for the sole purpose of underscoring the advocate’s case,\textsuperscript{7} this does not deny the lawyer the right to use such opinion strictly for that purpose.\textsuperscript{8}

The apparent paradox within this statement is countered by the fact that the opinion proffered by the expert should not be artificially manipulated to satisfy the lawyer.\textsuperscript{9} If it meets the lawyer’s expectations, then there is no barrier to prevent the lawyer from using it most forcefully to substantiate the case being made. Most expert witnesses provide their opinions with due recognition of their responsibility to the court,\textsuperscript{10} acknowledging the propriety of their obligations\textsuperscript{11} and doing their job in an ethical fashion.\textsuperscript{12}

It is axiomatic that the lawyer will not bring into evidence the opinions of an expert if the conclusions draw by that expert directly conflict with the proposition being espoused by the lawyer.\textsuperscript{13} Conversely, as already stated, the lawyer will draw heavily from those opinions which lend credence to the case being asserted. It follows that the bias being projected upon the expert witness is promulgated from the lawyer’s judicious selection either of a specific expert known to have an established perspective (as a matter of common knowledge)\textsuperscript{14} or by selecting only those opinions favourable to the particular outcome in the case.\textsuperscript{15}

If it be known that in certain circumstances a specific expert has openly stated, and substantiated, a specific opinion, and that opinion accords with the needs of the lawyer, that does not equate to that expert being a “gun for hire”. Each expert will have an opinion and often that expert will be known to hold a particular view within the context of comparable scenarios. As it is the duty of the lawyer to best represent the case of the client, it is logical for the lawyer to employ an expert known to be sympathetic to that view, recognising that the opinion held will enhance a given case. So long as that expert sincerely ascribes to the view for valid reasons, then it is inappropriate to label that expert a “hired gun”.

What follows is an analysis of the role of the expert witness within the adversarial legal system.

\textbf{RELATIONSHIP OF LAWYER AND EXPERT}

The lawyer will select the expert to be used in a case\textsuperscript{16} unless that expert is selected by the court.\textsuperscript{17} Such selection will be based on a preconceived concept of the views of the expert and on the need for Cite/View Citations: 63

\begin{itemize}
  \item Ryan, n 2; Abadee, n 5; James SH and Nordby JJ, \textit{Forensic Science: An Introduction to Scientific and Investigative Techniques} (2nd ed, CRC Press, Boca Raton, Fla, 2005) p 158.
  \item Australian Medical Association, n 5.
  \item Stowe H, “Preparing Expert Witnesses: A Search for Ethical Boundaries” (Summer 2006/2007) \textit{Bar News} 44.
  \item Berlin, n 5.
  \item Sperling, n 2; Stowe, n 9.
  \item Sperling, n 2; Stowe, n 9.
  \item Sperling, n 2; Stowe, n 9.
  \item Berlin, n 5.
  \item Gould, n 11, p 35.
\end{itemize}
an evaluation of the validity of a case. The selection will take into account the knowledge, standing and experience of the expert and the need for the expert to command sufficient presence and respect to counter any opposing expert.

The lawyer will provide a letter of introduction outlining any necessary assumptions upon which an opinion should be based. Also included will be the questions to which the expert should provide answers, and reports necessary for the expert to fully evaluate the case. Such reports may include medical records and correspondence from other doctors (in a case of a medical nature) and any available opinions formed by others.

The lawyer will outline the case and provide transcripts of the necessary codes of conduct which the expert will be expected to acknowledge and accept. The lawyer will further provide assurance that the fees of the expert will be guaranteed.

In return, the expert will agree to examine the client, make an independent assessment, review all additional documentation and provide an opinion based upon the available information and in accordance with the stipulated code of conduct for an agreed fee.

Inherent in this agreement is an obligation for the expert to form and proffer an opinion based on all the available materials. The expert will be expected to justify that opinion and be prepared to validate such justification under cross-examination by the opposing team of lawyers.

The expert will also provide the lawyer with sufficient documentation of her or his standing and experience, in the form of a modified curriculum vitae, to authenticate any claim of expertise.

**CONDUCT OF THE EXPERT WHEN PREPARING A REPORT**

The expert should act as an independent agent rather than appearing to be a representative of the lawyer. As such, the expert should attest to such independence as part of any prepared report.

Each expert will adopt a different formula or structure when preparing a report but there are some minimum criteria which need to be addressed. The report must respect an unbiased approach and should include a statement to the effect that the expert had completed the report with the inclusion of an independent history and examination which confirms a lack of influence from other sources. Where additional information has been provided, it must be analysed to determine its relevance to and

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21 Gore, n 20; Notley, n 20.
22 Gore, n 20; Notley, n 20.
23 Notley, n 20.
25 Abadee, n 5; Notley, n 20.
28 Muroff, n 27.
30 Butler-Sloss and Hall, n 3; DiMitto, n 5; Freckleton and Selby, n 5; Freckleton, Reddy and Selby, n 2.
31 Abadee, n 5.
influence upon the overall assessment.\textsuperscript{32} Such contribution must be acknowledged and attributed to its source to indicate how, and why, it affected the final opinion.\textsuperscript{33}

If it becomes apparent that any final evaluation would be incomplete without further material being produced, be it adjunctive history, results of tests or additional existing records, then it behoves the expert to identify same and to explain why it is needed.\textsuperscript{34}

Once all materials, necessary to construct an opinion, have been made available, the expert should develop the opinion based upon that available evidence. The opinion needs to be justified and explained in terms that a lay audience will appreciate and understand, with sufficient clarity to establish a critical interpretation which is expressed using as simple language as the concept will allow. Subsequent to the formulation of the opinion, the expert must then answer the questions set out in the letter of introduction from the lawyer. The responses to those questions should also be explained so that a lay person can comprehend the nature of the answers and why the expert responded as he or she did.

It must be reiterated that the expert is not obliged to endorse the position adopted by the instructing lawyer but it is equally important to reinforce that a competing view will not be introduced into evidence by the lawyer. On that basis, it may prove most efficient for the expert with a view that opposes the aims and stance desired by the lawyer to contact the instructing lawyer to explain why such counter-proposal has been adopted and to seek clarification as to whether a written report is still required. This is quite different to the expert changing an opinion to satisfy the lawyer, because to do so would amount to unconscionable behaviour in contravention of any accepted code of conduct.\textsuperscript{35}

A final component in an expert’s report is the provision of compelling evidence to justify why the expert should be accepted as such and to confirm that the expert has adhered to relevant court rules for expert witnesses.

THE EXPERT AS A WITNESS IN COURT

The only unequivocal duty that the expert must respect is to answer truthfully any question posed by any officer of the court, be it the lawyer leading the evidence, the opposing lawyer cross-examining that evidence or the judge seeking clarification.\textsuperscript{36}

While the expert should attend court with a properly formed and reasoned opinion,\textsuperscript{37} it does not necessitate unconditional adherence to that opinion.\textsuperscript{38} Should further evidence be adduced which conflicts with that opinion and which is sufficiently compelling, then the expert must recognise the inconsistency of the previously adopted position and alter the opinion accordingly.\textsuperscript{39} This does not translate into a compulsion to accept any conflicting opinion just because it has been suggested, if the premise upon which that opposing opinion is based is not sufficiently compelling.\textsuperscript{40} To do so, in the absence of a convincing argument, would translate into the expert being inconsistent and providing an inconclusive opinion, in the first instance, and hence would devalue that expert. Only a sufficiently cogent counter-argument should translate into an altered opinion and the expert should be prepared to clarify the reason for altering a previously held opinion based upon any additional evidence.\textsuperscript{41}

\textsuperscript{32} New South Wales Law Reform Commission, n 16 (2005b).
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\textsuperscript{35} Abadee, n 5.
\textsuperscript{37} Notley, n 20.
\textsuperscript{39} New South Wales Law Reform Commission, n 16 (2005b).
\textsuperscript{41} Iyer, n 40, p 634.
Unlike the lawyer who has instructed the expert, the expert has no particular responsibility to achieve anything other than a just outcome, which need not favour the lawyer’s client. This re-emphasises the expert’s duty to the court rather than a client. An ill-conceived opinion which is constantly altered may well result in the expert being of limited value and not being further used. A tarnished reputation is difficult to reinstate and an impeccable reputation is an expert’s most valued asset.

**CONCLUSION**

Experts should offer well-constructed opinions based on all available evidence, including independent evaluation, and be prepared to justify those opinions. The expert has no “duty of care” to endorse a lawyer’s opinion irrespective of the fact that it was the lawyer who retained the expert. Moreover, the expert has a responsibility to offer an opinion which is designed to assist the court to discover the truth within any given case. The instructing lawyer will only use those opinions which advantage the proposed argument proffered by that lawyer’s client but should still respect the integrity of an expert who has cogently and forthrightly offered an alternative assertion. That lawyer will be forearmed once advised of a potential opposing view, as this allows the lawyer an opportunity to develop a counter-argument.

It follows that the role of the expert witness in the adversarial legal system is to appraise all available material and to provide an honest and comprehensible opinion which is not unduly influenced by external factors such as the expectations of the instructing lawyer.

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42 Barbieri, n 36; Freckelton and Selby, n 5.
43 lyer, n 40, p 634.