

LEVEL

TWENTY
SEVEN

C H A M B E R S



Preparing your expert evidence

Mei Barnes

Liability limited by a Scheme approved under professional standards legislation

>> Roadmap

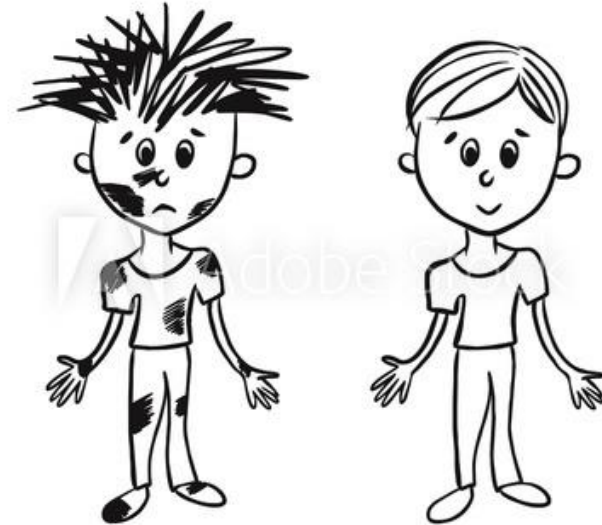
1.1. Selecting your expert

1.2. Briefing your expert

1.3. Testing your expert's evidence

>> 1. Selecting your expert

- Recall: “specialised knowledge based on their training, study or experience.”
- Clean and dirty experts



#177681641

>> 2. Briefing your expert

Include:

1. Any formal requirements (Federal Court Guidelines for Expert Witnesses; UCPR r 428);
2. Key documents;
3. Assumptions
4. Instructions

Exclude:

1. Privileged documents;
2. Documents that cannot be proved (as far as possible)
3. Irrelevant documents

>> 3. Testing your expert's evidence



Things to check:

- Qualifications
- Assumptions
- Methodology
- Addressing the question
- Qualifications
- Identification of basis
- Matters beyond expertise



Ethical obligations

Australian Solicitors' Conduct Rules

24. Integrity of evidence – influencing evidence

24.1 A solicitor must not:

24.1.1 advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or

24.1.2 coach a witness by advising what answers the witness should give to questions which might be asked.

24.2 A solicitor will not have breached Rules 24.1 by:

24.2.1 expressing a general admonition to tell the truth;

24.2.2 questioning and testing in conference the version of evidence to be given by a prospective witness; or

24.2.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not encourage the witness to give evidence different from the evidence which the witness believes to be true.

>> Matters of form

- *Harrington-Smith v Western Australia (No 7)* (2003) 130 FCR 424 (Lindgren J at [19]):

“Lawyers should be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed. In the same vein, it is not the law that admissibility is attracted by nothing more than the writing of a report in accordance with the conventions of an expert’s particular field of scholarship.”

>> Matters of form

- *Harrington-Smith v Western Australia (No 7)* (2003) 130 FCR 424 (Lindgren J at [19]):

“Lawyers should be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed. In the same vein, it is not the law that admissibility is attracted by nothing more than the writing of a report in accordance with the conventions of an expert’s particular field of scholarship.”

>> Testing the evidence

- *Boland v Yates Property Corporation* (1999) 167 ALR 575 (Callinan J at [279]):

“I do not doubt that counsel and solicitors have a proper role to perform in advising or suggesting, not only which legal principles apply, but also that a different form of expression might appropriately or more accurately state the propositions that the expert would advance, and which particular method of valuation might be more likely to appeal to a tribunal or court, so long as no attempt is made to invite the expert to distort or misstate facts or give other than honest opinions. However it is the valuer who has to give the evidence and who must make the final decision as to the form that his or her valuation will take. It will be the valuer and not the legal advisors who is under oath in the witness box and bound to state his or her opinions honestly and the facts accurately. The lawyers are not a valuer’s or indeed any experts’ keepers.”

>> Testing the evidence

- *Boland v Yates Property Corporation* (1999) 167 ALR 575 (Callinan J at [279]):

“I do not doubt that counsel and solicitors **have a proper role to perform in advising or suggesting**, not only which **legal principles** apply, but also that a **different form of expression** might **appropriately or more accurately** state the propositions that the expert would advance, and which **particular method** of valuation might be more likely to appeal to a tribunal or court, so long as **no attempt is made to invite the expert to distort or misstate facts or give other than honest opinions**. However it is the valuer who has to give the evidence and who must make the final decision as to the form that his or her valuation will take. **It will be the valuer and not the legal advisors who is under oath in the witness box and bound to state his or her opinions honestly and the facts accurately**. The lawyers are not a valuer’s or indeed any experts’ keepers.”

>> Live example



- Qualifications
- Assumptions
- Methodology
- Addressing the question
- Qualifications
- Identification of basis
- Matters beyond expertise