thoughtpieces
Incisive analysis of topical issues

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Top tips for effective expert evidence

About this issue

This issue has been co-authored by Thayne Forbes, Stuart Whitwell and Paul Cliff, from Intangible Business, based on their forensic experience gained from giving expert evidence over the last 25 years. This work has involved the production of over 100 expert reports, and oral testimony including under cross-examination on 12 occasions. This article also reflects the views of others involved in the dispute resolution process, in particular from the parties, lawyers, arbitrators and judges.

The authors' specific expertise is in the fields of global accountancy, marketing, valuation, lost profits and excessive or wasted costs. They have provided independent expert evidence in disputes involving issues of both liability and quantum. However, although this article draws mostly on their specific expertise and experience, much of what follows can properly be regarded as of general application in the preparation and presentation of effective expert evidence.

1. Expert evidence has to be understood by various audiences

It is important to remember that expert evidence has to be understood by various audiences. In particular: opposing experts; instructing and opposing lawyers; the parties; mediators but most importantly the arbitrators or judges involved. This is not easy, as they will generally be sophisticated audiences which may have, or may offer, significant experience and skills in areas related to, but different from, the expert evidence. They want to understand the expert evidence from their perspective and without going over too much ground with which they are already familiar.

In many of our cases, explaining the concept of discounting future cash flows (DCF) to a single present amount has been a concept which has had to be explained by reference to first principles to arbitral tribunals and High Court judges, whereas in the same cases the first principles were already known to opposing experts. In such cases we have also seen that a particular and practical method of resolving a dispute has been to identify the key disputed DCF assumptions to be ruled on. Once a ruling has been given on those assumptions, the parties were able to agree how this would be reflected in a DCF calculation.

2. Be as simple as possible

It is the authors' experience that expert opinions expressed in accurate but simple terms are generally more effective than those expressed in an unnecessarily complex manner. Keeping in mind a few simple pillars to support the evidence helps an expert to keep a proper perspective on the reasonableness of that evidence and any challenges to it.

On the other hand, a degree of complexity may well be unavoidable. Nonetheless, it will usually be sensible to open with simply expressed opinions, and all reports should have a clear summary and conclusion. For example, DCF calculations projected indefinitely into the future are often utilised by financial valuation experts. However these can be daunting to the layman, both in their implementation or adjustment and in their conceptual shortcomings.

Such DCF calculations might be useful in the right context, for example as an alternative valuation method or to deal with issues particularly suitable for DCF analysis. However a simply expressed alternative, such as a valuation based on a multiple of one year's cash flows, is more likely to be easier to use and work with so far as the calculations are concerned.

3. Independent, relevant and clear

Expert evidence should be independent, relevant, clear, thorough, well informed and supported, backed up and cross checked. Dispute resolution is usually based on information presented, assessed and tested. If expert opinions diverge then resolution will most likely focus on the reasons for the opinions expressed. Therefore, expert evidence should be well articulated and robust, whether written or oral.

In one case on which we worked, the opposing expert had made significant arithmetical errors in the presentation of important figures in his report. As he was unable to explain this in cross examination this was damaging to the credibility of his evidence overall.

4. Keep within the expertise held

Expert evidence should be confined to the scope of the expertise held, not on the edge or outside. If an expert is drawn in to giving opinions on the edge of, or even outside, their own expertise, this is likely to be more vulnerable to attack, which could well then have further ramification such as damage to overall credibility.

We have seen where an opposing expert in technology was persuaded also to give an opinion on the value of that technology, where valuation was on the margins of his experience. That left him open to damaging cross examination on valuation issues, which was detrimental to the effectiveness of his expert evidence overall.

5. Sober and careful terms

Expert evidence should always be soberly and carefully expressed. In an adversarial legal system, such as for England, experts should not get caught up in aggressive tactics which may be adopted by others involved in the dispute. Opinions should be firm, and fair, but not presented in extreme terms or aggressively. Feedback that we have received from arbitrators and judges is that they often find it tedious and a waste of their time to wade through aggressive self-serving letters exchanged between law firms acting for the parties to a dispute. Whilst such letters (or "backward facing submissions") might satisfy clients in the short term, aggression, point scoring and posturing is generally of no assistance in writing an award or judgment. The same is equally true of correspondence between experts, some or all of which can find itself in the material which is placed before the court or arbitrator.

6. Follow CPR Guidelines

Expert evidence should take account of the tensions that can arise in the conduct of adversarial proceedings not least with being instructed by a party to that process. CPR Part 35 regulates and provides guidance to experts as to the nature and essentials of expert evidence. Prior to that the general requirements have been long established in various judgments of the courts, most notably by Mr Justice Cresswell in his judgment in 1993 relating to The Ikarian Reefer. The current general requirements for expert evidence in Practice Direction 35 – Experts and Assessors, which supplements CPR Part 35, follow this judgment closely, and should always be borne in mind:

> *"2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.*
>
> *2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.*
>
> *2.3 Experts should consider all material facts, including those which might detract from their opinions.*
>
> *2.4 Experts should make it clear –*
>
> *(a) when a question or issue falls outside their expertise; and*
>
> *(b) when they are not able to reach a definite opinion, for example because they have insufficient information.*
>
> *2.5 If, after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court."*

The central thread to CPR Part 35 is that expert evidence should be impartial and intended to assist the court or tribunal in understanding the issues it has to decide. In practice, a lot of the time expert evidence frequently engages with, and supports, too much one side to the dispute (likely to be the side who instructs the expert).

This might seem initially attractive but would be risky and inappropriate for all involved. There is a great deal of guidance that expert evidence should be impartial. Despite this, we have often seen opposing expert evidence that is clearly partial, and this is highly dangerous both for the other side's case and for the reputation of those experts. There have been a number of cases where experts have been publicly and heavily criticised by judges, for example in Pearce v Ove Arup.

Judges and arbitrators set great weight by the professionalism and impartiality of expert witnesses. If they are confident that an expert appreciates that his first duty is to provide impartial advice for the assistance of the court or tribunal, they will inevitably give greater credence to his evidence.

Experts should also be able to identify when an external opinion or calculation may not be impartial or where there is a potential conflict of interest. For example, a valuation report on a particular company by an investment bank may not be independent if that company is also a client of the bank.

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7. Be persuasive

Whilst recognising the requirements highlighted in the previous paragraph, expert evidence should be expressed persuasively, as any opinion is likely to be opposed by experts giving substantially different opinions on the same evidence or issues. In one case in Australia we considered an expert report on brand valuation which claimed to have been produced in compliance with valuation standards. However on

examination it was not so compliant, in several important respects, and therefore lost the force gained from the authority and rigour of such compliance. This deficiency was so significant that the claim was abandoned shortly by the other side after service of our report in reply.

8. Consistency

Expert evidence should be consistent, most importantly within itself, but also with the evidence or issues to be decided. This is really self-evident but consistency is as key to expert evidence, as it is to many other activities. For example, McKinsey have expressed the three Cs of customer satisfaction as: (1) consistency; (2) consistency; and (3) consistency. *"It may not seem sexy, but consistency is the secret ingredient to making customers happy. However, it's difficult to get right and requires top-leadership attention."*

9. Focus on key issues

Expert evidence is often costly and time consuming. It is therefore important that the evidence focuses on key issues, and is not side-tracked into insignificant or peripheral areas. Civil disputes are usually concerned with achieving a judgment or award involving the payment of a sum of money by one party to the other. In several cases we have seen significant time and resources devoted to issues where no significant money was at stake on the resolution of those issues. The outcome was, unsurprisingly, not relevant and resulted in wasted and diverted time and resources which could have been applied to more significant areas.

10. Recognise alternative assumptions

Experts should always be prepared to recognise reasonable alternative assumptions or any mistakes made. A refusal to accommodate alternative reasonable assumptions and to correct mistakes will be detrimental. There is a balance here for adjusting financial figures for reasonable alternatives (eg a plausible alternative of relevant facts such as the frequency of an entertainment group touring) to not adjusting when presented with unreasonable alternatives (eg where such future touring is claimed to be unprofitable despite many indicators to the contrary). Generally, an expert who recognises that an earlier view or opinion that he has expressed is wrong, and accepts and corrects that, will be seen as more credible and impartial than one who stubbornly sticks to his guns and is then seen is perceived as flawed or partisan.

We have seen a valuation expert who simply refused to acknowledge the existence of any reasonable alternative assumptions to the ones which underpinned his valuation when such assumptions plainly existed. This gave the impression that the expert was lacking in objectivity and so damaged his credibility.

11. Be helpful

Expert evidence should be helpful to a dispute resolution process. It should therefore address the key relevant issues in a constructive way and not stray into irrelevant areas. We can recall a mediator saying during a mediation (which ultimately resolved a post-acquisition dispute) that an overly aggressive approach in expert meetings was unhelpful in keeping things moving forward and resolving the dispute.

12. Understanding and experience

A good understanding of, and experience in, the dispute process should be had by the expert so that their expertise is properly and fairly presented in the context of that process. Experience of preparing reports, attending meetings of experts, attending mediations and testifying in tribunal or court hearings, is helpful when providing effective expert evidence. A forensic environment can be intimidating for an expert, and the delineation of what an expert can and cannot do is not always that clear. Even so, expert evidence can have great significance and relevance to the dispute resolution process.

We have seen opposing experts, mainly through inexperience of the dispute resolution process, concede readily all points put to them in cross examination. Had this been done in their expert reports prior to trial then the issues in dispute would have been substantially narrowed. Equally we have seen experts who have been too reluctant to concede points properly in the witness box, with the consequence that they seem too entrenched in their client's position and lacking objectivity and credibility.

13. Respond effectively

Experts should have the ability to respond effectively when tested, particularly under cross examination. They are well advised to adopt the following basic approach:

- listen to the question;
- answer the question as put to them;
- expand on the answer if that is necessary for a full and proper understanding of that answer; and
- do not be tempted to fill the silence between the previous answer and the next question (a common interviewer's tactic).

Staying within the bounds of the expert's remit and being straight forward and authentic counts for a lot, both in cross examination but also in written reports. We have seen an opposing expert in an arbitration hearing avoid questions in cross examination and then, after a break, take an argumentative approach in answering. This gave a bad impression to the tribunal and that expert evidence was dismissed in the award.

An expert has to walk a difficult line; when giving oral evidence, he/she must be prepared and confident enough to explain his/her views and, in particular, must be willing to speak up if he/she feels that an important point is being overlooked or given too little significance. Equally, for most of the time that he/she is providing his/her oral evidence, he/she should let the parties' lawyers and the court/tribunal take the lead in deciding how his/her oral evidence should unfold. How an expert conducts himself/herself in the witness box can have a significant impact on the outcome of a case.

> Cross examination is the ultimate testing ground for expert evidence

14. Deal with challenging questions

The expert should have the ability to deal with challenging questions typically such as:

- what would you say if instructed by the other side?
- what are the weaknesses in your expert report?

In conclusion

Many of the examples given above are based on where we have seen opposing experts depart from our top tips for giving effective expert evidence. However, when these tips are followed, expert evidence can be a powerful part of a case and can sometimes be relied on in part or in full.

Due to the confidential nature of much of our work, only a few details can be disclosed and some of the examples given have been edited to preserve confidentiality (whilst fairly illustrating something which has actually occurred in our experience).

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