



Guidelines on Expert Evidence in Relation to Conveyancing Practice

There have been many recent developments in the area of expert witness evidence in Ireland, including the Rules of the Superior Courts 2016 (S.I. Nos. 254 and 255), The Law Reform Commission Report LRC-117-2016 ('The Law Reform Commission Report') and the recent Supreme Court Judgement of Mr Justice MacMenamin in *Denis O'Leary v. Mercy University Hospital Cork Limited and Khalid M. Ali Chiad Al-Safi* ([2019] IESC 48 (31 May 2019)) ('O'Leary v Mercy Hospital'). The Conveyancing Committee has updated its Guidelines on Conveyancing Expert Witnesses (published in the Law Society Gazette, August/September 1996 – the '1996 Guidelines') in light of these developments.

1. Engaging a conveyancing expert witness

Necessary expertise

- 1.1 Solicitors proposing to engage a conveyancing expert witness should satisfy themselves that the proposed expert has the necessary expertise and experience in relation to the matter or matters in issue. They should also consider whether the proposed expert can prepare their witness statement, affidavit, opinion or report (for convenience hereafter 'Report') in a clear and concise manner, clearly intelligible to a lay person, and whether, if the matter goes to court, the proposed expert would make a coherent witness in giving evidence and under cross examination.

Expert not necessarily a member of the Conveyancing Committee

- 1.2 Expert witnesses need not be solicitors who serve or have served on the Conveyancing Committee of the Law Society. They must be solicitors with the requisite experience and expertise in the relevant practice area.

Timely instructions

- 1.3 The instructing solicitor should instruct the expert witness in good time, and before the statement of claim or defence stages as appropriate. In a professional negligence

action the Report should be obtained before the commencement of proceedings. In other cases also it may be advisable to have sight of the Report before proceedings are issued. The Report may assist in drafting the proceedings.

Experienced expert witnesses may decline to act in a matter where there is insufficient time to review the materials, give due consideration to the issues, and prepare their Report.

No conflict of interest

- 1.4 The instructing solicitor should ensure that there is no conflict of interest and that the expert will be independent and impartial. Full details of all parties, actual and potential, to the proceedings should be produced to the proposed expert so that a comprehensive conflict check can be carried out before the expert witness accepts the instructions.

Overriding duty to the court

- 1.5 The instructing solicitor must appreciate that while the expert witness will owe a duty to the instructing solicitor and his/her client to exercise due care, skill and diligence, the overriding duty of the independent expert witness is to the court. The expert is not a “hired gun” engaged to bolster the case of one side or the other, but rather an independent expert assisting the court in relation to his or her area of expertise – in this instance conveyancing practice, or a specific area within conveyancing practice.

Exclude matters of law or adjudication on facts

- 1.6 The expert witness should not be asked to give an opinion in relation to matters of law, or adjudicate in relation to disputed facts. Those are matters for the court. The expert can only give evidence in relation to matters within his or her area of expertise i.e. conveyancing practice.

Experts can express a view on the facts alleged by the party instructing them, but must acknowledge that the allegation is, or may be, disputed. The arbiter on matters of fact is the court.

Fees

- 1.7 Fees should be agreed in advance. These can be a set fee or can be based on time. A fee arrangement based solely or partially on the outcome of the action should be avoided as the expert witness should not have any interest in the outcome of the case in order to maintain their independence and to discharge their primary duty to the court.

If an expert agrees to act pro bono, this should be stated in the Report. It should be clear that pro bono does not mean the expert will be paid only if their client is successful, but rather that they will not receive fees regardless of the outcome.

An expert should expect to be cross-examined regarding the fee arrangement.

Preparation of brief

- 1.8 The brief to the expert witness should be carefully prepared and properly presented so as to contain all of the relevant material, including material potentially adverse to the case. Seeking to conceal relevant matters from the expert witness will be counter-productive as inevitably the matter will arise in the witness statement of the other side, or in cross examination at hearing, whereupon the credibility of the expert witness will be undermined.

The expert should be given a concise brief, with a detailed outline of the matter, either in a covering letter or consultation, or both, and the specific issues which the expert is being asked to address should be clearly stated.

The brief should be focused specifically on the issues which the expert is to address. As most fee arrangements with expert witnesses are calculated on a time basis, this is cost effective. An expert witness should review and consider all materials presented to him or her. If they simply receive all of the papers and files which the instructing solicitor has, then the fee will reflect the additional time required both to review them and to collate them into a coherent form.

Meeting/Consultation with the expert

- 1.9 If the expert advises that he or she does not understand the issues having read the brief, or that there are gaps or inconsistencies which the expert cannot reconcile, the instructing solicitor should arrange a meeting with the expert, perhaps with counsel, to discuss the matter. The instructing solicitor should be satisfied that the expert has a full understanding of the relevant issues.

The instructing solicitor may decide in the circumstances of a particular case that, before the expert reviews the papers or prepares their Report, a meeting or consultation with counsel is desirable in any event.

2 Acting as an expert witness

Should you act as expert witness?

- 2.1 The following wording comes from the 1996 Guidelines and is reiterated, with a minor change:

Unless it is obvious that you have the relevant experience to give your evidence the necessary weight, think carefully before agreeing to act. You may be a very experienced conveyancer but not have much experience in relation to the type of matter the subject of the particular dispute. In such event you should consider suggesting to the parties that they get somebody who has more experience of the particular type of transaction. Remember you may be cross-examined for anything from a few minutes to days on your opinions and the experience upon which they

are based. Do not allow your willingness to help a colleague to become the cause of a major embarrassment to yourself.

Complete brief

- 2.2 Identify any missing, incomplete or illegible documents, uncoloured maps, gaps, inconsistencies or other issues arising from the papers received and raise them with the instructing solicitor at the earliest opportunity. Expert witnesses have a duty to fully inform themselves in relation to a matter and it will be no excuse to simply say for example that a document which was clearly relevant was not produced to you or was illegible.

Duties of expert witness

- 2.3 Be conscious of your duties as independent expert witness. Familiarise yourself with the relevant case law on expert witnesses. Mr Justice MacMenamin in *O’Leary v Mercy Hospital* in paragraph 25 gives a non-exhaustive list of duties:
- 2.3.1 Disclose any connection, whether personal or otherwise, to a party in the litigation;
- 2.3.2 Make known any financial or economic interest in the outcome;
- 2.3.3 Acknowledge in writing that the independent overriding duty of the expert witness to the court takes precedence over the duty to any party paying the expert’s fee. Order 39, Rule 57 of the Rules of the Superior Courts (see S.I. 254 of 2016) reiterates this long established principle and requires that the Report of the expert witness include a statement acknowledging this and requiring disclosure of any financial or economic interest;
- 2.3.4 Accept the necessity of expressing an independent opinion which is the product of the expert’s own research;
- 2.3.5 Observe the duty to set out all the material facts, assumptions, or methodology upon which views and opinions are based, including such matters as may detract from the opinion formed,
- 2.3.6 Address only areas within the expert’s own expertise.
- 2.3.7 Indicate if any opinion expressed is qualified, or subject to revision,
- 2.3.8 Acknowledge that the expert witness should, at the earliest opportunity, indicate if their views have been altered as a result of discussions with those retained by the other side and if so, in what area.
- 2.4 Mr Justice MacMenamin cites the non-exhaustive principles of the *Ikarian Reefer* case (referred to in the 1996 Guidelines) as follows:-
- 2.4.1 The evidence of expert witnesses should be, *and be seen to be*, independent and uninfluenced in form or content by the exigencies of litigation;

- 2.4.2 Such witnesses should provide independent assistance to the court by way of objective, unbiased, opinion in relation to matters within their expertise and should never act as advocates;
- 2.4.3 Such witnesses should state the facts or assumptions upon which their opinion is based, and consider material facts which could detract from their concluded opinion;
- 2.4.4 Expert witnesses should make clear when a particular question or issue is outside their expertise;
- 2.4.5 If such witnesses consider that insufficient data is available, they should say so, and indicate that the opinion is provisional only;
- 2.4.6 If the witness is not sure that their Report contains the truth, the whole truth and nothing but the truth, without some qualification, they should state that qualification in their Report. If an expert witness changes his or her views on a material matter such change of views should be communicated (through lawyers) to the other side without delay and when appropriate to the court;
- 2.4.7 Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents these must be provided to the opposite party at the same time as the exchange of Reports.
- 2.5 Mr Justice MacMenamin recognised that these rules have been further refined in case law in England and Wales and referred to chapter 8 of the Law Reform Commission Report.

Overnight transcripts and court attendance

- 2.6 The judgement in O’Leary v. Mercy Hospital usefully deals with overnight transcripts and confirms that it is not unreasonable that the expert witness be kept apprised of what other witnesses are saying and the manner in which the case is developing. Mr Justice MacMenamin saw no objection to an expert witness attending court if they wish. The instructing solicitor may well request that the expert attend at least some of the hearing, and it is important in particular that the expert hear the evidence of the expert witness on the other side.

Consultation with counsel

- 2.7 The judgement in O’Leary v Mercy Hospital also confirms that there is no objection, per se, to the fact that from time to time counsel may wish to consult with the expert witness. However expert witnesses must be careful to ensure that they do not ever allow a situation to evolve where they put themselves, or are put in, the position of being seen as advocates rather than as independent witnesses.

Meeting of experts

2.8 Order 39, Rule 61 of the Rules of the Superior Courts provides a mechanism whereby, on the application of a party to the proceedings, or at the discretion of the judge, the judge may order that the expert witnesses on each side meet in private to discuss their evidence. Following that meeting the experts are required to prepare a joint report setting out the evidence that is agreed and such evidence as is not agreed. This may be followed by the “debate among experts” procedure set out in Rule 61(4).

3 Form of Report

3.1 The expert witness may be asked to prepare a witness statement (in some instances on affidavit), give an opinion or prepare a report. If the document used is prepared for production to the other side, and to be produced in court, then regardless as to how it is described it should :-

3.1.1 describe the professional career, expertise and experience of the witness

3.1.2 set out who is instructing the expert, and on whose behalf

3.1.3 describe the materials reviewed by the expert

3.1.4 describe the background or context to the matter in respect of which the expert's opinion is sought

3.1.5 give the opinion of the expert in respect of the matters put to him or her

3.1.6 include any qualifications to the opinion

3.1.7 incorporate a statement of the duties of an expert witness, to include the statement as to the overriding duty to the court, requirement of disclosure of any financial or economic interest, and basis of fees.

3.2 A specimen statement of duties is set out below. This is not intended as a precedent and practitioners who regularly do expert witness work will usually have their own version. The statement can appear in the body of the Report or as an appendix to it.

Duties and responsibilities in acting as expert witness

- 1 All views I express are my own independent views and represent my true and complete professional opinion on the matters to which they refer. In particular they are not influenced by the fact that I have been engaged by one of the parties to the litigation, nor by the exigencies of litigation;
- 2 My primary duty in furnishing written reports and giving evidence is to assist the court, and this duty takes priority over any duties which I may owe to the party or parties by whom I have been engaged. I confirm that I have complied and will continue to comply with this duty;
- 3 My agreed fee arrangement with the party or parties by whom I have been engaged is not contingent on the outcome of litigation or otherwise contingent in any way;
- 4 My opinion relates exclusively to matters of prudent standards of conveyancing practice in Ireland. I acknowledge that matters of law and adjudication on disputed facts are matters for the court;
- 5 I have endeavoured in my report and in my opinions to be accurate and to have covered all relevant issues concerning the matters which I have been asked to address;
- 6 I have included in my report those matters of which I have knowledge and of which I have been made aware that might adversely affect the validity of my opinion;
- 7 I have given due consideration to alternate views expressed in the information and materials presented to me and I have had regard to those views in formulating my opinion;
- 8 In respect of matters in relation to which I express an opinion I have formed an independent view notwithstanding views or suggestions that may have been expressed or made to me by others including the instructing solicitor and their client;
- 9 Where I have relied upon information from others including the instructing solicitor and their client I have so disclosed in my report;
- 10 Where I have relied on sources outside of my personal experience I have indicated those sources in my report;
- 11 Where my opinion on any matters is a provisional opinion I so state in my report;
- 12 I am not aware of any conflict of interest which might detract from my ability to act as an independent witness in accordance with the duties and responsibilities set out herein;
- 13 Neither I, nor anybody connected with me, has any financial or economic interest in the business or economic activity of the client of the instructing solicitor;
- 14 I will notify those instructing me immediately and confirm in writing if, for any reason, my existing report or opinion requires any correction or qualification;
- 15 I acknowledge my duty to indicate, at the earliest opportunity, if my views have been altered as a result of discussions with those retained by the other side and if so, in what area, and I will comply with this duty;

- 16 I understand that (a) my report, subject to any corrections before swearing as to its correctness, will form the evidence which I will give under oath or affirmation (b) I may be cross-examined on my report by a cross-examiner assisted by an expert and (c) I am likely to be the subject of public adverse criticism by the judge if the court concludes that I have not taken reasonable care in trying to meet the standard set out above.

Conveyancing Committee

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