

ACTING AS AN EXPERT WITNESS

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Guidance Papers

Objectives

The principal objective of a Guidance Paper (GP) and Resource Pack (if applicable) is to clarify professional and industry processes, best practices, and procedures and to discuss their use and implementation.

A GP is designed to be of assistance to Members and those who use Members' services. They serve as a guide and measure of acceptable professional practice and conduct of a Member.

The intention of a GP is to:

- a) provide information on the characteristics of different types of assets that are relevant to the advice.
- b) provide information on appropriate practices and their application.
- c) provide information that assists Members in exercising the judgements they are required to make in specific situations.
- d) convey elements of what is considered "competent professional practice" for Australian Property Institute (API) Members and "best practice" for Property Institute of New Zealand (PINZ) Members.

A GP is not intended to provide comprehensive training, instruction or prescriptive practices and procedures, or direct that a process, professional approach, or method should or should not be used in any specific instruction or situation.

Member Obligations

The Member is responsible for choosing the most appropriate approach in a matter based upon the task and instruction. It is a matter for each Member to decide the appropriate practice in any situation, and if they are unclear, seek professional advice from others, or contact the Institute(s). Members have the responsibility of deciding when it is appropriate to depart from the guidance and practices contained in a GP.

The Institute(s) do not warrant that anything contained in this, or any GP is the definitive or final statement on any issue. Members must perform their own work pursuant to their own professional expertise and experience and if required, seek additional advice which might include legal advice.

Court or Tribunal Reliance

A court or tribunal may consider the contents of any relevant GP or other document relating to a recommended professional practice published by Institute(s) in deciding whether the member acted to a standard required by law.

Currency of Publication

Case law and relevant legislation may change over time and whilst the Institutes(s) consider this GP current at the time of publication, Members and those who use Members' services should have regard to legislative changes and new rulings and if necessary, seek further advice prior to having regard to this GP.

Departure or Non-Compliance

Where a Member considers that a circumstance exists that warrants the departure from or non-compliance with any of this GP, the Member's report (or other advice) must include a statement that outlines:

- (a) the reasons for the departure or non-compliance with this GP; and
- (b) any impact the Members departure or non-compliance may have on the content of the report.

Members are advised to seek legal and/or other advice before departing from practice recommended in a GP.

Enquiries

If any Member considers any information or advice in this GP to not be accurate or up to date, or wish to raise any issue for consideration arising from the contents of this GP, please refer this to

API contact: standards@api.org.au

PINZ contact: standards@property.org.nz.

1.0 Acting as an Expert Witness in Courts and Tribunals

1.1 Scope of this Guidance Paper

This GP is to provide a summary of the current principles of dealing with Expert Evidence in Australia and New Zealand. This GP applies to Members involved in the provision of expert evidence.

It should be used in conjunction with other GPs and standards which are either overarching or directly applicable to the issues involved.

1.2 Introduction

In 1900 Judge Leonard Hand observed 'no one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how to do it best.' (Justice Leonard Hand, "Historical and Practical Considerations Regarding Expert Testimony" (1901) 15 Harvard Law Review 40).

Since then, the complexity of litigation and the issues which need to be decided to have increased significantly. There has also been criticism of expert witnesses in the areas of perceived bias and a failure to adequately set out reasoning.

The basic rationale for permitting admission of expert opinion evidence, is that the subject matter of the evidence is such that "ordinary persons are unable to form a sound judgment ... without the assistance of (those) possessing special knowledge or experience ... which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience (see *HG v The Queen* (1999) 197 CLR 414 at [58]).

The primary duty of an expert giving evidence in Courts is to apply specialised knowledge to assume the observed facts, and to form an opinion based on that specialised knowledge. The various codes of conduct adopted by the Courts in the past decade emphasise that in giving this expert opinion, the paramount duty of an expert is to assist the Court to understand the evidence in the case.

In recent years there have been significant changes to the way that the evidence of the expert witness is presented in some jurisdictions and this TIP outlines the present way to adduce expert evidence.

1.3 Background

Although there have been many attempts to address the presentation of expert evidence by Courts and Tribunals in the past, a comprehensive report was prepared by the Law Reform Commission of NSW (Report 109 – Expert Witnesses) in June 2005 which investigated recent developments in Australian and international jurisdictions. In NSW the *Uniform Civil Procedure Rules 2005* was introduced to comprehensively codify the use of expert evidence.

Courts, including the following Federal, State and Territory Courts have formulated practice directions and rules to guide experts:

- Family Court
- Land and Environment Court
- Supreme Courts
- Federal Court of Australia

Similar legislation and Codes of Practice have been introduced in all States of Australia and also relating to each of the jurisdictions of the Supreme Court, Federal Court, Family Court as well as Specialised Jurisdictions (e.g. Land and Environment Court of NSW). Codes of conduct have also been introduced in the District and High Courts of New Zealand.

1.4 Overriding Purpose

The Courts have an expectation that the parties including expert witnesses will work to achieve the just, quick, and least expensive resolution of the real issues in the proceedings.

1.5 Duties of an Expert Witness

An expert witness has several conflicting duties which need to be managed and resolved correctly. The most important is the duty to the Court and is to be treated as a paramount and overriding duty. At its core is an obligation to assist the Court in arriving at the truth. It should be borne in mind that, it is the Court, which makes the ultimate decision, and the role of the expert is to educate the Court to the same level of understanding as the expert on the issue in question. The expert is not an advocate for a particular party and should remain true to their profession and refrain from attempting 'to win' the case for the client. However, an expert witness is to ensure that all of the relevant points of their client's case are brought to the attention of the Court.

An expert has a duty to comply with the directions or orders made by the Court. These directions should be provided to the expert by the legal practitioner conducting the matter. They are usually straightforward and typically, determine whether there will be a joint conference, the timeframes for serving reports, the dates for hearing, define terms on which experts are to be briefed and the like. In Australia Court directions are usually made by a Registrar sitting in Court but it is not unusual for a Judge to give directions or make orders. In New Zealand, such directions will normally be made by the Judge, often by consent of the parties.

The expert has a duty to maintain their reputation by providing competent advice to the Court (reasoned conclusions are preferred to bold conclusions) and refusing to put forward arguments that lack substance or credibility to unreasonably advance the client's case. It is inappropriate to allow the instructing lawyer or any outside party to 'filter' the expert's report. The lawyer may provide advice on legal or procedural matters and may even provide advice as to the scope of the report and its relevance to the proceedings. With Joint Conferencing it is inappropriate to allow the instructing lawyer or any outside party to interfere with the independent expert witness process once a Joint Conference has commenced. The exception to this is where a facilitator is engaged to assist the experts to produce a credible Joint Report.

The duty to the client includes confidentiality, diligence especially in presenting the case fully and fairly, punctuality, not to mislead on the prospects of success to obtain instructions and to quote fairly and transparently.

The duty is to be truthful as to fact, honest as to opinion and complete as to coverage of relevant matters. The duty is the same whether the Expert is giving evidence in Court or to

a Tribunal on oath or not on oath. Expert evidence must be independent, objective, and unbiased.

1.6 Code of Conduct

The various Practice Notes published by the Courts and legislation often refer to a 'code of conduct' which usually sets out specifically, the expert's duties, reporting requirements and includes an undertaking for the expert to have read and agree to be bound by the code.

1.7 Relevant legislation

The expert should be familiar with the legislation and Court Practice Notes relevant to the jurisdiction in which they are practising.

For valuation compensation matters consider listing each heading of compensation under the relevant Act, even if a sub-section has "nil" or "not applicable", or in the case of professional expenses – "to be determined by the Court". It demonstrates to the Court that the expert has considered each of the relevant heads of compensation under the Act.

1.8 Taking Instructions

Before accepting an instruction, the expert should advise the client that the expert's overriding duty is to assist the Court, and that the expert's opinion is not negotiable, and that at times, it may be necessary to provide advice and explanations to the Court which may be contrary to the client's interest. The duty to the Court is not altogether inconsistent with the expert's duty to the client. It is in the client's interest for the expert to be a credible witness and the expert's recommendations accepted by the Court.

On receiving instructions to act as an expert witness the expert should follow the below main steps:

- (a) Identify, read, and understand the relevant legislation, Court practice directions and Court rules.
- (b) Obtain a copy of all relevant directions that have been made by the Court during the pretrial phase of the matter.
- (c) Read the instructions and confirm that they are correct and appropriate to the area of expertise. If necessary, aid in correctly framing instructions bearing in mind that it is a good practice to annex a copy of the instructions to the report.
- (d) The expert should engage with the client and the legal advisers if already appointed and obtain clear and written instructions as to the expert report and the issues to be addressed in the proceedings. If there is no legal adviser currently appointed such a request is to be made of the client. If the expert requires any information that will assist them in preparing evidence which they cannot obtain, they need to ask their instructing lawyers to take appropriate steps such as issuing subpoenas and notices to produce and/or seeking Court orders for the discovery of documents.
- (e) Reach agreement on remuneration. In the case of Joint Experts and Court-Appointed Experts the parties are usually jointly and severally liable for the expert's fees which are usually fixed by the Court.

If the expert is being considered for appointment as a 'parties' single expert' (a jointly instructed expert) then it would be inappropriate for the legal representative to elicit the expert's opinion on a relevant issue dealing with the matter prior to formal instruction. However, the expert is entitled to know who the parties are (and, if relevant, the other experts) to ensure that there is no conflict of interest.

1.9 Conflicts of Interest

If an expert has acted as a negotiator for one party, they cannot then act jointly for both parties. Also, if an expert has acted for both parties (such as a determining valuer in an acquisition matter) then they cannot act for one of the parties in any subsequent court action unless agreed to by both parties.

1.10 Presentation of Expert Evidence

The traditional process of adducing evidence is set out below.

- (a) Statement of Evidence (or expert report) is where the expert sets out their opinion on the issues in question. It should ideally be a complete document without the need for further amendment. (See supplementary reports below)
- (b) Statement in Reply – this gives the expert the opportunity to respond to issues stated by the opposing party's expert with which they do not agree. It is not an opportunity to amplify or amend the Statement of Evidence.
- (c) Supplementary Reports – (a) Supplementary reports require the leave of the Court and/or consent of the parties depending on the circumstances. (b) On the other hand, if an expert changes their opinion, then there is a duty on the expert to advise the parties and immediately provide a supplementary report.
- (d) Joint conferencing - where two or more experts confer to discuss the questions put to them by the Court or by the parties which leads to the preparation of a Joint Expert Report. This conference is conducted as a conclave, and without the interference or referral to any outside parties, unless the Court directs otherwise.
 - Some Courts may direct the experts to go straight to Joint Conferencing without first preparing separate reports. If the issues in dispute can be resolved less expensively or quickly by going directly to Joint Conferencing, then the expert should advise the client accordingly.
- (e) Joint Expert Report - Is the report produced because of the Joint Conference (See 'Joint Expert Report' below).
- (f) The expert's evidence is generally tested in Court in two main ways.
 - i. Concurrent evidence - where two or more experts are sworn in and questioned on their evidence at the same time. (See below under 'Concurrent Evidence')
 - ii. Separate cross-examination of each expert retained by each party.

1.11 Acting as an Advocate

A member is entitled to act as an advocate for a client however, the advocacy role is subject to proper professional practice in conducting negotiations on the client's behalf and that role must be declared to all parties. A member must not act as an advocate then as an expert in the same matter.

2.0 Expert's Report/Statement of Evidence

2.1 General Points

An acknowledgement that the expert has read the 'Code of Conduct' and agrees to be bound by it should be contained in the first report prepared (i.e. statement of evidence (expert report) or Joint Expert Report). If this is not done, then there is a possibility

(depending on jurisdiction) that the report cannot be admitted into evidence without the leave of the Court.

In Australia, a written report on the issues to be addressed is nearly always required. Multiple originals are always required which are usually filed by the instructing lawyer in the relevant Court and stamped with the Court's seal and dated. The Court will retain one original, the instructing lawyer will keep another, and an original will be served on the other parties. There is no similar requirement in New Zealand.

The starting point for any expert report is to obtain and

- (a) read the relevant Court Practice Note (or Direction),
- (b) read the Points of Claim and Points of Defense (where available),
- (c) read any relevant Orders from the Court.

The report should be written to a level of detail that educates the 'decision maker' to the same degree of understanding as the expert. Direct basic 'Plain English' language is to be preferred and the report should be capable of being understood by the average person. Technical terms should be fully and clearly explained.

A Summary should be provided at the front of the report.

Every page of the report should be numbered. Ideally, the numbering should run consecutively from 1 onwards including the annexures so that they can be easily found when the report is being dealt with in the Court.

All paragraphs should be numbered or referenced.

A Curriculum Vitae or equivalent should be attached to the report that sets out the expert's qualifications as an expert on the issue the subject of the report. This could include the expert's experience, qualifications, professional membership, papers written and presentations.

An expert's report must include the following:

- (a) the expert's reasons for each opinion expressed,
- (b) any literature or other materials utilised in support of the opinions,
- (c) if applicable, that a particular issue falls outside the expert's field of expertise,
- (d) any examinations, tests, or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out,
- (e) If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, then the qualification must be stated in the report.
- (f) If an expert witness considers that their opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
- (g) the facts and assumptions on which the opinions of the expert are based.
- (h) the issues the evidence of the expert addresses and that the evidence is within the expert's area of expertise.

If an expert wishes to make a minor correction or update a report, it may be possible to do this orally at the hearing with the leave of the Court. The instructing lawyer will have to be informed beforehand and will, after the expert has been sworn in, say to the expert '*Do you wish to make any correction to your report?*'

But note, as previously mentioned, major changes, additions or amendments to the report require a more formal procedure and will incur further costs (without consent of the other side, a Notice of Motion will be required) especially if expert reports have been served.

Again, if the expert changes their opinion, a supplementary report should be provided as soon as possible. Generally, a change of opinion comes about from a material change in the available evidence or a material change in the way the expert has earlier considered the evidence. Supplementary Reports are not automatically admitted into evidence. The problem becomes more acute if the report appears to introduce fresh evidence at a late stage (the issue is procedural fairness to the other party).

3.0 Supporting Evidence

The Court needs to understand the expert's reasoning process and the legal representatives are entitled to test the basis upon which the expert's opinion is formed. It is better to have some evidence than no evidence in support of an expert's opinion. Generally, it is not satisfactory to simply answer 'due to my 20 years' experience'. However, in some cases when all avenues of enquiry and analysis have been exhausted, and there is no evidence to support an expert's opinion then it is appropriate and relevant for the expert to state that they rely upon their experience and judgement alone. Reasoned conclusions are of more assistance than bold conclusions.

Other supporting evidence can be obtained from State GIS systems, austlii.edu.au, government legislative websites, web-based viewing/mapping sites and private and public property data providers etc.

4.0 Categorising Evidence

As part of the reasoning process that should be contained with the expert's report, consider using a category of:

Primary Evidence – Evidence which provides a high standard of evidence to a particular issue. For example, in valuation matters, a comparable sale that sold at public auction, between willing but not anxious parties, both parties cognizant of the relevant facts, a reasonable marketing period, and excluding any special bid by a special purchaser. It is the main basis for the opinion expressed in the report.

Secondary Evidence – Evidence that does not meet the above standard. In valuation matters sales that did not meet the 'market value' definition, but can be readily adjusted with careful enquiry, analysis, and explanation.

Background information – Evidence that does not fit the two categories above but provides some guidance to the expert's rationale exercise. In valuation matters it may relate to sales that underpin a minimum value in a certain area or assists in tying the above sales evidence into the fabric of value in the surrounding areas.

5.0 Attending Court

The veracity of the expert should be above reproach. Veracity has a somewhat wide connotation and although an expert witness may not consciously be untruthful, it is possible that they may be biased towards their client. They owe a duty to the Court as the Court seeks to gain assistance from the expert. It is important to have confidence in the opinions that they express. A primary requirement is to ensure that the expert report is thoroughly prepared and that the expert is familiar with all facts upon which conclusions are formed. Knowledge plus careful preparation helps greatly to engender self-confidence.

At the hearing, the expert is sworn in by taking an oath or affirmation. The witness is then asked, for the record, to state their name address and occupation. The witness will be asked whether they have produced a report or reports to be used in the proceedings. After the report/s have been identified and if there are no objections from the other side they will be tendered into evidence and given an exhibit number.

It is a sound practice when attending Court to take a note of all documents tendered and the exhibit number given. The presentation of the expert's evidence will be enhanced if they are able to refer to the tendered documents accurately and by their exhibit number so everyone in the Court room knows exactly to which document they are referring. Eg. *'I refer to page 41 of Mr. White's report which is exhibit Z'*

Remember that if the expert has numbered all the pages and paragraphs of their report, they will be able to refer to parts of their report efficiently and without delay.

When called to the witness box, the expert should take their notes and documents. The expert should not hesitate to request that documents be shown to them if that will assist them in giving evidence.

The expert should remain calm and polite and, if necessary, be firm in their opinions but not argumentative.

The expert should listen to the question and if it is not understood ask for it to be repeated or clarified and if they have made an error, they should not try to cover it up.

It is a good practice for the expert to retain a Court copy of the report to make sure that everyone is working from the same document.

The expert's report (including a Joint Expert Report) is the '**evidence in chief**' and will, among other things, form the basis upon which the expert is 'cross examined'. The essential difference between 'evidence in chief' and 'cross-examination' is that in the case of '**cross examination**' leading questions can be asked of the witness.

Expert evidence must be objective, independent and unbiased. Opinion should not be exaggerated or seek to obscure alternative views.

6.0 Techniques Used in Cross-Examination

In the main, 'yes' or 'no' answers are rarely acceptable to the Court. Usually, the answer will accept or reject part of the question or the assumption it contains or qualifies the whole or a part of the question.

Broadly speaking there are four (4) techniques utilised in cross-examination.

- (a) **Confrontation:** The cross examiner seizes on a part of the evidence, and then confronts the expert with a fact or an opinion that is directly contradictory to elicit a reaction. The expert may be confronted with a fact that is obviously true or that is common ground or that clearly appears to be correct or incorrect, derived from an internal contradiction in the expert's own evidence. The cross examiner may be excessively polite, or they may be aggressive.

In any case, they are doing their best to present their client's case. Confrontation is usually preceded by a passage of cross examination by which it is sought to have the witness commit themselves to some fact, proposition, or course of reason. When the witness has committed themselves, they are confronted and the witness' reaction is noted particularly by the Court.

- (b) **Probing:** This is a technique capable of wide variation to meet a range of circumstances. In essence, probing means pressing for more details. A cross examiner may probe because they feel a witness is untruthful and if they are pressed for more detail, they may give themselves away. The cross examiner may be wanting to prepare the way for a confrontation or seeking some weakness in the expert's evidence that they suspect is present or to expose an absurdity or a contradiction.
- (c) **Insinuation:** To insinuate here in this context, means to endeavour step by step to see whether, and the extent to which, the witness will accept or agree to facts or opinions that tell in favour of the side whom the cross examiner represents. It can be done gently, or it can be done strongly. It can be employed alone or in conjunction with other techniques.
- (d) **Undermining:** This technique consists of an indirect challenge. An expert witness puts themselves forward as an honest and responsible person, aware of the oath which they have undertaken. The witness will be undermined by showing that some of their published works or conclusions have been recently discredited or disproved by others in the same field.

Cross examination is flexible and effective. An expert witness need not view the prospect of being cross examined with alarm, however it should certainly put them on guard that they should check and double check their report, their reasoning, and their conclusions. They should strive to express themselves as accurately and completely as possible. They must be prepared to be frank and to concede immediately anything that should be conceded. A successful cross examination can severely weaken or destroy an expert's testimony, however a cross examination that reveals the accuracy of an expert's report,

the logic of their reasoning and the soundness of their conclusions, enhances the weight and reliability of their opinion and their standing as an expert.

If after cross-examination, it appears necessary to clarify some of the answers given by the expert, leave can be sought and usually obtained for '*re-examination*' of the matter needing clarification (as opposed to further evidence). This is often a frustrating exercise for the expert witness because leading questions cannot be asked during re-examination with the consequence that the witness may not then have the opportunity to further elaborate on a point or issue.

The expert must ensure that:

- (a) the answers are comprehensive,
- (b) the opinions are fully expressed if given the opportunity,
- (c) all points are covered.

7.0 Joint Conferencing

The Court may direct experts to confer before the hearing to endeavour to reach agreement on any matters in issue, produce a joint report setting out the matters on which they agree, the matters on which they disagree and the reasons for any disagreement and agreement, and to base any joint report on specified facts or assumptions of fact.

An expert witness must exercise their independent, professional judgment in relation to such a conference and joint report and must not act on any instruction or request to withhold or avoid agreement.

If experts are directed by the Court to confer, experts are to ensure that any joint conference is a genuine dialogue between experts in a common effort to reach agreement with the other expert witness about the relevant facts and issues. Any joint report is to be a product of this genuine dialogue and is not to be a mere summary or compilation of the pre-existing positions of the experts.

A product of the Joint Conferencing process should be a narrowing and a clarification of the issues in dispute. The issues requiring adjudication form the basis of discussion and argument within the Court room and should be dealt with in a logical sequence.

8.0 Joint Expert Reports

A Joint Expert Report is a document produced for the Court by two or more experts, usually at the Direction of the Court and at times requested by mutual agreement by the parties.

The key to a good Joint Expert Report is for the experts to jointly: -

- (a) distil those elements and issues of disagreement between the experts that require adjudication. State the reason/s for the disagreement.
- (b) place those issues for adjudication into a logical format that makes it easy for the Judge, Commissioner or Member to clearly see the competing arguments and supporting evidence. A point and counter-point layout in a landscape table is recommended and allows for a narrative of the competing arguments and sets out the respective reasoning between the experts,
- (c) identify those areas of agreement between the experts, those areas where agreement cannot be reached and the reason/s for the disagreement.
- (d) provide a logical sequence of matters or issues to be adjudicated which could be used as a basis for an Agenda for questioning in the witness box.

A Joint Expert Report should *not* be:

- (a) a simple regurgitation of the respective Statements of Evidence, or Evidence in Reply,
- (b) a “this is my half done, now you do your half” approach, and without any correlation between points of disagreement,
- (c) an overly verbose and extensive document (but must be comprehensive enough to fully state the reasoning and answers the questions put to the experts)

9.0 Concurrent Evidence

If the parties are to retain their own experts (as opposed to ‘parties’ single expert’ or ‘court appointed experts’) the Court may still direct that the expert evidence be presented concurrently by having all the experts in relation to a particular topic sworn in at the same time. The written reports are then tendered together with the document which reflects the experts’ pre-trial discussion (see Joint Expert Report above). The Court may identify the topics that require discussion to resolve any outstanding issues.

What often follows is a discussion, which is managed by the Court, so that the topics requiring oral examination are ventilated. The process enables experts to answer questions from the Court, the advocates and, most importantly, from their professional colleagues. It allows experts to express in their own words the view that they have on a particular subject. There have been cases where as many as six experts have been sworn to give evidence at the same time.

The merit of giving evidence concurrently is that it allows a greater discussion within the Court room and allows experts to further elaborate on an issue rather than being tightly controlled in the formality of adducing and testing evidence.

10.0 Additional Reading

Such reading should include relevance to your jurisdictional environment.

An example of further reading is:

The Expert Witness in the New Millennium - Justice Abadee, 2 September 2000

11.0 Additional Resources

A separate resource pack has been prepared to support this GP. The resource pack is intended to be a support document that may assist you apply the GP in practice. The GP and the resource pack should be read in conjunction with each other. The resource pack may be updated as case law and legislation change so, please ensure that you view the latest version of the resource pack.

12.0 Effective Date

This GP is effective from 1 July 2021. Earlier adoption is permitted.

This GP, ANZPGP 203, replaces the superseded TIP ANZRPTIP 1 which was withdrawn on 30 June 2021.