



CONVEYANCING EXPERT WITNESSES

THESE GUIDELINES HAVE BEEN COMPILED BY MEMBERS OF THE CONVEYANCING COMMITTEE WHO HAVE CONSIDERABLE EXPERIENCE OF ACTING AS EXPERT WITNESSES. THE GUIDELINES HAVE BEEN APPROVED BY THE CONVEYANCING COMMITTEE.

The Conveyancing Committee receives a regular stream of requests to provide expert witnesses in litigation cases involving conveyancing practice. While the Committee endeavours to meet such requests it is concerned that on many occasions insufficient notice is being given to the Committee and the following practice note was issued to the profession in the August/September 1996 issue of the Gazette.

1. An expert witness should be instructed before the statement of claim or defence stages as appropriate.
2. The expert should be given proper instructions i.e. a proper case to advise, not undigested correspondence files and shoals of documents.
3. A consultation should be held with the expert witness as soon as he has given his advice. Occasionally a consultation may be necessary before the expert gives his advice.
4. An expert should not be asked to give evidence on issues of law but only on matters of conveyancing practice.
5. An expert witness is not a “hired gun” and should not be expected to be an advocate of the party who calls him as a witness. Indeed a solicitor has an obligation to the Court to give balanced evidence.
6. An expert witness should not be expected to appear on a contingency fee basis.
7. Solicitors should endeavour to engage their own expert witnesses and not rely automatically on the Conveyancing Committee. The choice should not be confined to members of the Committee. Counsel do tend to direct that the expert witness should be sought from the Conveyancing Committee but the vast majority of experienced conveyancers are obviously not members of the Committee and should not be excluded on that account.
8. Solicitors who have already embarked on cases in which they will require expert witnesses should engage those witnesses now and not wait for Counsel’s advice on proofs.

THE FOREGOING GUIDELINES ARE AIMED MORE AT USERS OF THE EXPERT WITNESSES RATHER THAN THE EXPERT WITNESSES THEMSELVES. THE FOLLOWING GUIDELINES ARE INTENDED FOR THE ASSISTANCE OF EXPERT WITNESSES OR POTENTIAL EXPERT WITNESSES.

When asked to act as an expert witness: -

1. Check for conflicts.



2. 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 someone who has more experience of the particular type of transaction. Remember you may be cross-examined for an hour or so 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.
3. If you have agreed to act as an expert witness:-
 - (a) If at all possible insist on a preliminary meeting at which the particular point at issue is explained to you by someone who understands it fully. Otherwise you may find yourself having to wade through a cubic foot of paper trying to understand what the dispute is all about. You will be furnished with copy deeds and copy contracts with maps attached and as often as not you will find that the maps are not coloured and are accordingly impossible to understand. You may of course still have to read through all the documentation, but from experience, we can tell you that it is far easier to read through it with a clear picture in your mind as to what the actual problem is.
 - (b) Many litigation solicitors tend to run property disputes in the same way as running down actions and will often propose to have a consultation with Counsel on the morning of the Court. We believe that this is completely unsatisfactory for cases involving property disputes. They may feel that there is no great mystery to conveyancing but we know from experience that new angles frequently arise at a consultation which need further research or checking. You should insist on a consultation well in advance of the hearing.
 - (c) Consider the duties and responsibilities of expert witnesses: These were reviewed by the High Court in England in connection with a case known as “The Ikarian Reefer” and were stated as follows:-
 - (i) expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (*Whitehouse -v- Jordan*, [1981] 1 W.L.R. 246 at p. 256, per Lord Wilberforce);
 - (ii) an expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd -v- Commercial Union Assurance Co. Plc.*, [1987] 1 Lloyd’s Rep. 379 at p. 386 per Mr Justice Garland and *Re J.* [1990] F.C. R. 193 per Mr Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate;
 - (iii) an expert witness should state the facts or assumption upon which his

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- opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (re J. sup.);
- (iv) an expert witness should make it clear when a particular question or issue falls outside his expertise;
 - (v) if an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (Re J. sup.). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (Derby & Co. Ltd and Others -v- Weldon and Others, The Times, Nov. 9, 1990 per Lord Justice Staughton);
 - (vi) if, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and, when appropriate, to the Court; and
 - (vii) 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 (see 15.5 of the Guide to Commercial Court Practice).
- (d) Do put your views on the matter in writing. Normally the instructing solicitor will ask you to do this anyway. Doing this in the form of a letter should be perfectly satisfactory in most cases. Doing a written report will take a surprising amount of time because you need to spell out your thinking and particularly so knowing that it is going to be used by Counsel to review your evidence. It will almost certainly be used as the basis for your direct examination in due course. Counsel prefer if you assume that they know nothing about conveyancing, planning or landlord and tenant practice. Also please remember even those Counsel who have an expert knowledge of the legislation do not necessarily know what happens in practice.