

Acting as an Expert Witness

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Key words: expert witness, expert, expert report, adjudication, arbitration, litigation

SUMMARY

This paper looks at some of the issues facing expert witnesses whether they are acting in adjudication, arbitration or litigation.

Expert witnesses are required to give evidence in all types of disputes related to surveying and thus this paper is relevant to all types of membership within FIG.

Experts can be appointed by the parties to a dispute, or by an adjudicator, arbitrator or judge, but in all instances the expert owes his primary duty to the adjudicator, arbitrator or judge.

This paper is based on the appointment of expert witnesses in England but the processes prescribed by the various bodies can be seen as describing Best Practice and can thus be followed in any international jurisdiction, amended of course by any process prescribed in the local jurisdiction.

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1. ACTING AS AN EXPERT WITNESS

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1.2 Introduction

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1.3 RICS (Royal Institution of Chartered Surveyors) - Surveyors acting as Expert Witnesses

- 1.3.1 “Surveyors acting as Expert Witnesses” is a document prepared by the RICS, setting out the procedures which must be followed by members of the RICS when acting as an expert witness. The document can be obtained from the RICS www.rics.org but currently is in the process of updating. The document sets out the following practices:
- 1.3.2 The Report must state in the declarations that the Report complies with the Practice Statement
- 1.3.3 The primary duty of the expert witness is to the Court or Tribunal
- 1.3.4 The procedure for Changes to Instructions
- 1.3.5 Agreeing Facts and Resolving Differences
- 1.3.6 Duty, conflict, previous involvement, maligning opponent
- 1.3.7 Written offer to the client to supply Practice Statement
- 1.3.8 Identification of documents
- 1.3.9 Appointment of a Single Joint Expert
- 1.3.10 Advocacy and Expert Witness Roles

1.3.11 Prohibition of Contingency Fees

1.3.12 Experts can give a range of opinion

1.3.13 Gives guidance to the expert on the raising of questions

1.4 Part 35 of the Civil Procedure Rules (CPR 35)

1.4.1 CPR 35 forms part of the Rules prepared by the Department for Constitutional Affairs in England and provides guidance to experts. The rules HAVE to be followed when a case enters the formal legal system but also provides excellent guidance for adjudication and arbitration. The document sets out the following:

1.4.2 The overriding duty of the expert is to the court

1.4.3 The procedure for parties to make written questions to experts

1.4.4 The Court's power to appoint a single joint expert

1.4.5 The disclosure of information

1.4.6 The recommended contents of the experts report

1.4.7 The procedure for discussions between Experts

1.4.8 The experts right to ask for Directions

1.5 Practice Direction 35 (supplements CPR 35)

1.5.1 Practice Direction 35 is supplementary and complementary to CPR 35. The document sets out the following:

1.5.2 The experts report must be uninfluenced by the pressures of litigation

1.5.3 The experts must not assume the role of advocate

1.5.4 The experts must state all facts including those which might detract from opinion

1.5.5 The expert must not act outside the area of the experts expertise

1.5.6 The procedure where the expert has a changing of view

1.6 Protocol for the Instruction of Experts (Civil Justice Council)

- 1.6.1 The Protocol for the Instruction of Experts prepared by the Civil Justice Council provides further guidance to experts in the carrying out of their duties with particular reference to CPR 35. The document sets out the following:
- 1.6.2 It encourages the agreement of issues for the experts
- 1.6.3 The procedure for agreeing the whole or part of Issues
- 1.6.4 The efficient management of proceedings
- 1.6.5 The need for Experts
- 1.6.6 The Appointment of Experts
- 1.6.7 The amendment of Reports
- 1.6.8 A summary of the expert witness process

2. CHECK LIST FOR THE EXPERT

2.1 Prior the Hearing the expert should carry out the following

- 2.1.1 Agreement of fees
- 2.1.2 Confirm availability during the report and hearing stage
- 2.1.3 Agreement on terms and conditions
- 2.1.4 Clear identify of Client
- 2.1.5 Ensure instructions received clearly and in writing
- 2.1.6 Confirm the acceptance of Instructions
- 2.1.7 Record documents utilised and interviews completed

2.2 Prior the Hearing the expert may be involved in the following

- 2.2.1 Joint Meetings with other Experts
- 2.2.2 The preparation of Joint Reports
- 2.2.3 Questions to Experts and Answers – CPR35

2.2.4 Meetings with Lawyers

2.2.5 Submission of Report

2.2.6 Rebuttal Report

2.3 Immediately Prior the Hearing the expert should ensure the following:

2.3.1 “Preparation Preparation” – reports may have been prepared some time ago and will require review

2.3.2 Check the the Trial Bundle to ensure documents available

2.3.3 Check times!!

2.4 During the Hearing the expert should take account:

2.4.1 Any amendments to his or her Report

2.4.2 Personal Demeanour – act professionally

2.4.3 Distance from own Client/Lawyer – remember the expert is a servant of the court

2.4.4 The documents he wishes to refer to in the Court – the other party has the right to examine any documents taken by the expert into the witness box

2.4.5 Examination in Chief

2.4.6 Cross Examination

2.4.7 Re-Examination

2.4.8 Questions from Judge/Tribunal

2.5 Experts should consider application for the following Registrations

2.5.1 Professional Institutions

2.5.2 Expert Witness Institute

2.5.3 Academy of Experts

2.5.4 TeCSA

BIOGRAPHICAL NOTES

Professional Registrations: Fellow of the Institution of Civil Engineering Surveyors; Fellow of the Royal Institution of Chartered Surveyors; Fellow of the Chartered Institute of Arbitrators.

Current Position: Independent chartered quantity surveyor, claims and dispute resolution consultant and expert witness.

International experience: Lived and worked in the USA, Hong Kong, Somalia, Kenya and Trinidad and Tobago over a period of 15 years. Additional working experience in China, the Philippines, Thailand, Taiwan, Sudan, Tanzania, Egypt and the UAE.

Practical experience: Geoffrey Schmitt has dealt with all aspects of claim submissions, claim defence and dispute resolution on a range of civil engineering and building projects including hydro-electric dam storage projects, process facilities, pipelines, marine works, expressways, reclamations, water supply, submarine pipelines and a wide range of building projects presenting and defending cases in dispute resolution including arbitration support, preparation of expert witness reports and appearance as an expert witness in both arbitration and litigation.

Examples of major assignments include acting as commercial and contractual adviser to the World Bank presenting their case to a Dispute Resolution Board in respect of a major project in China; appearing as a quantum expert witness in a case in the High Court in London; providing contractual support to a contractor in arbitration in Taiwan and preparing a quantum expert report in respect of an oil pipeline/marine terminal project in East Africa.

Additional information: Furthering his interest in the global market, Geoffrey is the developer of two multi-lingual websites serving the construction industry, go4construction.com, a global supply chain directory, and go4constructionjobs.com

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