

## The role of the Expert Advisor and the Expert Witness

Anyone who has seen a courtroom drama on TV will be familiar with the role of the expert witness. Whether they specialise in forensic science, road traffic accidents or accountancy, they are there to provide the court with an independent expert opinion on a technical matter that is outside the general knowledge of the judge and/or jury. What is not so well known though is the role of expert advisor.

In this edition of our topical ebriefs, brought to you by Jane Fowler, Managing Director of Aquila Advisory, the boutique forensic accounting company, we look at the distinction between instructing an expert to provide evidence in court and an expert in an advisory capacity, and we look at the benefits in seeking an independent specialist viewpoint.

Both expert witnesses and expert advisors are appointed by a party to litigation, but unlike an expert witness whose responsibility is to the court, the expert advisor is responsible only to the party appointing them.

### Expert Advisor and Expert Witness

The difference between the two can be summarised as follows:

Expert Witness	Expert Advisor
Permission of the court is needed to appoint an Expert Witness	No court permission is required
Duty of the Expert Witness is to assist the court and not the party appointing them	Duty is to the instructing party
Fees may be payable by the losing party	Fees to be covered by the instructing party
Instructions are not covered by privilege	Advice and instructions are covered by privilege
Liability is limited to negligence and breach of contract claims from the appointing party	Open to claims of negligence from both parties to litigation.
Must satisfy the court of their complete independence from all parties to the litigation and connected parties. Failure to do so will result in their evidence being struck out.	Independence and lack of prior knowledge is not required.

On large or complex cases it is common to have both expert witnesses and expert advisors. An expert advisor becomes an integral part of the team and can assist greatly in directing the investigation efforts and in helping form robust arguments of claim. Being covered by legal privilege enhances this involvement; as this enables all members of the team to share views and information that is not subject to discovery.

It may be possible for an expert advisor to be instructed as the expert witness, although care should be taken to enter into new terms of engagement so that it is clear that the new engagement is not covered by privilege. In circumstances where there could be a conflict of interest or difficulty relating to privilege, a separate expert witness should be appointed.

## Benefits of appointing an Expert Advisor / Witness

The benefits of appointing an expert advisor/witness go beyond applying their particular expertise and knowledge to a given area. It brings an independent and fresh overview to any proposed approach; opens up new avenues of investigation and provides a benchmark against best practice.

- In bringing in an expert advisor/witness early the party can quickly get to grips with the weight of evidence available and the strength of their claim or defence.
- Often a report from an expert advisor or witness will bring settlement negotiations to the fore. Obviously the earlier this occurs the better, for both sides, as the cost of litigation is reduced.
- Investment in early expert advice can save significant legal fees.

The decision whether to appoint an expert advisor or expert witness in the first instance is best made by the legal team, as the most relevant consideration will be the need to preserve Legal Professional Privilege. The legal team must weigh up the extent of assistance needed in any specialised field and the amount of evidence needed to be disclosed. It may be that they require an in depth review of the accounting records which could prove prejudicial to their client should all information obtained be disclosable; or they may just need the evidence of an expert on one given aspect.

Remembering also that to appoint an expert witness the court must approve the appointment. The legal team may just require an additional technical resource to devote their time to the investigation, evidence of which the court may consider can be given by a non-expert and/or other witnesses due to be called.

*Courts traditionally afford expert witnesses a great deal of respect. This is so because these persons possess an expertise in a particular area of endeavour where lay persons require assistance.*

*The hallmark of an expert witness is that he or she exercise an independent professional judgment in their assessment of the facts of a given case.*  
~ Fenwick v. Parklane Nurseries Ltd.

## Duties of an Expert Witness

Should the court give permission to appoint an expert witness, the statutory duties are set down in Part 35 of Civil Procedure Rules (CPR), Part 33 of the Criminal Procedure Rules (CrPR) or Part 25 of Family Procedures Rules (FPR), depending on whether the claim being advised upon is civil, criminal or family (eg matrimonial). However they were adeptly summarised by Justice Peter Cresswell in a case commonly referred to as “Ikarian Reefer”

This states:

1. 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
2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise.
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts that could detract from his concluded opinion.

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. 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.
6. If the expert cannot assert that the report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.
7. 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 (where appropriate) to the court.
8. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports, or other similar documents, they must be provided to the opposite party at the same time as the exchange of reports.

## Meeting of Experts

Under the CPR, expert witnesses are usually instructed to produce a joint statement detailing points of agreement and disagreement to assist the court or tribunal. This is achieved through a meeting of experts, without the instructing solicitors, whereby both experts review their report in light of the others opinion with the aim of producing a joint statement.

As set out in the *Ikarian Reefer* principles an exchange of expert opinions can change or modify the opinions held, these modifications or changes must be notified to the other side without delay. This can often greatly assist the resolution of a case and avoid substantial costs of trial.

## Choosing the right Expert Advisor and Expert Witness

**Choosing the right adviser can be critical to your case. It is therefore important that you take time to research your options and appoint the right expert for you. At Aquila we have experience in both civil disputes and criminal proceedings and the strength of our findings and robustness of our reports have often led to out of court settlement.**

**To find out more about the services provided by Aquila Advisory, speak to us today. Our experts are on hand to advise you of your options and to help you make the right decisions.**

### **CONTACT AQUILA ADVISORY:**

**Jane Fowler, Managing Director**

Tel: 020 7397 8318  
Email: [info@aquilaadvisory.co.uk](mailto:info@aquilaadvisory.co.uk)  
Website: [www.aquilaadvisory.co.uk](http://www.aquilaadvisory.co.uk)

