

Expert evidence/handling the expert witness:
Edwin Glasgow QC

1. Some hints on dealing with your own expert :

- (i) Always keep in mind that an "expert" – in a forensic context:
 - a. is qualified to give opinion evidence to the court;
 - b. her/his function is to "educate" the court so as to assist it reach the correct conclusion;
 - c. he/she is independent and unaffected by who pays, or the exigencies of the case;
 - d. is distinguished by expertise in the field of practice.

- (ii) How the lawyer should deal with the expert retained:
 - a. strip away intellectual insecurities and preconceptions;
 - b. ask expert to educate;
 - c. use open, non-leading questions;
 - d. ask expert to teach you;
 - e. meet early in the case;
 - f. do not proceed until you have understood clearly what the expert is saying;
 - g. once you have understood the expert's thesis, but not before, then you can test, asking the expert to do so first.

- (iii) The right expert and the right issues
 - a. think about whether an expert is needed at all;
 - b. think about instructions to expert – will they be privileged?
 - c. The four essential questions:
 - 1. Do I need an expert at all?
 - 2. in what field?
 - 3. of what seniority?
 - 4. on what issues?

- (iv) Presentation of expert evidence in clear and "tribunal friendly" way:
 - a. short reports;
 - b. encourage use of diagrams/pictures;
 - c. appropriate models/toys;
 - d. each expert report in separate files.

- (v) Testing the expert's thesis without rehearsing or coaching, ask:
 - a. for explanation of other expert's report
 - b. why he agrees or disagrees
 - c. for supplementary report
 - d. aide memoire for lawyers

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2. Dealing with the opposing expert/s:

- (i) Test (and even undermine their expertise). Then, if appropriate, seek to undermine the Tribunal's confidence in his or her expertise or suitability to give 'expert/ opinion' evidence on the subject before the court.
 - a. In some cases, but not all, there is scope for getting the other side's expert to agree (a) as to the undoubted expertise or eminence of your expert and (b) as to the *relatively* greater experience in the field. But – be cautious – and generally only do so where there is a marked difference in expertise and experience – because Tribunal's don't like deciding cases on 'fine' differences in experience between e.g. two professors of metallurgy.
 - b. In a very rare case you may be able to knock out the other side's expert altogether on his lack of real expertise in the field in question. This sometimes happens with so-called 'professional experts' who pop up in the courts on all manner of topics. It pays to study the other side's expert's CV carefully – you never know what you might pick up
- (ii) Attack their assumptions. The second – and normally most fruitful – cross-examination technique of experts is to attack the *assumptions* which he has made leading to his conclusions. All experts have to assume certain facts or events as a starting point – in order to have a notional factual base to analyse and upon which to base their opinion. If you can chip away at that factual base – cast doubt (where legitimate to do so) on given facts; alter timings, change dates, change composition of materials etc. – you begin to undermine the foundations of the whole edifice upon which his report is based.
 - a. So, always begin, when analyzing the other side's expert's report, by listing the assumptions upon which his report is based. And then seeing whether there is scope, from what you know of the facts and evidence, for putting different factual hypothesis to the expert.
 - b. Even if the position of one plank is altered, it can often lead the expert to a different conclusion.
- (iii) New material. The third technique is to do an audit on what material, documents, witnesses statements the expert has read and listed in his report and taken into account. It is amazing how often you find that the expert has not been given, for instance, the latest version of the other side's main witness statement – or late discovery – and how shocked experts are to be confronted suddenly with new material. How they resent their own attorney for having 'not given them the full picture' – and how willing they are under XX to say 'Well, yes, if I had seen this material it would or may have affected my opinion.'
- (iv) Attack their Logic. Fourthly, look carefully at the logic of the other side's experts' report. List the steps in logic from the facts assumed *right the way through* to the ultimate conclusion – A, B, C, D etc. And see what flaws there are – or leaps of faith – or speculation. It is good test if you don't understand a step – there may be a flaw in it (not you!). You may need your own experts' help.

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- (v) Put the Weight of opinion. Fifthly, some cases will involve perfectly respectable views on both sides. And the Court just has to choose which school of thought to prefer. So you need to build up a case and put it to the other side's expert that the weight of opinion favours X not Y. This means painstaking work by your expert and the solicitors to scour around for academic journals.

- (vi) Ask a different question. Sixthly, it is worth spending a little time analyzing whether the other side's expert has been asked – or asked himself the right question. Sometimes, the question can be skewed to suit a particular case – but the different question (or the same question put a slightly different way) may lead to a different answer.