

## Handout on expert evidence & ethics for ENV3103 & ENV7123 lecture 12 – 27 May 2015

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### Expert evidence

“Evidence” is the information that courts use to make findings of fact in disputes. It can be given orally to the court by witnesses or contained in documents (e.g. photographs, reports, etc) or other things (e.g. a knife tendered in evidence as a murder weapon). There are rules that limit what evidence may be presented in court proceedings. One of the most important rules in environmental cases concerns expert evidence (also called “opinion evidence”). Under this rule:

- Normal (lay) witnesses in court proceedings are generally only permitted to give evidence of what they saw, heard, touched or smelt (i.e. things that they directly perceived with their own senses). They are generally not allowed to give their opinions, except where it relates to something of common experience (e.g. a person’s age, the speed a car was travelling at, etc).
- Expert witnesses are allowed to give their opinions on matters within their field of expertise. That is, expert witnesses can express their professional judgment, view or estimate based on facts within their field of expertise, not merely facts that they have directly observed.

An “expert witness” is someone who possesses peculiar skill where the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance. In other words, when the subject matter of inquiry partakes of the nature of a science as to require a course of previous habit or study in order to the attainment of a knowledge about it.<sup>1</sup> Put another way, expertise consists of a body of knowledge and/or skills based upon experience or training which concerns a subject which is of such a nature that it can be grasped and commented upon in an informed way only by a person with training and/or experience extending beyond that possessed by the average person.<sup>2</sup>

Examples of expert witnesses and the types of evidence they might give include:

- A psychologist to give evidence of a person’s mental state at a particular time;
- A medical doctor to give evidence of whether an injury was life threatening;
- A zoologist to give evidence identifying particular animal species on a site;
- A botanist to give evidence identifying particular plant species on a site;
- A cultural heritage expert to give evidence about the cultural heritage values of a building;
- A traffic engineer to give evidence about correct road design for a development; and
- A town planner to give evidence on planning issues associated with a proposed development.

Court cases involving environmental disputes often involve multiple expert witnesses on different topics.<sup>3</sup>

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<sup>1</sup> *Clark v Ryan* (1960) 103 CLR 486 at 491 (Dixon CJ)

<sup>2</sup> Gillies, “Opinion evidence” (1986) 60 ALJ 597 at 602.

<sup>3</sup> See, e.g., the expert reports presented in the Carmichael Coal Mine case at <http://envlaw.com.au/carmichael-coal-mine-case/>.

## Ethics of being an expert in court & generally

Once you have graduated and worked in your field for some time you will be able to appear in court as an expert in your professional field.

Your basic ethical obligation if you are engaged to appear as an expert witness in court proceedings is that you have a duty to assist the court and that duty overrides any obligation you may have to the party or any person who is liable for your fee or expenses.<sup>4</sup> In essence this means that you should strive to tell the court the truth about the matters within your area of expertise. You should not knowingly mislead or confuse the court in any way, including by omitting information that is adverse to your client's case.

This sounds simple enough but in practice it can be very difficult when you are employed by a client to give your opinion on a topic if your true opinion is contrary to what your client wants. For instance, if you are acting for a developer and you believe that their proposal will have serious impacts that cannot be adequately mitigated. If you are working as a professional consultant, you know that if you do not say what the client wants they may not employ you again. You might think that keeping your business going means giving the "right" answer – the answer that the client wants to hear – and it is not in your financial interests to say what you truly think is correct. Others cannot see inside your head to know what you truly think so it is easy enough to say the opposite of, or "bend", what you truly think and dress it up as the correct answer. This is a common perception of how town planners in private practice, environmental consultants and expert witnesses behave. The common term is that the person is a "hired gun" (i.e. willing to do whatever the person paying them asks).

How you live your life and the sort of professional you want to be is ultimately your decision but my suggestion is that in your day-to-day work, not simply as an expert witness, you should aim for **honesty, independence and rigour in your professional opinions** and apply three basic principles:

1. You should aim to be independent of your client and employer and to hold the same opinion about a proposed development or issue whoever your client or employer is. That is, your views should not simply bend, either consciously or unconsciously, to whatever your client or employer wants them to be. You should not be a "hired gun" who will do whatever your client or employer wishes if they pay you to do so.
2. You should not accept instructions from a client, employer or their lawyers to hold particular views or to amend a report that you have written to remove parts that are unfavourable to them. However, it is perfectly ethical for your client, employer or lawyers to tell you what is relevant to include in your report (provided this is not a backdoor way of excluding adverse or embarrassing information that you believe should be included for the report to be correct). It is also perfectly ethical for them to tell you basic things about the structure and legal requirements for your report (e.g. that you must sign it and number each page).<sup>5</sup> If they review a draft of your report, it is also acceptable for them to ask that particular parts of the report be clarified if they think something is confusing and to correct factual and typographical errors. As long as they are not interfering with your professional judgment and seeking to change what you will say about substantive issues, they can assist you to structure and write the report.
3. You should also ensure that your conclusions are always supported by sufficient evidence, data and testing and that any sources of uncertainty are properly acknowledged. It is common to see expert reports stating opinions that are not well supported by evidence and that gloss over uncertainties. Make sure your reports are not slack like this. If a matter is complex and the client's budget does not allow you to properly investigate it, you should make this problem clear in your report.

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<sup>4</sup> For civil proceedings in State courts under rule 426 of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR).

<sup>5</sup> Rule 428 of the UCPR sets out a number of requirements for expert reports in civil proceedings in Queensland.