



Tensions between Lawyers and Experts (Wherever in the world you may be)

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ABSTRACT — two senior lawyers and two experienced experts discuss the role of experts across jurisdictions and the common tensions that arise from both the experts' and lawyers' perspectives. This paper also includes practical suggestions as to how these tensions can be resolved (or at least managed).

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Introduction

Expert evidence has been a key aspect of dispute resolution for centuries, but the construction industry is arguably now more reliant on expert evidence than ever before. While the reliance on expert evidence has increased, so too has the tension between the lawyers and the experts engaged by the clients.

This paper examines the role of experts in construction disputes against the backdrop of expert evidence code requirements in different jurisdictions. We examine common tensions that arise between lawyers and experts (from both perspectives) from the point of engagement, until, and including, cross-examination. We also look at how we can manage these tensions to best serve our clients.

To lay the groundwork, we first outline the different roles of experts across the following jurisdictions:

- (a) the United Kingdom;
- (b) New Zealand;
- (c) Australia;
- (d) Canada; and
- (e) the United States.

We then discuss common tensions that arise, and how these tensions can be resolved for the benefit of our clients.

Tensions will differ across jurisdictions depending on the recognised legal role of the expert but there are many consistencies. The commonwealth countries have adopted a code of conduct for experts, which codifies the role of expert witnesses in each respective jurisdiction. The United States by contrast does not have a code of conduct, meaning an expert's role in this jurisdiction is more difficult to define. Importantly in construction, experts are arguably more commonly used in arbitration, which means we must also examine their role with reference to the applicable arbitration rules.

Role of experts across jurisdictions

In this section we discuss the role of experts across jurisdictions. There is consistency across the commonwealth jurisdictions. The United Kingdom, New Zealand, Australia and Canada all have prescribed codes of conduct for expert witnesses which include the prohibition of expert advocacy. The United States stands alone in not having a code or rules against advocacy. This opens the landscape for expert advocates in a legal setting, which would fundamentally contravene the commonwealth codes, and potentially allows experts to move towards becoming advocates.

In each jurisdiction, we examine who is considered an expert and the codes and rules that apply. All jurisdictions in this paper define an expert as someone who forms an opinion based on specialised knowledge, skill, experience or education. They require the expert to state their qualifications and the facts and assumptions they relied on in producing their opinion. They must also give reasons for their opinion. The commonwealth countries require experts to disclose any relevant literature or other material used in their report, a description of the tests involved, and often a description of those conducting the tests. All codes require the disclosure of incompleteness or inaccuracies in the evidence, and a statement if the expert had insufficient data.

Some jurisdictions have unique requirements. For example, in England and Wales an expert's report must be directed to the court and not to the party engaging them. Only New Zealand and Canada require the expert to state specifically that the evidence is within their area of expertise. In England and Wales and Australia, the expert must provide to the court the questions they were asked to address. If the expert disagrees with other experts in the same dispute, only England and Wales and Canada require the expert to explain the points of agreement and disagreement in their reports.

Both the United States and New Zealand require the expert to disclose compensation paid to the expert. Uniquely to the United States, experts must disclose all cases in which they have participated in the preceding four years.

Across jurisdictions many professionally qualified experts also have a code of ethics to adhere to. These codes sit alongside the legislative codes. Despite not having legal status, experts consider compliance with such codes of ethics to be a professional obligation. They will also be

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essential in establishing whether the expert has met the reasonable standard of care expected of him or her.

We expand on each jurisdiction below.

United Kingdom

England and Wales has not codified the admissibility of expert evidence, but has been hearing expert evidence under the common law since at least the sixteenth century.^[1] An expert's opinion is admissible on any relevant matter that the expert is qualified to give expert evidence.^[2]

While the admissibility of expert evidence is based on the common law, the role of the expert is codified in the Civil Procedure Rules (**CPR**) at Part 35. An expert has an overriding duty to the court,^[3] and this is supplemented by Practice Direction 35 (**Practice Direction**), which states that evidence should be independent,^[4] objective^[5] and based on all the material facts.^[6]

The content of experts' reports is prescribed in the CPR and the Practice Direction. The codes of conduct of the other commonwealth countries broadly adopt similar requirements.

Experts' reports must:

- (a) be in writing;
- (b) provide details of the expert's qualifications;
- (c) provide details of any literature relied on in producing the report; and
- (d) state all the facts and instructions material to the opinion expressed.^[7]

If there is a range of opinions available, this range must be summarised by the expert, with the expert giving the reasons for adopting an opinion within that range. The expert must also state

[1] *Buckley v Rice Thomas* (1554) 1 Plowd 118.

[2] *Halsbury's Laws of England* (2018, online ed) Expert Evidence at 887.

[3] Civil Procedure Rules 1998, r 35.3.

[4] Practice Direction 35, para 2.1.

[5] Practice Direction 35, para 2.2.

[6] Practice Direction 35, para 2.3.

[7] Practice Direction 35, para 3.2.

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any qualifications necessary to come to that opinion.^[8] This includes disclosure of any persons conducting examinations or tests for the expert, and whether these were supervised appropriately.

Any opinion must be followed by a statement in the prescribed form that the expert understands his or her duty to the court and the requirements under the CPR and the Practice Direction.

Scotland^[9] and Northern Ireland^[10] also have codes of conduct for experts with similar requirements as the Practice Direction.

The courts in England and Wales have been outspoken in their support of expert impartiality. In *Phillips and others v Symes and others*,^[11] the Court had power to make a costs order against an expert who disregarded their duties to the Court. In some circumstances the judiciary is scathing of experts who act outside their brief. In *Pride Valley Foods Ltd v Hall & Partners*^[12] Judge Toulmin described an expert's report as "offend[ing] against the established basis on which experts should give evidence."^[13] The report was over 100 pages in length with 100 pages of appendices, and included findings of fact the Court assessed were supposed to be assessed by a judge. The expert's statements of what he himself would have done in the circumstances were found to usurp the judge's role.

New Zealand

Expert evidence in New Zealand is codified. It is admissible under the Evidence Act 2006 so long as it is of "substantial help" to the fact-finder^[14] and the expert's conduct is in accordance with the prescribed Code of Conduct (**NZ Code**).^[15]

The NZ Code is similar to the Practice Direction in England and Wales. It also requires the expert to state that the evidence is within their area of expertise.^[16] Unlike the Practice Direction, the NZ Code does not require the expert to state the specific questions which the expert has been

[8] Practice Direction 35, para 3.2.

[9] Law Society of Scotland "Expert witness code of practice" <<https://www.lawscot.org.uk/members/business-support/expert-witness/expert-witness-code-of-practice/>>.

[10] Practice Direction No 1 of 2015 at Appendix 2, Code of Practice for Experts.

[11] [2005] 4 All ER 519.

[12] [2000] EWHC Technology 106 (4th May, 2000).

[13] At 137.

[14] Section 25.

[15] Section 26.

[16] High Court Rules 2016, sch 4 s (3)(c).

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asked to answer, nor does it require the expert to provide an explanation of a range of opinions that can exist.

If an expert does not comply with these rules, their evidence may only be given with the permission of the court.^[17]

Lawyers engaging experts also have a duty to maintain the expert's strictly impartial and independent role. Lawyers cannot attempt to influence an expert in reaching his or her opinion or suggest changes to preliminary findings. All relevant material must be presented to the expert, with lawyers unable to selectively choose material they suspect will produce a desired outcome. While of course lawyers may choose not to include expert evidence that is detrimental to their client's case, they cannot tailor an expert's evidence to render it more helpful.^[18]

Due to the limited size of New Zealand's jurisdiction, these strict rules have created challenges in practice, and the courts have had to be somewhat flexible. The Court of Appeal in *Commissioner of Inland Revenue v BNZ Investments Ltd*^[19] held that both experts' evidence was admissible in part despite the experts not being independent. The two tax experts, one from a large law firm and one from a large accountancy firm, had previously represented counter-parties and related entities on similar arrangements. Both experts' briefs of evidence also contained legal submissions in breach of the NZ Code. Despite s 26 of the Evidence Act enabling the Court to render both experts' briefs inadmissible in their entirety, the Court of Appeal merely excluded those sections that were not NZ Code compliant rather than disqualifying their evidence completely.

Australia

The Australian Expert Evidence Practice Note (**Australian Practice Note**) states that an expert's role is to benefit the court with an "objective and impartial assessment of an issue" of which they have specialist knowledge. The Australian Practice Note includes the Harmonised Expert Witness Code of Conduct (**Australian Code**).

[17] Evidence Act 2006 (NZ) s 26(2).

[18] Lisa Hansen "Duties in respect of witnesses in civil actions" *Professional Responsibility in New Zealand* (online edition, LexisNexis).

[19] [2009] NZCA 47.

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The Australian Code has similar requirements to the other codes and rules of conduct. Uniquely under the Australian Code, if a report is lengthy or complex, the report must contain a brief summary of the expert's findings.^[20]

Despite these legislative requirements of impartiality and objectivity, in practice the role of experts and lawyers across Australian jurisdictions is fairly collaborative. Experts have the dual role of both assisting the court and educating the lawyers to better understand the technical issues in their case. Lawyers are in turn expected to educate the expert on the legal issues and help the expert effectively structure their evidence. Lawyers can advise the expert on admissibility of the expert's report, assist the expert with clarity and structure, and identify any weaknesses in the report's logic.^[21]

The Australian courts have excluded opinion evidence that is found to be improperly reasoned. In *Dasreef Pty Ltd v Hawchar*,^[22] the Court held an expert's report was inadmissible because the expert did not state his reasoning in the report. The Court found an absence of such statement meant his opinion was not demonstrated to be based wholly or substantially on his expert specialised knowledge.^[23]

Canada

Like England and Wales on admissibility, Canadian evidence also remains largely uncodified in the common law provinces, with the criminal case of *R. v. Mohan*^[24] setting the standard of admissibility for expert evidence in both civil and criminal cases. The evidence must be reasonably necessary and relevant and the expert must be properly qualified before the evidence will be admissible.^[25] The Canada Evidence Act provides that no more than five expert witnesses may be called by a party to a proceeding.^[26]

[20] Expert Evidence Practice Note Annexure A *Harmonised Expert Witness Code of Conduct*, s 3(1).

[21] Donald Charrett "Getting the Most out of Expert Witnesses – Lessons from the Victorian Bushfires" (2015) ACLN at 10.

[22] [2011] HCA 21, (2011) 243 CLR 588.

[23] *Dasreef*, at [40].

[24] 1994 CanLII 80, [1994] 2 SCR 9.

[25] Above n 24.

[26] Canada Evidence Act RSC 1985 c C-5, s 7.

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However in Quebec, the Code of Civil Procedure outlines that the purpose of expert evidence is to “enlighten the court and assist it in assessing evidence.”^[27]

The Canadian Federal Courts Rules (**Canadian Rules**) set out the requirements for expert witnesses at the Federal level. These rules are subject to a Code of Conduct for Expert Witnesses (**Canadian Code**). The Canadian Code has the same requirements as the other codes. However uniquely under the Canadian Code, a letter of instructions sent to the expert may be attached to their report.^[28] The expert must also disclose to the court any relationship they have with any other party to the proceeding if that might affect their duty to the court.^[29]

If an expert does not comply with the Canadian Code, the court may exclude the expert’s affidavit or statement either in part or in its entirety.^[30]

The Canadian courts have been wary of the expanding nature of expert evidence for decades. In 1998, Canadian Supreme Court Justice Binnie wrote extra-judicially that “courts are side-stepping their role as gatekeeper” with “some judges decid[ing] cases on the basis of which team of experts is more persuasive.”^[31]

The Canadian bench has stringently excluded expert evidence it suspects is not impartial.^[32] In *Mitsui & Co (Point Aconi) Ltd. v. Jones Power Co.*^[33] the expert report was ruled inadmissible because the expert “came across as an advocate for the defendant” and not “an expert witness assisting the Court in understanding complex issues.”^[34] Similarly, in *McNamara Construction Co. v. Newfoundland Transshipment Ltd.*,^[35] the Court refused to place reliance on an expert witness’ evidence when the expert was found to be defensive and argumentative with conclusions that were “at worst misleading.”^[36]

[27] Code of Civil Procedure CQLR c C-25.01, s 231.

[28] Federal Courts Rules SQR/98-106, sch 1 s 3(d).

[29] Schedule 1 s 3(k).

[30] Rule 52.2(2).

[31] Ian Binnie “Semi-advocate Experts Cheapen Litigation” *Lawyers Weekly* (7 July 1998).

[32] Robert A. Graesser, Q.C. “The Changing Role of Expert Witnesses in Construction Litigation” (2004) 38 CLR (3d) 33 *Construction Law Reports*, 3rd series, 2004.

[33] 1999 CarswellINS 460 (NSSC).

[34] 1999 CarswellINS 460 (NSSC) [In chambers].

[35] (2002) 20 CLR (3d) 1 (NLSCTD).

[36] *McNamara*, above n 35, at [941].

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United States

The United States is the only jurisdiction in this paper that does not have a required code of conduct for experts. The Federal Rules of Evidence (**US Rules of Evidence**) give authority for parties to call expert witnesses. These rules are a codification of the *Daubert*^[37] case and not always followed in State courts that follow the *Frye* standard.^[38] However, generally, a pre-hearing determines whether an expert's evidence is admissible.

The hearing determines whether:

- (a) the expert used reliable methods appropriately applied; and
- (b) whether the relevant evidence will help the fact-finder.^[39]

If facts or data contained in an expert's testimony would otherwise be inadmissible, the testimony can only be included if its probative value outweighs its prejudicial value.^[40]

The Federal Rules of Civil Procedure (**US Rules of Civil Procedure**) give the requirements of expert evidence.

Under the US Rules of Civil Procedure, expert reports must:

- (a) be in writing;
- (b) include a complete statement of all opinions, facts or data considered by the witness; and
- (c) state the witness' qualifications.

Uniquely to the United States jurisdiction, experts must also include:

- (a) a list of other cases in which they have testified in the preceding four years; and
- (b) a statement of what compensation they have received for their testimony.^[41]

[37] *Daubert v. Merrell Dow Pharmaceuticals* 509 U.S. 579 (1993).

[38] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[39] Fed R Evid 702.

[40] Fed R Evid 703.

[41] Fed R Civ P 26(2)(B).

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There is no statutory requirement that United States experts acknowledge any duty of impartiality or independence. The required disclosure of compensation is instead used as a means of preventing parties from “bribing” experts, with larger than usual fees signposting potential issues.

Experts in the United States jurisdiction are considered part of the litigation team. Lawyers select their teams based on an expert’s résumé, references, personality and chemistry.^[42] Lawyers must ensure any expert’s previous reports do not negate the client’s position.^[43]

United States lawyers are known to separate their experts into categories, with testifying experts subject to cross-examination and consulting experts exempt. Consulting experts will be available in the pre-trial stage, but only testifying experts will give evidence in court. This allows lawyers to prevent testifying experts from accessing any information produced by consulting experts that is not favourable to their client’s position, and therefore prevent unfavourable conclusions being revealed during cross-examination.^[44]

This active role of lawyers in engaging experts is not limited to litigation, with United States alternate dispute resolution methods following suit. In international arbitration this can create a clash of ethics across jurisdictions. Often, while for one party the United States lawyers are expected to thoroughly prepare their expert, on the other side the other party’s lawyers and experts are ethically bound in their jurisdiction not to collaborate in the same way.^[45]

Ethical issues are often handled by expert organisations rather than legislation. United States engineers, for example, have a code of ethics for engineers serving as expert witnesses, including that they be objective and include all relevant information.^[46]

Arbitration

Arbitration is the most common forum for expert reports in the construction industry, and an expert’s role in arbitration is similar to their role in the courts across jurisdictions. Often the

[42] Robert F. Cushman et al “Construction Litigation Experts” *Construction Disputes Representing the Contractor* (3rd ed, Aspen Publishers, 2018).

[43] Above n 42.

[44] Above n 42.

[45] Troy L Harris “Ethics in International Arbitration: They’re not just for lawyers” (2003) 8 No. 3 *Construction L. Int’l* 37.

[46] “National Society of Professional Engineers Code of Ethics” <<https://www.nspe.org/resources/ethics/code-ethics>>.

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arbitral tribunal will adopt or refer to the statutory and common law principles regarding expert evidence. However, arbitral institutions also prescribe rules addressing expert evidence that parties can choose to adopt. In New Zealand, the Arbitrators' and Mediators' Institute of New Zealand Arbitration Rules (**AMINZ Rules**) are commonly adopted to address expert reports in arbitration. The rules surrounding expert reports in arbitration have the same requirements as the NZ Code. However under the AMINZ Rules, the reports must include a statement that the conclusions in the report are the genuine belief of the expert on the questions put to the expert.^[47]

If there is more than one expert involved in the arbitration, the AMINZ Rules also enable arbitral tribunals to order a meeting between experts to determine their commonalities and differences.^[48] The tribunal can then require the experts to produce a joint report.^[49]

The tribunal can also appoint its own expert after consulting the parties. The parties must provide all documents to the expert, and the expert's report must be made available to the parties.^[50]

Arbitration is a common method of dispute resolution across jurisdictions. The IBA Rules on the Taking of Evidence in International Arbitration 2010 (**IBA Rules**) state at article 5 that a party may rely on an expert as a means of evidence on specific issues.

An expert's report has the same requirements under the IBA Rules as the codes of conduct for expert witnesses, but also requires that the original language of the report be included if the report is translated, and if the report is signed by more than one person the report contains an attribution of what sections of the report were attributed to each author.^[51]

ICC Rules

The International Chamber of Commerce also has Expert Rules (**ICC Rules**).

[47] "Arbitrators' and Mediators' Institute of New Zealand Arbitration Rules" <https://www.aminz.org.nz/Category?Action=View&Category_id=173>, rule 65.2.

[48] Rule 65.3.

[49] Rule 65.4.

[50] Rule 65.5.

[51] "International Bar Association Rules on the Taking of Evidence in International Arbitration" <https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> art 5.

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The parties may jointly appoint an expert, but if there is no joint nomination, the Centre will select the expert independently.^[52] An expert must be impartial and independent from the parties.^[53]

Common tensions

Tensions exist between lawyers and experts across jurisdictions. In order to best serve our clients, it is important these are reconciled.

Level of advocacy

Experts are embracing a variety of roles in construction disputes. It can be cost-effective to use the same expert for remediation, negotiation and court processes. However, this means an expert is sometimes put in the position of supporting a client's strategy, but must remain objective on the issues. All jurisdictions except the US specifically prohibit experts becoming advocates for their clients. In the US, experts must disclose the compensation they received.^[54] Arbitration rules usually require experts to be independent.^[55]

As we have discussed earlier, in many jurisdictions a decision maker can render an expert's report inadmissible if it is deemed to be biased in favour of a client. From a lawyer's perspective, it is therefore crucial that experts do not step into the realm of partiality when producing their reports, as inadmissibility can be fatal to a case. In the US, expert advocacy is not prohibited in the same way, but for the other jurisdictions, impartiality is crucial.

This can sometimes be difficult for experts. If an expert feels strongly about a particular outcome, this cannot be evident in their report. But if the outcomes are pre-determined, and the lawyer has already prepared their arguments, it can be difficult for an expert to keep to their brief and remain impartial. To keep the risk of expert advocacy at a minimum, while lawyers can direct experts as to the questions, they should not direct the expert as to the preferred answer.

[52] International Chamber of Commerce Expert Rules <<https://iccwbo.org/publication/icc-expert-rules-english-version/>> art 3.

[53] Article 4.

[54] Fed R Civ P 26.

[55] See AMINZ, r 65.2(a); IBA Rules, art 5(2)(a).

Understanding scope

Perhaps one of the biggest downfalls of expert evidence is the failure by the lawyer to first identify why the expert is required and the issue they are asking the expert to consider. This means the expert does not have clear direction and attempts to pose the question themselves, which leads to a mismatch of expectations.

Lawyers and experts can disagree on the scope of the expert's report. From a lawyer's perspective, it is crucial that an expert answer only the questions they have been asked, as these questions are often tailored to provide guidance on key factual and legal issues. In England and Wales^[56] and Australia,^[57] the expert must include in their report the specific questions they have been asked to answer. This can also be a requirement in both New Zealand and international arbitration.^[58] By contrast, neither Canada nor the US has a specific requirement for experts to include such questions. For lawyers, including these questions can be helpful as it tailors expert reports to the key factual questions at stake. In jurisdictions without these requirements there is more potential for experts to answer questions they have not been asked, and for this to go unnoticed.

While it may be the lawyers who ask the questions, from an expert's perspective it is important that lawyers do not underestimate the complexity of the answers. Often somewhat 'easy' questions will have difficult answers, and tensions will arise when lawyers underestimate their expert's process.

Experts say that the right questions will be answered if the expert's brief contains the right information. Photographs and samples in "raw" form will usually be more useful to an expert than existing reports and other documents. If lawyers want their questions answered correctly, they must ensure their experts' briefs contain the best information. Experts should then use this information to answer only the questions they have been asked.

Presentation of evidence

The style of an expert's report should be within an expert's discretion, however tensions will arise if an expert's report does not adequately answer the questions in a way the lawyer or

[56] Practice Direction 35, at 3.3.2(3).

[57] Federal Court Rules 2011, r 21.13(d).

[58] See AMINZ, r 65.2(a); IBA Rules, art 5(2)(b).

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decision maker can understand. While a report must be comprehensive, it must also be compelling. Some technical points will require more weight and explanation than others, even if the expert thinks all points are equally important and require equal explanation. As discussed earlier, the courts will sometimes reject briefs that are too long, despite none of the jurisdictions setting down specific requirements as to length.

Hot-tubbing and expert conferences

While all jurisdictions use expert reports as the main method of presenting expert evidence, recently it has become common for experts to concurrently discuss issues during expert panels (hot-tubbing) and expert conferences. This approach arises in two stages:

- (a) Prior to the arbitration or court hearing, the experts meet for an expert conference to narrow the issues and identify areas of dispute; and
- (b) During the proceeding, the experts meet as a panel for time efficiency reasons and to enable the experts to be examined and cross-examined.

All jurisdictions discussed in this paper, except the US, have a duty to confer with other expert witnesses in their codes of conduct. Arbitral tribunals can also require experts to meet together and submit joint reports outlining their points of similarity and difference.^[59]

Requiring experts to confer can be cost-efficient. It can allow issues to be removed that would ordinarily require cross-examination, and allow the experts to concentrate on key issues only.

There are issues with a potential “one size fits all” approach to expert conferences. If one expert has a more dominant personality than the others, this can overshadow the evidence. Lawyers from a strategic perspective will sometimes want to prevent exposure of their experts at an early stage. In multi-party disputes, there will be multiple issues that do not impact all the parties. There may also be confidentiality considerations.

Tensions arise as lawyers see hot-tubbing as cost and time-saving. From an expert’s perspective, these conferences can sometimes be difficult to attend for practical reasons. For example, if an expert is based overseas, it will not be cost-efficient for an expert to travel on two occasions.

^[59] See AMINZ, r 65.3; IBA Rules, art 6.

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It is important that the hot-tubbing environment remain controlled. Some experts suggest it can be beneficial for a hot-tubbing session to be conducted at the end of the hearing, as this enables the tribunal to address any remaining issues and clarifications required after the evidence has been heard in examination and cross-examination. Many lawyers, however, consider that hot-tubbing is the point at which evidence is given and should occur following submissions.

Boundaries of expertise

The lawyer and expert have distinct roles in the dispute resolution process. From an expert's perspective, they must be qualified to answer the questions asked of them. All the codes of conduct require that the expert state their qualifications in their report. This is also a requirement in the US Rules of Civil Procedure. In arbitration, many rules require the expert to state their qualifications and that the evidence is within their area of expertise.^[60]

A tension can arise if a lawyer purports to have expert knowledge about certain topics. In construction law, lawyers are involved in several disputes about similar factual issues, and can therefore gain a level of knowledge around certain topics. This level of knowledge is however not the same as that of an expert. If a lawyer suggests to an expert what their findings should be, this can put the expert at real risk of becoming an advocate.

The weighting of the questions can also be an issue. The most important issues from a legal perspective will not always be the same from a technical perspective. What is logical to an expert will not always be logical to a lawyer.

In order to best serve our clients, it is important that experts and lawyers openly communicate these perspectives, and understand where the other is coming from. Certain conclusions that seem unimportant from a technical perspective may be crucial from a legal perspective, and vice versa.

Level of certainty in findings

None of the codes of conduct require experts to be certain of their findings. In arbitration, experts can be required to state that the opinion is the expert's "genuine belief."^[61] Across all the jurisdictions discussed in this paper, the burden of proof of expert evidence is the balance of

[60] See AMINZ, r 65.2; IBA Rules, art 5(2)(a).

[61] See AMNZ, r 65.2(f); IBA Rules, art 5(2)(g).

probabilities, not beyond reasonable doubt. This means the conclusion must be “more likely than not”.

The level of certainty can create tension. Often experts will want to be absolutely certain of their answer. However this can be cost prohibitive and unnecessary given the burden of proof. In civil law, the expert is not under any obligation to substantiate their evidence so that it is immune from reasonable doubt. Merely the expert’s honest opinion of the facts at issue will be sufficient, and the client will be successful if the decision maker finds it to be correct on the balance of probabilities.

Conclusion

Despite these tensions, the lawyer’s goal is to best serve their clients and the expert’s goal is to produce the best evidence possible to inform the court. An understanding of each other’s perspective will be crucial in resolving tensions that arise.

Take home points for experts and lawyers are as follows:

- Experts should refrain from becoming advocates, but lawyers should refrain from giving experts pre-determined outcomes;
- Lawyers need to provide experts with all the relevant raw data, rather than reports;
- Lawyers and experts need to communicate better in determining what the key issues are;
- Experts should understand their report needs only be accepted on the balance of probabilities; and
- Evidence that is not impartial or is incomplete will likely be given little weight by the decision maker.

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