Dueling Technical Experts

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ABSTRACT

A seemingly increasing number of disputes or arguments relating to coating, lining or corrosion issues culminate in the involvement of a technical expert or consultant. Sometimes, if the parties are serious about their positions or if large sums of money or prestige are at stake, lawyers also get involved.

However, the roles that technical experts and lawyers undertake in such disputes often become blurred or indefinite, and this can become problematic or may jeopardise the correct, objective and impartial settlement of the dispute. A lawyer is hired to advocate his client’s position, and too often, the technical expert – possibly in a misguided attempt to provide the best possible service to his client – also assumes, adopts or morphs into an advocacy role, risking his technical credibility.

This paper outlines the role and modus operandi that good and effective technical experts should take in disputes, and gives some examples of cases where experts have abandoned their primary roles as fact-finders and fact-interpreters, and have become hired guns or duelists.

Keywords: expert witness, litigation, advocacy, expert reports, evidence, cross-examination.

INTRODUCTION

The purpose of this paper is to provide a resource for technically-skilled people in the coatings and corrosion fields that may find themselves in a position where they have to either write technical reports or witness statements, give technical evidence, or act as an expert witness in dispute proceedings – especially those that become legal – related to their field of knowledge. This can be a daunting prospect to a first-time participant in construction litigation, even to someone with an excellent technical knowledge of their subject.

This paper will provide brief suggestions on how to:

- deal with an approach to act as a technical expert or as an expert witness;
- receive a briefing on the matter;
- approach and undertake a field investigation (if this is required);
- collect and document samples; and
- give guidance on how any testing or analysis is performed, interpreted and reported.
It will include in more extensive detail:

- suggestions on the writing and formatting of an initial technical report (or witness statement) that may be used in a dispute that has possible legal consequences;
- advice on generating subsequent reply reports, typically prepared after reviewing the technical reports of experts for the other party; and
- suggestions on conduct during the giving of evidence-in-chief and being cross-examined in various legal forums.

Several legal practitioners that I have had the pleasure of working with on past high-level disputations related to coatings and corrosion matters have provided input to this paper. Their input has been invaluable in compiling a list of Dos and Don’ts; providing practical definitions of legal terms; descriptions of the litigation and arbitration processes; giving guidance on format, style and the nature of witness statements; and tendering expert evidence. I am indebted to their contribution.

The following paper is written in the context and terminologies of the legal and dispute resolution system of most states, territories and the Commonwealth of Australia. It is similar to that in use in other parts of the world, but local differences, terms, laws, regulations and practices will always prevail.

THE PROBLEM – DISPUTES BY THE DOZEN

We live in a very litigious world. With all too common regularity, one party to a contract or project will feel that he has been wronged or disadvantaged and he will seek some redress, extra payment, damages or a discount, or some other form of compensation or rectification.

There are various levels of dispute ranging from a minor disagreement such as whether a particular item of plant or area is included in the scope of work, or if the inspector’s interpretation on DFT (dry film thickness) achievement meant that spot or full coat touch-up is needed; up to multi-million dollar claims for delays, premature coating or asset failure, or a lack of conformity to project documentation risking fitness-for-purpose. Other disputes can arise because the coating has suffered some unexpected condition, e.g., a tank lining has blistered or a colour has faded, and the cause of the problem is not easily assigned between the contract participants such as the coating supplier, the application contractor or the owner. Many of these disputes, particularly the smaller ones, are solved by discussions or negotiation limited to the directly-involved people, which is often where technical experts and/or lawyers become involved. The latter situation is the subject of this paper.

In many ways, our contract and dispute system feeds on itself. I call this contract cannibalism.

In a typical situation where a facility owner or principal wants some coatings work performed, he will write (or have prepared) a specification and a scope of work. I believe the original intent of most principals is to keep this documentation brief and concise. However, when a contractor starts the work, a dispute can arise, for example, as to whether an item or area is actually included in the definition interpreted from the scope of work, or whether a clause in the specification means one thing or another. Most participants learn from this process, so that on the next project, the owner’s specification or scope is tightened or (hopefully) clarified, and so it progressively becomes more extensive and specific, intending to close past loopholes.
Too often – particularly in the case of semi-government bodies or utility operators – the Terms and Conditions, Scope of Work and Technical Specification sections of the project paperwork become enormous because they have been going through evolution, growth, and so-called refinement for years or decades and no one has the courage to take out redundant, duplicated or contradictory clauses because of their perceived importance. In some ways, I believe that this is designed to give this party the upper hand if a dispute arises by having a few “all your responsibility” or else a number of “get-me-out-of jail” clauses somewhere in the documents, and the more the better. The process inevitably increases the risk of ambiguity, conflicts or inconsistencies within the document(s).

However, this system can and does backfire. In attempting to make all documentation bullet-proof or watertight, the complexity of the paperwork all too often becomes extreme and even contradictory. Commonly it happens that Technical Services need to look over it; Legal needs to peruse it. Insurance must be consulted, and/or Financial must have some input or review. More doesn’t always equal better.

In response, contractors undertaking the work have to search every clause and section to establish exactly what they are to undertake: they may even need to have their own lawyers dissect it. This takes time and costs money which must be recovered in some way. Also, contingencies get built into price offers to cover possible ambiguities because contractors expect that the principal may try to invoke an obscure clause to get additional items or services for free, and conditions or exclusions get written into tenderers’ bids hoping to snare an extra or circumvent a penalty. A less scrupulous operator may get clever in his ability to low-bid the project knowing that some fancy legal or documentary scrutiny might make him lots of profit on variations or extras. If things go wrong, the very documents that are designed to give instructions, prevent or minimise disputes and to set a fair price for the intended work scope, become the morsel-coated bones that both sides pick over at length.

If the differences cannot be handled or negotiated between the directly-involved parties, an expert may be sought by one or both sides without there being any formal legal involvement. In many cases, this can result in a satisfactory and cost-effective outcome. In this scenario, either one of the parties will approach someone that they feel could help their cause and be technically competent to carry out an investigation and prepare a report, whilst all the while appearing to be professional, neutral or uninvolved; or alternatively, the parties may agree between themselves that one expert can help them collectively.

At this level of dispute a number of outcomes are possible. Quite often, the expert, due either to his technical knowledge and/or his ability to present a well-reasoned case, may uncover, articulate or describe a cause for the problem or an interpretation that had not hitherto been considered or understood by the parties. This revelation can quite often be the deadlock-breaker. In the role so described, the expert can often remain mostly independent and aloof from the individual contractual positions of the involved parties.

If both sides appoint their own expert – which is more common – this can result in a technical showdown between the experts: the dueling technical experts or the hired guns. In this situation my experience is that the experts have a greater tendency to gravitate towards the technical or commercial position of the party paying their fees, i.e., an element of advocacy starts to materialize. This is not always to the benefit of the settlement as the expert’s focus can too often be just on those facts that support his client’s position and the objective of technical impartiality is relegated accordingly.
Advocacy is all too often encouraged by the client as his aim is to prevail, to get the answers that they like and also to get value for the money spent on “his” expert. I find that this advocacy often starts at the first phone call or briefing, where, unconsciously the hiring party describes the situation to his expert mostly from their own perspective, with a request for help or assistance, ostensibly to get the other parties to buy into his position.

This can be a trap for an unwary technical expert or one who is inexperienced in helping with such disputes. I believe that the correct thing to state at the time of the enquiry or initial briefing, is something to the following effect:

“Thank you for your request for me to provide assistance in this matter. I consider that I have the experience and skills that can provide a contribution. I must point out before we commence that, as a technical expert, my role is to find, investigate and interpret the facts and to provide an opinion as to the cause, responsibility or remediation needed based solely on those facts and not be biased by or towards the party who is paying my fee. This means that I cannot be an advocate or a hired opinion for any position on the dispute and my findings may indeed be counter the position of the party that commissions and pays me. The reason for this stance is that if I am called to give evidence on this matter before any Court hearing, arbitration or the like and am accepted by the Court as an expert witness, my specific duty under the Court’s Expert Witness Code of Conduct is to assist the Court impartially on matters relating to my area of expertise, and that I cannot be an advocate for any party including the person retaining me as an expert.

If the above or similar is not stated or declared early, I have found that it can be a problem to later on amend or correct this position with the client. I think some clients live on the understanding that their money is paying their expert to articulate and support their position.

There is another pathway that is sometimes followed by parties to a dispute at this level. This involves the use of legal practitioners, typically a solicitor, who acts for a client without the dispute having been formally registered into the Court system. A common manifestation of this is where, instead of a technical expert’s assistance being sought, one party will brief his solicitor. The solicitor will write a letter providing an opinion of the position of his client with respect to the purported legal interpretation of the documentation (or whatever) and encourage a settlement, usually to terms or arrangements that his client will accept. The (often) unwritten implication in such a letter is that a legal suit will be lodged if the recalcitrant party does not respond favourably. Ostensibly, this is legal bluff.

The difference in this scenario as compared to the former, is that the solicitor is unashamedly and unequivocally hired to be an advocate for his client. This is the accepted history and role of this occupation and is beyond comment or criticism.

The controversy – and too often, the problem – arises when both a solicitor and a technical expert are involved in the same dispute. To perform their respective jobs properly, one can be and is expected to act as an advocate; the other must be careful to stay mindful of his function and stay focused on the facts and the interpretations of such within the expert’s direct field of expertise. Very often, in my experience, I have found that technical experts – probably by diffusion and most likely in an effort to provide the best assistance to their client – can also adopt, assume or morph into an advocacy role, sometimes without realizing it.
A 1999 study of 244 Australian judges found that 85% of the judges surveyed had encountered partisanship in expert witnesses, and that 40% of respondents thought this was a significant problem.¹ This suggests that there is a systemic problem with advocacy in expert witnesses.

Most lawyers, solicitors and barristers are highly trained, dedicated and very experienced; and being an advocate for their clients is their normal day-to-day *modus operandi*. Technical experts generally don’t write expert reports or give Court evidence on a regular basis. They, therefore, are the ones who need to be mindful of the pressures upon them to slide into a position of advocacy. Being part of a team working with the solicitor, the barrister and possibly, with the client on the dispute, e.g., discussing tactics, formulating responses to other experts and so on, can make it very hard for the expert to avoid acting, talking or working as a pseudo-advocate.

To explain the traps and details of a typical situation, I will stroll through a common sequence of a dispute involving technical experts in a case that becomes a legal contest. However, before I do that, I feel that a few paragraphs are needed to explain briefly how the legal system usually works in litigation matters.

**THE LEGAL PROCESS**

Besides the process designed to provide general law and order to society (the criminal code), there are other sections devoted to litigation (typically lawsuits over contracts, property, sale of goods, etc.), family law, tort law, as well as others. I will stay concerned with litigation on industrial or contractual matters, typically called construction disputes or construction litigation.

The Courts as we now know them have evolved considerably from the court of the monarch in very early societies. In these days, the king or queen would hold court on certain days and times to hear the squabbles or pleas from the populace about issues that they could not settle by force, negotiation or fisticuffs. The theory was quite probably that the monarch was supposed to be all-knowing and wise and after submissions were made with all due respect to the sovereign from both applicants, would provide a judgment according to his wisdom. This would be binding on the parties.

The role of solicitors evolved at about the same time. The earliest form of this profession is believed to be a learned person who had (in those days) the rare skill of being able to read and write. They would set up tables in the vicinity of the Court and “solicit” the milling populace gathered to present their grievances to the monarch. As most of the population was illiterate, the solicitors offered the service of writing up the applicant’s testimony, probably marketed on the basis that a well-reasoned and more professional presentation would have a higher chance of prevailing, i.e., to get the desired judgment. Solicitors often worked with experienced presenters to the Court (now barristers-at-law), probably so named because of their oratory skills arguing cases at the “bar”, literally a barrier or rail which originally separated the prisoner from the court proper. The solicitor, who had gathered and documented the protagonist’s case, usually provided this in a concise form (the Brief) to the barrister to argue the case before the monarch or judge who sat on the “Bench”, originally the seat at the head table of the court.

The recorded judgments became, progressively, the basics of written law and a tool for consistency and guidance on the basis of prior judgments, i.e., precedence. Decisions and judgments from many centuries ago are still quoted in legal precedence.
It is also clear that as the process grew, no monarch could personally hear each and every case, and so appointed judges and magistrates to hold court in his name.

Whilst the development of this process into the legal system that exists today may be fascinating, a few fundamental principles, besides the names of the participants, terms, protocols and the general procedures, are important and have survived. One of these is that the parties to a disagreement, if they cannot resolve it themselves, actually surrender their rights to individually reject a settlement or a judgment to the Court when the matter is formally lodged into the legal system (litiscontestation). This means that the litigants acknowledge their failure to reach an agreement by their own effort and on their own terms, assign all aspects of the case to the Court, and agree that the Court will provide a decision and judgment through its own processes and this will be binding on all.

The process of making submissions to the Court on behalf of each party has also survived. This is undertaken in most upper level courts by barristers who have the right to represent clients in Court. Solicitors can, in many jurisdictions, also present evidence and represent clients in Court, but tend not to, therefore each sticks to his specialty. Conversely, to be accepted as a barrister, (to be called to the bar) generally means foregoing the right to do solicitor’s work.

Solicitors typically undertake most of the preparatory work of assembling the evidence, searching through and cataloguing written materials, receiving witness statements, correspondence between representatives for the other parties and the lodgment of documents and the like to the Court. When a trial or arbitration is pending, the solicitor will brief the barrister who does all the in-court presentations and cross-examinations.

GETTING EVIDENCE INTO COURT

It is said that a Court has to make findings of facts and law; and a person’s opinion is usually neither.²

There are two types of persons who can give evidence to a Court. These are either “lay witnesses” or “expert witnesses”.

A lay witness is typically a non-professional person who can provide written statements and verbal testimony as evidence of facts due to their involvement in a situation or process or their witnessing of an event, i.e., what they might have seen, heard, did or otherwise perceived about an event. A lay witness’s evidence does not involve technical expertise beyond the level of a typical man-in-the-street. Specifically, lay witnesses cannot give evidence of opinion.

An expert witness is one who, due to training, qualifications, study, experience or other; is accepted by the Court as an expert in a particular field and is skilled and knowledgeable so as to provide technical expertise, facts and opinions on a specific subject that the Court itself does not have. An expert witness’s testimony, therefore, is a form of opinion evidence and only experts accepted by the Court can give opinions.

During the swearing in of expert witnesses, some often intensive debate – usually led by the counsel for the other party – ensues before the Judge makes a formal declaration that the witness is accepted as an expert or not. It is also possible for the opposing counsel to seek a limit on the fields or topics that the expert is acknowledged as having expertise in. For example, if the proposed expert witness is found under cross-examination during witness swearing to be deficient in qualifications and/or experience...
relating to, say, polymer chemistry, then the Judge may decree that the expert is restrained from giving expert testimony on that topic and all sections of the witness’s statements relating to chemistry may be struck from the evidence. This is why the following section on résumés, qualifications and experience cautions on extending beyond very safe ground.

A very important point is worth stressing: the long-proven success of the Courts in establishing facts and extracting the truth, is due for the most part because the process is extremely adversarial. The supporters of this process advocate that rigorous debate, intense cross-examination and forceful argument – and even measures approaching badgering of witnesses with quick-fire interrogation or the same question put in a number of different ways – can be very effective in eliciting the truth from both lay and expert witnesses.

This means that many parts of the litigation process are extremely confrontational and are quite intentionally designed to put witnesses under pressure. This will be further discussed in a later section of giving evidence.

Most Australian Courts have developed and adopted a Code of Conduct or Court Rules for expert witnesses. The references logically vary but the content is mostly similar. In Victoria, the Code is known as an Order 44A (Victorian Supreme Court Rules). The key points of this are:

1. A person engaged as an expert witness has an overriding duty to assist the Court impartially on matters relevant to the area of expertise of the witness.
2. An expert witness’s paramount duty is to the Court and not to any party to the proceedings (including the person retaining the expert witness).
3. An expert witness is not an advocate for any party.
4. Every report prepared by an expert witness for the use of the Court shall state the opinion or opinions of the expert and shall state, specify or provide-

   ... the facts, matters and assumptions on which each opinion expressed in the report is based ...;

   ... a declaration that the expert has made all the enquiries that the expert believes are desirable and appropriate, and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the Court;

   ... any qualification of an opinion expressed in the report without which the report is or may be incomplete or inaccurate has been stated; or

   ... whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason.”

The intent of the Code of Conduct is very clear: the expert is a specialist advisor to the Court on matters that the Court itself may be or is deficient in, and the expert must not act in any way as an advocate for any party including the one that may be paying his remuneration.
THE FIRST CALL

After what seems a near lifetime of living and working in a technical role in the coatings or corrosion industry, it can come as a very pleasant surprise and be a lifting endorsement of your reputation to receive a telephone call from a solicitor saying that you have been recommended as being someone who could assist in a potential legal case involving a coatings or corrosion dispute. Before the euphoria fades, it is helpful to gather your wits and find out quite explicitly what the nature of the dispute is. This is to save you getting involved in a flurry of excitement, only to find later that the particular matter is not directly within your area of expertise and knowledge outside of which you could be decapitated in cross-examination. If you’re possibly out of your depth or beyond your field of expertise, it is recommended that you declare this early and save yourself the pain.

It is naïve to assume that the dispute topic is close enough to your field of expertise and you could “wing it” or do some specialised research to bring yourself up to speed. I find that a good way to keep a modicum of reality to your enthusiasm to participate, is to imagine that the expert for the other side on this technical topic is the most knowledgeable, highly qualified and most articulate of your peers, and one who doesn’t like you for some past reason. This will be the person briefing the legal team for the other party, dissecting your reports and preparing awkward questions for their barrister to grill you with under cross-examination. Only if you can stomach this, agree to proceed.

After getting past this stage, the next vital question – which will very likely have to be answered in confidence – is: who are the direct and possibly the indirect parties involved? Some complicated cases can have ten or more parties with claims or cross claims against each other. To proceed, you must be absolutely sure that you do not know, currently have or have had past dealings with these parties that could in any way be seen as a conflict of interest. Be aware that the opposition legal team will probably do enormous research work on your background, skills and past involvements to try and discredit you or your evidence.

Very commonly, the solicitor making the enquiry will already have undertaken quite a lot of research into the facts of the case. Typically, these people are very focused and are able to very quickly drill down to the key technical, practical or logistic details about a complex subject with which they have hitherto been mostly ignorant. Their ability to surprise even an experienced technical expert on their grasp of quite complex subjects is enviable.

If the concept of your involvement is still alive, the solicitor will typically ask for a copy of your résumé. An easy trap to fall in to is to provide the one that you might already have on hand and was used to get your last employment position. Don’t do this. I suggest that you gather as much background about the nature and detail of the technical issue or issues in dispute and make sure that your résumé absolutely reflects your past work history, academic qualifications, list of published papers, etc. In many instances, your résumé will be the most closely scrutinized document that you provide, especially to the legal team on the other side. Never make claims that are not true and don’t embellish anything that you could be caught out on under cross-examination. Also, don’t make the mistake of tailoring your résumé exactly to the case at hand – be a lot more subtle. I have seen a very experienced barrister absolutely decimate a key expert witness for the other party by researching four or five past résumés that the expert had submitted for other legal cases (on topics mostly unrelated to coatings or corrosion) and pointing out to the Court that this person appeared to be an expert on a diverse range of matters such as ballistics and child safety mats in playgrounds. The prompt for this research was a visibly different font and paragraph spacing on the section summarizing the expert’s knowledge of coatings and corrosion.
relative to the current dispute, suggesting that it was tailored. Serial experts or experts for hire are not well regarded, in my experience.

Be careful too, with details of past papers written or awards that are listed on your résumé. I had one instance when an expert for the other side claimed to have extensive experience in CP (cathodic protection) and claimed in his report that his résumé supported this. However, a close examination of his work history and in particular, the list of written papers in his résumé, showed that out of 30-odd published technical papers, only two were related obliquely to CP systems, both of these were co-authored and the most recent was twelve or so years ago. This gives a great opportunity for a Gotcha, when the evidence of work history and experience doesn’t link with the claim for expertise.

Unfortunately, many legal firms gravitate towards experts that have tertiary qualifications – I believe that they assume that more degrees or qualifications are preferred as to the value or esteem of their experts. This explains why they often look to universities or professional societies for coatings and corrosion experts. Practical experience, especially without recognised qualifications, is harder to sell, even though in many respects, the knowledge, competence and pragmatism of a field-experienced expert may often be far superior. In my experience, whilst the legal teams typically look for formal qualifications and the like, judges and arbitrators appear more disposed towards a healthy mix of practical experience and relevant qualifications. Don’t be put off if your expertise has been gathered by more work experience and research than qualifications – expertise to a level that will satisfy the Judge can be obtained by a variety of means.

Setting a fee for your services is usually the next step. This is most commonly undertaken on an hourly T&M (time and materials) basis. Most legal work, especially presenting evidence and being cross-examined, is not done at cheap rates. After spending days in the witness box getting clinically dissected, mentally tortured, systematically dismembered and then set on fire by the other party’s legal team, you want your hourly rate to be worthwhile.

THE INITIAL BRIEFING

I have noticed that a solicitor seldom searches around for a technical expert until they have already undertaken quite a lot of work on the dispute. Primarily, this is because experts with technical skills are traditionally unreliable in the environment that exists in court, so, as much as possible, counsel prefer to minimise their involvement unless it is mostly unavoidable. Sometimes this is unfortunate as it could lead to the saving of a lot of time and prevent a lot of unnecessary or futile research, data collection, correspondence or even the position taken by one party. I have seen instances where the client and the solicitor have taken an initial stance as to their position and even some technical understandings, only to find that they are not correct, and their Pleading (a formal statement to the Court of their position) is not their strongest argument. This is not so much of a problem if there has been little or no technically-related correspondence prior to your briefing, but having to reverse into a new position is not recommended.

If an initial briefing is conducted, you may be provided with various items of correspondence, reports, technical specifications, etc. My habit is to date and initial every document that I am given – whether I receive it by hand or electronically – and to create a single holographic or electronic register of these giving title, author, date, revision number, date received, etc. This does not need to be elaborate initially, but it needs to be able to be extended into a list of Provided Material as you work through your tasks, and which will be appended to your report. Good housekeeping in this regard can save you later on if you can prove that you did or didn’t receive a particular document, and when. The Provided
Material is important, because, just as a jury must assess a criminal case only on the evidence that is presented in Court and not what they may have read on the newspaper or seen on television; you are generally required to limit your incoming facts about the written history of the case to the Provided Materials and what facts you ascertain from your own investigations.

Whilst mentioning documents and correspondence, it is vital that you understand the rules and guidelines of Legal Professional Privilege and Discovery.

Legal Professional Privilege (most commonly referred to simply as privilege) is a client’s right to seek and obtain legal advice in confidence, and to have the steps being undertaken in preparation of a case for trial also carried out in confidence. Privilege prevents confidential documents and communications made primarily for these two purposes from being made available to the other parties before or during the trial.

Discovery is the process of making available all non-privileged documents, communications and records relating to the case to the other parties.

The rules and processes of privilege and discovery may be different in other jurisdictions, but most commonly, discovery means that most documents and communications that are connected with the dispute, (but usually excepting solicitor-to-client advice) are discoverable and are therefore required to be made available to the other side of the dispute (if it is legal) before the trial. Just adding a heading to an email or a letter to the effect that it is legally privileged and not subject to discovery, does not ensure that this is upholdable. I am aware of an instance where a written document was denied privilege, but the same document with handwritten notes as a result of a meeting between the client and the solicitor, was granted privilege.

Potential expert witnesses need to be aware that with only very few exceptions, all material that you are provided with, work with and that you generate – including handwritten notes, emails, diary records, draft reports, verbal briefings, meeting minutes, etc., are not protected by privilege and are discoverable. In past legal cases, there are instances where a series of draft reports, correspondence or emails that led to the adjustment or polishing of a witness statement or an expert report, have been denied privilege and have proved very awkward for the parties involved, especially if an expert’s opinion is seen to have evolved or been modified or amended to possibly better suit their client’s case or position. One expert had all his draft reports discovered and provided to the other party because he wrote in a commercial invoice (for a progress payment) that he had, amongst other duties, met with the solicitor to review and amend a draft report. This was enough to inform the other legal counsel of the existence of the earlier report versions which were then systematically dissected and compared to follow the evolution in the expert’s opinions.

At or around the time of the initial briefing, you will normally get a letter of appointment, your terms of reference or a briefing letter, most commonly from your client’s solicitor. This will typically dictate what tasks you are expected to undertake, for whom and by when. The content and instructions in this letter are important, as will be explained later in the section in writing your expert report. Briefing letters and other solicitor-to-expert communications (and vice versa) are discoverable and are listed in the Provided Materials.

Typically, the solicitor is the clearing house for all documents, in and out for their client’s case and it is a good idea for you to have minimal direct contact with the client, unless the solicitor so instructs and is present. Your briefing letter will normally dictate communication pathways, which you should
observe. If there is any doubt ask your solicitor verbally whether he wants to see a draft version of your report (or other documents) before you email or send it to him. If he received it, in any form, it is almost certainly discoverable.

GATHERING EVIDENCE

In many instances, the expert will need to visit the site or look at the job and collect evidence. Even though this might be a regular and common activity in your normal course of work, it is worthwhile stepping back and considering a few things before you start.

If the case may turn legal, my suggestion is that you be extremely particular about sample and data selection, collection and documentation. This is a very easy activity for the opposing legal team to feast on. I have seen near endless discussion and discrediting criticism of an expert because the glass vials within which he secured his blister liquid samples, had (possibly) the wrong type of closure (lid seals). In this situation, he had neoprene seals under the closure and a contrary expert felt that nylon or PTFE would have been better because some of the solvent in the sample could have been absorbed or otherwise affected by the closure used. The opposing legal team then attempted to have all of his subsequent findings, interpretations and evidence disallowed or discredited. Nitpicking becomes a practiced art in this climate. Very careful attention to detail is important.

Not only is collecting the right type of samples and data important, but you may need to later justify how you consider that the “good” samples are indeed representative of sound areas and “bad” samples are equally relevant. Documentation by the way of field maps, measurements, photographs, etc., can assist, but make sure it is unchallengeable and robust. Expect everything to be criticized and you are less likely to be exposed or disappointed.

If your data involves DFT readings, for example, ensure that your DFT gauge is calibrated and is verified before and after the readings are taken, or as dictated in a recognised industry standard, so you can defend the accuracy and validity of the data.

This approach to diligence in collecting samples will probably soon prevail on most of the other work that you do. After seeing what criticism can arise in legal cases over sample taking, I now tackle every job – no matter how inconsequential it may seem – on the basis that I may have to present in court at a later date. Remember that if you don’t collect samples and field data in the right way the first time – even if your analysis and interpretations are perfect – you can’t usually go back and get subsequent samples to flesh out what you have already done.

Sample care in transport and full traceability – positive identification and security from tampering – are another zone of potential attack.

SAMPLE TESTING

Knowing how to prepare samples, what to test for and how to interpret results should go to the core of your experience in analysis and forensics; but if you don’t have a high order of personal control, i.e., if it is a contract laboratory doing the specified analysis, be mindful that someone from the other side might make confetti out of your report and make your cross-examination very uncomfortable. For example, if there is an industry-recognised test for establishing the weight solids, lead content or volume solids of a coating sample, make very sure that all of the requisite steps and procedures in the test
method are followed, not your own adaptation. Also make sure that any test equipment is correctly and currently calibrated to lessen any attack on these or similar issues.

If the findings from one analytical step leads to another, for example if an FTIR spectra suggests a foreign ingredient, make sure that the subsequent test, say Ion Chromatography, you undertake demonstrably follows that pathway. Don’t jump inexplicably to what you may know (from your experience) as the logical answer without doing the steps that provide the proof. Court cases are based on facts and only facts that are proven by yourself or are proven by others, are admissible as evidence.

One of the key requirements of the whole forensic exercise of sample collection, testing, interpretation and reporting; is to uniquely link cause and effect. In my experience, failure to exclusively link the cause of the problem to the effect found – that effect not being achievable by any other mechanism with the evidence present – is the major deficiency in most technical investigations and reports. This means, for example, that even if a long list of influences can cause a coating material to behave in an unexpected way, only one could have done so in this instance because only this evidence was present, all others having been systematically excluded.

I was involved in one dispute where an expert (for the other party) was commenting on the causes of widespread blistering on the bottom plate of a very large potable water tank recently lined with solvent-free epoxy. He declared in his conclusions that the fundamental mechanism for the blistering was osmotic although the exact species causing this was not known. He then described the typical process where a water-soluble material such as salt or a hydrophilic material such as certain solvents, either within or beneath a paint film in immersed aqueous conditions, can cause osmotic blistering.

The investigator postulated that the blisters that were present at or near the surface of the steel were due to hydrophilic compounds site-added as an atomizing aid during spray application of the solvent-free epoxy, which became absorbed into the primer. He summarily dismissed the possibility of cathodic disbondment (from the water tank’s CP system) even though this had not been investigated and the pattern of failure observed he felt was not indicative of cathodic disbondment.

This author’s conclusions of his investigation was that the blisters were purely osmotic, they had been caused by an unidentified hydrophilic material in the paint film, that cathodic disbondment was not the problem, that the liability rested with either the coating application contractor or the coating supplier, and that the only remedy was full removal and replacement of the lining, a cost approaching $A0.5 million.

All this sounds reasonable, until you search amongst the report text and the testing regime to discover that the author had no evidence to support his opinion – none whatsoever – as to the nature or extent of any soluble material, and this fact was actually admitted in the report. The report declared that it was very hard to obtain blister liquid, even though the blisters were prolific and many were quite large. This means that the investigator was rendering an opinion as to causation that he simply could not support with evidence.

One other party to the dispute (the coating manufacturer) who did his own investigation found that most blisters in the freshly-dewatered tank were mostly dry, but they did manage to obtain a very small quantity of blister liquid and did some extensive testing – the results of which the above investigator was provided with. No detectable soluble materials of any sort were found.
In short, this investigator, in spite of a total lack of evidence from his own inspection and testing and from other sources, and the absence of a direct connection between the cause and the effect; concluded that the blisters were osmotic caused by entrapped solvent. They were not. The blisters were caused by a supposedly self-regulating impressed current CP system that went horribly out of control and exposed the new lining – for an unknown period over about 18 months – with potentials (relative to Cu/CuSO₄) of up to -1.5 Volts. If blisters inside a potable water tank are mostly dry, I believe a prudent investigator should be looking for a blister formation process involving the evolution of some form of gas, e.g., hydrogen, not a soluble material.

In this example, was it a coincidence that this investigator – who was hired or retained by the water authority who had tested and accepted the new tank and its lining system, and had full management and operational control over the impressed current CP system after commissioning – ignored or discounted discernible evidence and cause/effect connections that were a possible disadvantage to his client? In reading this report I concluded that there was a greater stench of advocacy for the water tank owner’s commercial and technical position than there was whiff of solvent in the blister liquid. It took a great deal of effort to overturn the well-entrenched mindset that had developed in the main parties to this dispute by this outrageous report.

We all make mistakes in not seeing some evidence or not properly connecting the dots, however, the desire with experts should be to keep the process professional and honest.

WRITING A TECHNICAL REPORT

The first and most important rule is that the expert witness report must be the expert’s own work and must fully and absolutely reflect his (and only his) findings, facts and opinions on the technical aspects of the dispute as instructed in the briefing letter.

An important thing to keep in mind is that any engagement as an expert witness is a personal one; often inexperienced experts think their firm is engaged. It is not. The Court only recognizes evidence from an individual, and if the report is a joint effort, then all of the writers will need to be called. As a corollary of that, the report should be written in the first person – not “we examined … our opinion is …” etc.

The instructions to the expert – often contained in the briefing letter – should be provided in a written form, and it must be understood that these instructions will be provided to the Court and to the other parties. In fact, they should be both referred to and appended to the expert’s report. These instructions should be the basis of the expert report and should:

- identify the parties to the dispute;
- describe the solicitor’s role to the client and the expert’s role to the solicitor and to the proceedings;
- instruct that the expert will be obligated to observe in all regards the relevant Code of Conduct for expert witnesses applicable to the Court of jurisdiction, and must attest in writing to this fact;
- attach copies of relevant documents (being careful to avoid the inclusion of privileged material which will lose its privileged status during this transmission);
- ask for a statement of the expert’s experience and qualifications, i.e., a current résumé, (to support the application to the court for status as an expert to be acknowledged);
- state any assumptions that the expert is to consider, make and/or comment on;
request an opinion or a set of opinions – either generally or via a set of questions – on the issues contained in or arising from the Pleading, that the expert is to answer in accordance with his expertise;

- request that the expert identifies the documents, previously-established facts or facts confirmed by the expert, upon which the opinion(s) are based;
- request that the expert identifies the facts, the data, the assumptions and the reasoning upon which he has reached the relevant conclusions;
- give guidelines as to form and presentation of the expert’s report; and
- attach a copy of the relevant Code of Conduct of the Court’s Rules for expert witnesses.  

I have found that writing the first technical report for a dispute is the most difficult, especially if other experts will be or are likely to be involved in the future. It is somewhat easier to respond to and criticize someone else’s prior report than to scratch the first patterns in the sand. What you write, how you write it and what you report and conclude will be often very closely scrutinized by the other side. I have spent hours per page dissecting the writings of others, so it must happen to my reports as well.

Sometimes, however, you have to lead. This means that your report is the first generated and you make the bow wave. My advice is to set the bar high and take the time to get your report right. Getting it right means order, format, sequence, clarity, explanations, support (references), structure, organisation (indexes, ease of re-finding things) and closing.

In spite of the above, I believe that the first report on a dispute matter is very important. If the parties have their own technical and commercial positions, which may have developed and become mostly immovable over time, these can be difficult to change. Nonetheless, I have known many situations where one really well-written and logical technical report – even if commissioned by one party – that keeps advocacy at length and articulates a solid and supportable technical analysis of the situation, can help to broker a settlement, especially if it brings forward and properly explains the technicalities and practicalities of the problem in a manner and to a depth that might not have been hitherto considered by the opposing parties. This can inspire an “I hadn’t previously considered that” or “that clearly explains something that I didn’t know” response from either or both sides which can be a activator for settlement, or at least help to narrow the gap. The best reports do this by eschewing advocacy and giving the impression of a skilled but somewhat disinterested expert explaining in a non-elitist and non-condescending manner complex or involved concepts of the main topics and details of the dispute, to a less technically-informed audience.

I have known instances where one excellent technical report has led to the withdrawal of the suit between the parties and a negotiated settlement outside the court system, possibly because the realism and strengths or weaknesses of the other party’s case was not previously identified or articulated.

Also, whilst it is tempting to write a complex report in a manner and using terminology that the author might think demonstrates his extensive knowledge and literary skills, this can be counter-productive. I often find that if it is hard for a lay person (including the Judge who will typically have a limited technical ability) to follow the technical descriptions – for example by using and not properly explaining acronyms, chemistry terms or physical processes – then the audience can miss the benefits. It is useful to remember that your technical report is not going to be presented at a high-end technical conference of your coating industry peers where you may want to impress with your knowledge, skills, research detail and penmanship; but needs to address and connect with an altogether different reader demographic with very alternate interpretative skills. Pitching the report at not too high and not too low
a level is important and can be very rewarding to the settlement process. Also, whilst wordiness is not more admired than content, your concepts should be clearly and unambiguously explained. In this situation, having your report gravitated towards, at the expense of others, due to its readability, pragmatism and ease of interpretation of your concepts; can make the parties and the arbitrator see your view or prefer your conclusions.

The expert witness needs to have excellent report writing skills. Anything less will be carved up like a Sunday roast by the opposition legal team and their experts. This can create quite a difficulty if preparing first-class reports is not your specialty. This can present a problem to the report writer, the solicitor and the client if a number or many aspects of the expert report are not suitable for lodgment on the basis of form, content, presentation or conclusions.

Having references to respected and industry-recognized publications, standards and technical papers is a good idea, but it doesn’t help to overdo this, unlike the assumed guidelines for tertiary institution thesis texts. Be very careful, too, of accuracy of the quotes or extracts that you use. Someone will very likely check these, so don’t rephrase or cherry-pick to suit your needs. Unfortunately, with an internet-based document distribution system, correctness, truth, science and reliable peer-review systems are all too often lacking. Written papers from even well-respected sources such as proceedings of industry conferences and text books, are not immune from errors or untruths. Junk science is extremely widespread – tying yourself to this could cause your position to become un-glued.

A number of issues can arise from the process of turning draft reports into lodged documents due to the issue of discovery. As noted earlier, almost without exception, everything that the expert writes, prepares or uses during all stages of his work – including verbal communications and instructions – is discoverable and is therefore available to the other parties. Whilst the solicitor can assist (carefully) on matters of form, there is a very fine line which he cannot cross with respect to amending (or encouraging the amending) of any technical aspect of the expert witness’s report. In short, a solicitor (and possibly the barrister as well) can advise on the form of the report – writing style, layout, expression, etc. – but cannot go so far as to coach the witness to either give or express some particular type of evidence or put the expert under any pressure (howsoever caused) to present conclusions in any specific manner or to negatively affect the expert’s independence.

A good expert report should be:

- correct;
- concise,
- complete;
- clear;
- comprehensive;
- consistent;
- certain (as far as is possible);
- logical;
- unbiased;
- unambiguous;
- well structured; and
- independent.4
The report must specifically address the issues of the briefing letter or the terms of reference.

Even though you may have prepared a large number of technical reports in the past (for non-legal cases) and may have your own time-proven style, layout, phraseology and format; it is not a good idea to blindly follow this model for an expert witness report.

Whilst someone appointed by a solicitor to prepare an expert report might consider himself an “expert” under this endorsement, it is unwise to rely on this being the case or to act in the manner of an all-knowing expert. Only a Judge can acknowledge a witness as an “expert”, which does not happen until the trial or proceedings commence. Up until you are accepted by the Judge, you are only an appointee expert whom your counsel has proposed for the Court’s approval, which may or may not be endorsed and it could be made with some restrictions as to the limits of your acknowledged expertise.

This should be borne in mind as you prepare your report. Also, your expertise (if endorsed) and contribution in the admissibility of expert evidence and expert opinion, is limited to the questions put to you and the tasks nominated in your briefing letter. This means that your report should be confined to the answering of questions, discussions of facts, and presentation of opinions related directly to the original briefing letter(s) or any subsequent instructions that the solicitor provides. For example, if you are asked to comment on the extent of damage and consequences for life expectancy for a coating system allegedly damaged by grinder dust or welding sparks, but make comment on issues that you notice (outside your brief) on apparent poor performance of stainless steel passivation or of obvious problems with dissimilar metals (possibly because your skills run to these matters); then these latter items are beyond your scope and should not be included in your report. Your expertise (if endorsed by the Court) is ordinarily confined purely to the tasks requested, notwithstanding that you might consider yourself an expert in many other matters. Of course, if you observe other defects or effects on the coating system allegedly damaged by the grinder dust or welding sparks that affect the coating’s life expectancy, then they must be discussed even if not referred to in the briefing letter.

Before your report is submitted, be very sure to check for consistency with all of the other documents and correspondence that you have generated for this dispute. If your opinion has changed, for example between the writing of an early précis report and your first technical report, declare that your further research has led to a development or refinement of your position of the basis of improved or extended data (or whatever) which has resulting to your opinion change. If you admit or acknowledge this change, you deny the opposing counsel the opportunity to pressure you in cross-examination over apparent inconsistencies.

ORDER AND FORMAT

A technical report for this duty should not be in the form of a typical letter, i.e., date; name; address, Dear Sir, etc. I believe it should have a single, clear first page that explains at a glance the identity (title) of the report, the author, the party or parties addressed and the date. It helps to have a title that is short and meaningful, (or can be made so) particularly as it may be referred to many times in future reports. Something that summarizes easily such as “The Dromgool Technical Report Dated XXX” is better than something which looks like “A Technical Report Into Why Some Paint Stayed Blue and Other Isolated Areas Changed Colour to Red on the Second and Third Spans of the Eastern Truss of the New Bay Bridge”. Having a date in the title assists when you prepare a reply report or further clarification reports.
It is subtle, but it can work subliminally if the short-handle title of your report includes your name, as this can put it in front of readers repeatedly when it is referenced in your opponent’s reports, whereby you may gain further exposure even if the writer is criticizing your work.

After the title page, insert a Table of Contents or an Index. Readers can get frustrated, which can work to your disadvantage, if they cannot go back to the particular section of your report that they wish to re-read.

A professional start to your report helps with a first impression. This can make you appear as an experienced report writer and a technical expert worthy of credibility and respect. My pattern is to start with a single paragraph personal introduction, i.e., name, address, state of residence, occupation, name of employer, years of experience in coatings-related disciplines and a factual non-promoting sentence or two about my skills, knowledge and qualifications, leading to a reference (contained in the first appendix) of my full résumé and a qualifications and experience (Q&E) document.

I would next state that I have been retained by Solicitor X on behalf of Client Y to assist in a dispute relating to Z, and then provide a cross reference to an appendix that contains a list of the Provided Material.

This is a good place to then confirm that you have been provided with a written copy of and have agreed to comply with the Court’s Expert Witness Code of Conduct with respect to advocacy, etc., and that your report and any testimony that you provide will be prepared and presented in full accord with the Code.

It would be pointless for me to list the sections that your report should contain, because this will clearly depend on the topic and content of your investigation; however, I suggest that an Executive Summary should always be the first main heading after your customary introduction. This section – which is one of the most important – should not be written until everything else in the body of the report has been completed and polished. The Executive Summary should succinctly address the tasks put to you in your briefing letter and give your summary of facts and opinions against each. This section is worthy of special emphasis and attention.

A suggested format for legal technical expert reports is to have every paragraph sequentially numbered, which good word processing software can easily accommodate. Major headings should also be numbered such as 1.0, 2.0, 3.0, etc., and subheadings 1.1, 1.2, 1.3, etc. Logically, sub-subheadings become 1.1.1, 1.1.2, 1.1.3, etc. Lists in the body of the report in individual paragraphs should be alphabetical, i.e., (a), (b), (c), etc. Sublists can go to small case Roman numerals, i.e., (i), (ii), (iii), etc. I do not use bullet or dot points in legal reports. This gives a logical cascade of identifier to each element and aids in directing people to the exact spot when referencing your material, either during the preparation of reply reports, whilst giving evidence-in-chief or under cross-examination.

Paragraphs should be confined to one thought, topic or discussion point. Single sentence paragraphs are acceptable, especially when you wish to make a worthy point and have it stand out. Paragraphs are best arranged at 1.5 or double line spacing, so that handwritten notes can be clearly written in and between lines. In my opinion, left-aligned text is preferred to justified.

All complex tables, charts, etc., should be uniquely numbered and be located in an appendix unless having the data and the discussion on the same page is important to connectability. Similarly, photographs are best in an appendix, unless they are isolated and random, and are pivotal to
demonstrating your point that would otherwise involve excessive text. All photographs should be numbered sequentially, dated and captioned.

Be careful with tense throughout the report, i.e., adopt one or other of past or present tense and don’t change. Make sure your grammar, syntax and punctuation are correct. This saves an embarrassing *sic* from your opposing experts in their reply reports when they notice alleged errors of form or other.

If you use an acronym or abbreviation that might not be obvious to an audience from outside the coatings or corrosion fields, define it the first time you use it. For example, whilst MIC or DFT might be very obvious to a corrosion or coatings person, let your readers know that these mean microbiologically-influenced corrosion and dry film thickness by inserting the full text in brackets. If there are many of these, consider including a full list in an appendix that is easy to find.

Some solicitors will provide instructions on the way that a report should be formatted, and all should provide guidance on the things to include and those to avoid.

At some later stage of the report, probably after you have provided your facts, findings and opinions, it is a good idea to include a section that sequentially addresses and answers each of the tasks from your briefing letter in a condensed and concise manner. These same conclusions should be inserted back to the Executive Summary.

**CONTENT, CLARITY AND STRUCTURE**

Content should be dictated by the tasks requested of you in your briefing letter. If the list of report properties contained in the section above is diligently provided, then the content and format of the report should fall into place and the key elements of clarity and structure should evolve.

Reviewing your own report is a difficult task, because the more you read what you have written the less you are able to stay concentrated on content, structure and flow. Remember that the key demographic of your report’s audience will be mostly non-technical, including the Judge and the counsel for both sides. Other experts will also read your reports and will undoubtedly be required to advise their parties on interpretations, etc., so you cannot afford to write in a manner that ignores or provokes any of these factions. At various stages during the writing process and before you finalise your report, carefully review the tasks detailed in your briefing letter to be sure that you have fully and adequately followed these instructions and have not been diverted into related topics or matters that might be tempting for you to address because of your comfort and technical knowledge.

An expert witness’s report should not attempt to address or directly answer the ultimate issue of fact. Typical issues of fact are whether a party was negligent, was there a breach of contract or if liability rests with one party or another. For example, if the main issue of the dispute is whether one party acted negligently, the expert can discuss the facts that are related to that matter, but should not give a final opinion as to whether the party was indeed negligent. That issue is for the Court to decide, not the expert. One can go close on such matters, but avoid making the final accusation or connection. For example, you might say that an ordinary competent coating applicator in the trade would do X, and this operator did Y; but it is the Judge who will assess these two pieces of evidence and conclude (or not) that the applicator was negligent.
Reports should also avoid making points of law: the expert’s job is to provide a resource for the Court on matters in which the Court may be deficient due to the technicalities of the disputation, not to usurp the skills that the Judge, jury or legal counsel already have.

Don’t make comments or claims in your report that are hard or impossible to support or prove. In many cases, every word of your report(s) will be extremely closely scrutinized by the legal counsel and experts for the other side. This may involve you being exposed to some very unfriendly cross-examination. If your briefing letter requests you comment to on assumptions made by others (e.g., in lay witness statements or in project records) it is better to state that you have been informed of such an assumption or record made by others, and if you are not able to establish this as a fact by your own resources, declare that if you were to accept this to be true, then your opinion would be such and such. This removes the onus of you proving someone else’s assumptions.

Declaring facts that you have established is acceptable, but be prepared to be able to prove them. Sometimes it is better to condition statements by saying that “in my past experience”, or “in my opinion”, or “standard industry practice is to … ”.

Your solicitor will inform you of the deadlines for submission and exchanging of expert reports. These are typically dictated by the Court’s timetable and are usually not flexible. It is wise to allow a sizeable period of time for the final polishing of report formats, style, etc., before the due date.

Be careful to obtain and follow your solicitor’s advice on a document retention policy. This particularly relates to draft versions of reports.

REPLY REPORTS

After you have invested a considerable amount of time making your own report as grammatically perfect, impartial and technically correct as you can; it is very disheartening to receive a copy of a report from an expert for the other party who has attacked your tome and turned it into shredder strips. This is even harder to swallow if you happen to know the other expert. This can be another subtle inducement towards advocacy for “your” position and that of your client as it is natural to defend your facts and opinions.

There is nothing more tempting than to fill all your cannon with powder and grapeshot, point them back to your opponent and light a string of fuses. I believe that it is best to avoid taking the bait as you line yourself up to respond.

Remember that the legal system is intensely adversarial. Your initial report in the hands of the opposing legal team will not be received with a hearty round of applause as you might expert to receive after presenting a technical paper at an industry conference amongst your colleagues and peers with only a few minor mutterings from the unpleasable stalwarts in the cheap stalls. It is also important to acknowledge that in the field of technical expertise or science, there is often more than one answer or theory that has potential validity. Expect to be aggressively criticized and you will be less likely to be surprised.

I find that the tone and format of reply reports are often very different from an expert’s first report. There are no sure-fire rules or formats, but a well-crafted balance of subtlety, a solid, well-reasoned attack and an appropriate measure of defence can work well. The temptation to respond to every criticism that the other expert might have made to your earlier reports is best shunned. Putting yourself
above making responses to criticism you may appear to have taken personally can be seen by other
readers of your report, e.g., by the Judge, as a measure of strength and confidence, which you hope will
be gravitated towards. There is a good theory, to which I subscribe, that if you ignore responding to
some petty comments made by others it might just deny them oxygen.

When reviewing the other expert’s reports upon which you have been requested to reply, I believe it
is helpful to very closely analyse all aspects of the subject report looking for errors of fact or conflicts of
opinion. These, if pointed out in a subtle and confident way, can lower the impression in the minds of
the Judge of the other expert’s knowledge and skills, and therefore the weight accredited to his
testimony. I have personally reviewed an expert report written by a seasoned practitioner with a similar
three-decades plus of industry experience as myself, who could not demonstrate that he knew the
corresponding written description and the industry standard terminology of a Class 2½ (NACE
No 2/SSPC-SP 10) abrasive blast quality and the connection (or lack of it) with profile height.

Even though it might sound a little stilted, my legal practitioner colleagues advise me that the order
of a sentence in your reply report is important. For instance, if you are about to comment or criticize a
paragraph or statement in another expert’s report, the former of the following two examples is preferred:

“At Paragraph 107, Mr A declares that a Near White Metal blast quality is known as a Class 3
blasting standard and this will result in a higher surface profile than Medium Blast Cleaning.
Mr A appears confused in this regard.”

“In my opinion, Mr A has failed to demonstrate that he understands the difference between blast
cleanliness and surface profile achievement when he states that a Near White Metal blast quality
is known as a Class 3 blast quality in Paragraph 107.

The suggestion is that the paragraph or section reference that you intend to discuss should be in the
van of the sentence.

Subtlety can be a powerful weapon in reply reports, but don’t over-use it and make sure that a less
technically-experienced audience doesn’t miss your point. If you firmly believe that the expert has
made incorrect or erroneous statements in his report, simply state that you consider Mr A is wrong and
briefly explain why. Cross-referencing back to sections of your own report can be helpful, and also to
other respected published technical papers or industry standards, at all times observing the warnings
included in the section on writing expert reports.

The Court acknowledges that in the fields of expert knowledge there can be more than one answer.
Therefore, it is the Court’s task to weigh the evidence presented by the various witnesses and assign an
appropriate weight to each. Achieving full consensus between experts is probably so rare as being
unachievable, so dissention between professional opinions is to be expected. Nonetheless, it is very
likely that the Court will gravitate towards the best package of testimony, including the written, verbal
and non-verbal performances of the witnesses.

An expert witness is not locked into holding on to an opinion on a material matter which must be
defended to the end at all costs. Most court Codes of Conduct allow and encourage experts from the
various sides to confer on the basis that they may shorten the list of technical differences that they
initially held. If an expert changes his opinion, then a supplementary report to that effect is suggested.
In a large and complex dispute, giving evidence in court or in an arbitration can be the culmination of many months or years of work. To an expert witness, this can be a very stressful activity.

It can be a surprise to many first-time experts, that, even in very complex disputes, it is common that only a short list of the relevant issues will ever get aired in court. If you are used to writing complex and comprehensive reports addressing all of the technical matters in an investigation, you possibly draw your conclusions from varying sized elements of evidence or data but all have some weight. Solicitors and barristers often seem to ignore issues that they believe have little prospect, and if so, these do not get entered into evidence. The surprise to a technical expert is that often monumental judgments and large sums of money are awarded on a sometimes severely truncated evidence.

There are certain protocols that must be observed in court. The barrister representing your client should advise you on the details applying to that jurisdiction.

There are typically two forms of giving verbal or oral testimony. The first is giving evidence-in-chief. This is usually where you are asked a series of questions by the barrister representing your client. The barrister will often direct you to certain paragraphs or sections of your report and get you to explain or clarify your facts or opinions of key issues. You might also be asked questions by the Judge during this process. Whilst still somewhat demanding, this form of testimony usually comes with minimal aggression – the barrister for your client is typically familiar with your reports and opinions due to pre-court discussions, and will mostly wish you to stress key aspects and present your case to the Judge.

Your demeanor and presentation during this stage is important. It helps to remind yourself regularly that the barrister is the advocate for his client and also the legal expert. Your task is to assist the Court, without traces of advocacy, to understand the technical aspects of the dispute with which you have been tasked. As an accepted expert, you are not in the witness stand to provide legal input, purely evidence of facts and opinions on technical matters relating to your area of expertise. The barrister asking the questions is in control of the presentation of evidence-in-chief, and the person that this is presented to is the Judge, or the Judge and a jury if this is the court format.

The second form of verbal testimony is cross-examination. This can be a cross between spending a day (or more) inside the rotating bowl of an industrial concrete (cement) mixer full of flying bricks; strolling blindfolded into the target zone of a shooting range; being the punching bag in the prize fighter training gymnasium or being stretched on a torture rack whilst your extremities are being blowtorched.

It was reported recently in a local newspaper that a criminal lawyer who fell from grace and was charged with a crime of embezzlement or similar, and therefore had had personal experience of being a trial lawyer, a witness and a prisoner; declared that being cross-examined as a witness in court was by far the worst experience.

It is worth expecting that being cross-examined will be hell. This is a feature of the long-established process of an adversarial judicial system. This is not personal and the questioner’s sole aim during cross-examination is to put you under pressure to see how you cope and to establish whether stress can make your testimony appeal less to the Judge. No one will tell you that your report is an excellent document, that your research and analytical skills are worthy of a Nobel Prize or that you should be considered as the pinnacle of technical expertise. If you don’t expect to be praised or lauded, and you
are not, then you will not be disappointed. You are a tool of the Court, and the Court usually works its tools hard.

It is an easy reaction to respond negatively to the barrister for the other party because of his method or nature during cross-examination. He is just doing his job and he is worthy of exactly the same respect and politeness that you display towards the Judge or the barrister for your own client. To do otherwise means that his tactics of apparent aggression will be seen to work. If he can’t fluster you, he may well give up.

It is also worth appreciating that your opposing client will normally be in court watching your performance. Even if you are not “on his side” in this dispute, your future employment as an expert witness can be dramatically enhanced if your manner, presentation and credibility are credit-worthy. There have been many instances, when a client will secure the services of an expert who was assisting the other party, when he next has a dispute. You should not tout for business, but it doesn’t hurt to be in demand for future work because you can do an first-class job of investigating, writing and giving evidence.

To follow are some suggestions for answering questions in cross-examination:

- Listen carefully to the question and ensure that you fully understand it before your reply. If you are in any doubt, ask for the question to be repeated or rephrased. Be especially careful of questions or statements that contain double negatives.
- Answer questions honestly and responsively but as briefly and succinctly as possible. Do not volunteer information which is not strictly responsive to the question.
- Avoid non-verbal or gesture-based responses, e.g., rolling your eyes heaven-wise, shaking your head in a negative manner, or thumping the witness stand with your fist. Judges are very adept at interpreting all elements of a witness’s responses.
- Do not step outside the limits of your knowledge or experience, particularly in an attempt to provide an answer that you feel could assist your client.
- Do not try to fill in any silence between your answer and the next question by elaborating on your previous answer unless you genuinely believe that the previous answer was inaccurate or incomplete.
- Concentrate on answering the actual question asked of you. Do not, in answer, try to anticipate what the questioner is getting at or his subsequent line of questioning.
- Remain polite and civil at all times even when provoked by the questioner.
- If your client’s counsel objects to the question asked, do not answer it, or, if in the course of answering it, immediately stop answering. Do not commence answering or resume answering until the objection has been dealt with by the Court.
- Always give answers honestly and based on best recollection – not on reconstruction. If you cannot remember, say so. The only exception to this is if you have an invariable practice of doing something and the question is not framed at obtaining your recollection.
- If you have no actual recollection (or you risk getting the order or sequence incorrect or similar) but if there is a contemporaneous document from which you could refresh your memory, say so and ask the Court for permission to look at it.
- Whilst being cross-examined (including during adjournments or overnight) do not discuss your evidence or the case with anyone including lawyers, family, other witnesses or colleagues.
• If you realise that you have made a mistake in an answer you have just given or in any previous answer, say so and give a corrected answer.
• If you believe that an answer requires an explanation or an expansion, i.e., if you believe a complete answer to the question necessitates an expansion, give that explanation or expansion. If you are cut-off in the course of so doing by the questioner or the Judge, don’t worry about it. If what you wanted to say is considered relevant or important, the explanation can be elicited in re-examination by your counsel.
• When answering, address your answer to the Judge or jury. If you want to address the Judge by title, call him “Your Honour”. If you want to address the questioner by title, call him “Mr X” or “Sir”.
• Do not argue with the questioner – just answer the question – you are the witness, your counsel is the advocate.5

The potential for advocacy to infiltrate an expert witness’s testimony is probably highest whilst giving verbal evidence. Again, this must be avoided or the witness’s credibility will be lowered. Whilst a Judge might not rule a witness’s evidence as inadmissible, he may lessen the weight to be attached to it.

Remember that most barristers are extremely well equipped with oratory skills and usually have incredible memories for what you might have said in an earlier question or in your reports. It is not worth trying to out-smart them on technical explanations, word plays, wit or other tactics.

You should also be aware that a barrister may use the tactic of alleging that you have some self-interest in the result, or perhaps just as a result of the money you receive from your engagement as an expert.

I was involved in a sizeable arbitration that involved an offshore gas platform that had been coated with a topcoat material that contained lead-based pigments. Because I happened to have considerable experience in the management of hazardous coatings and was required to outline the consequences that my client would face in the years ahead during coating maintenance, plant servicing, etc., the opposing barrister took the position that if my proposals for dealing with this material were adopted by the Court, it would likely mean many years of highly profitable work for my company providing post-arbitration expertise. This seemed to be the main focus of his attack on my testimony, which he returned to often as he took me through my prior evidence. Whilst remaining respectful, I continually deflated his position and killed his tactics by repeatedly stating that I was already overloaded with work, was on an active program to reduce my hours and it was unlikely that I could even accommodate this demand. After getting this answer a number of times without variance, he finally dropped the line of questioning.

CONCLUSION

Being involved in a complex and demanding legal dispute is both hard and rewarding. It can put the witness through extreme stress and intense pressure. However, it has many benefits. Some of these are to hone the processes of collecting evidence, assembling data and information; the act of comprehension of other usually well-written material; the performance of research to an often advanced level on certain topics; the fulfillment of writing comprehensive technical reports; and the opportunity to assist the Court in deciding on complex technical matters by the giving of evidence.
It is not a pastime that all would enjoy, but it can have considerable benefits to your level of understanding and knowledge on matters raised in the proceedings, and you can get to appreciate the skills and/or limits of some of your industry colleagues, whether they are retained for the other party of by your own. Some people bring out their best when put under pressure.

A good expert witness knows and appreciates the legal and litigation process, respects its history and protocols, knows the roles that the various parties play, and stays ever-mindful of the temptations of advocacy.

Enjoy your day in court – remember it is better to be paid for this experience as an expert witness rather than to be there as a defendant, a plaintiff or a prisoner!

References:

3  J. Digby QC and S. Gatford.  Ibid. With additions and modifications.

Bibliography:


Geoffrey A. Markham.  “Expert Evidence in Arbitrations and Court References with Specific References to Experts’ Conferences, Conclaves and Natural Justice”, Undated.

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