

COMP6455 Digital Forensics

The expert's report and giving testimony

29 October 2019



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Topics to be covered

- Expert Witness
- Guidelines for Experts:
 - Uniform Civil Procedures Rules 2005 (NSW) Schedule 7 – Expert Witness Code of Conduct
 - Federal Court of Australia (GPN-EXPT) – Harmonised Expert Witness Code of Conduct and Concurrent Expert Evidence Guidelines
- Preparation of an Independent Expert Report
- Presentation of evidence in Court
- Q&A

What is an Expert Witness and why are we needed?

Federal Court of Australia:

- A specialist in a subject for the purpose of providing his/her expert opinion on an aspect of a case.
- Such people may become an expert witness, if they are qualified in their area of expertise, training and specialised knowledge.

In order to adduce expert evidence, a party must be able to demonstrate:

- there is a field of 'specialised knowledge';
- there is an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert;
- the opinion is 'wholly or substantially based on the witness's expert knowledge';

To the extent that the opinion is based on facts, that:

- if the facts were 'observed' by the expert, that they have been identified and admissibly proved by the expert; and
- if the facts were 'assumed' or 'accepted' that they have been identified and proved in some other way;
- the facts observed or assumed by the expert form a proper foundation for the opinion; and
- the opinion logically follows from the information on which it is stated to be based.

UCPR 2005 (NSW) Sch.7 – Expert Witness Code of Conduct

Schedule 7 Expert witness code of conduct

(Rule 31.23)

1 Application of code

This code of conduct applies to any expert witness engaged or appointed:

- (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings, or
- (b) to give opinion evidence in proceedings or proposed proceedings.

2 General duties to the Court

An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the court impartially on matters relevant to the area of expertise of the witness.

3 Content of report

Every report prepared by an expert witness for use in court must clearly state the opinion or opinions of the expert and must state, specify or provide:

- (a) the name and address of the expert, and
- (b) an acknowledgement that the expert has read this code and agrees to be bound by it, and
- (c) the qualifications of the expert to prepare the report, and
- (d) the assumptions and material facts on which each opinion expressed in the report is based (a letter of instructions may be annexed), and
- (e) the reasons for and any literature or other materials utilised in support of each such opinion, and
- (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise, and
- (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications, and
- (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person, and
- (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the court, and
- (j) any qualification of an opinion expressed in the report without which the report is or may be incomplete or inaccurate, and
- (k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason, and
- (l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

4 Supplementary report following change of opinion

(1) Where an expert witness has provided to a party (or that party's legal representative) a report for use in court, and the expert thereafter changes his or her opinion on a material matter, the expert must forthwith provide to the party (or that party's legal representative) a supplementary report which must state, specify or provide the information referred to in clause 3 (a), (d), (e), (g), (h), (i), (j), (k) and (l), and if applicable, clause 3 (f).

(2) In any subsequent report (whether prepared in accordance with subclause (1) or not), the expert may refer to material contained in the earlier report without repeating it.

5 Duty to comply with the court's directions

If directed to do so by the court, an expert witness must:

- (a) confer with any other expert witness, and
- (b) provide the court with a joint report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing, and
- (c) abide in a timely way by any direction of the court.

6 Conferences of experts

Each expert witness must:

- (a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the court and in relation to each report thereafter provided, and must not act on any instruction or request to withhold or avoid agreement, and
- (b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

GPN-EXPT – Harmonised Expert Witness Code of Conduct

Annexure A

HARMONISED EXPERT WITNESS CODE OF CONDUCT²

APPLICATION OF CODE

1. This Code of Conduct applies to any expert witness engaged or appointed:
 - (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or
 - (b) to give opinion evidence in proceedings or proposed proceedings.

GENERAL DUTIES TO THE COURT

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

CONTENT OF REPORT

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:
 - (a) the name and address of the expert;
 - (b) an acknowledgment that the expert has read this code and agrees to be bound by it;
 - (c) the qualifications of the expert to prepare the report;
 - (d) the assumptions and material facts on which each opinion expressed in the report is based [a letter of instructions may be annexed];
 - (e) the reasons for and any literature or other materials utilised in support of such opinion;
 - (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;
 - (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;
 - (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;
 - (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the

- knowledge of the expert, been withheld from the Court;
- (j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;
- (k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and
- (l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

SUPPLEMENTARY REPORT FOLLOWING CHANGE OF OPINION

4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (l) of clause 3 of this code and, if applicable, paragraph (f) of that clause.
5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

DUTY TO COMPLY WITH THE COURT'S DIRECTIONS

6. If directed to do so by the Court, an expert witness shall:
 - (a) confer with any other expert witness;
 - (b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and
 - (c) abide in a timely way by any direction of the Court.

CONFERENCE OF EXPERTS

7. Each expert witness shall:
 - (a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and
 - (b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

² Approved by the Council of Chief Justices' Rules Harmonisation Committee

Process of being engaged as an Independent Expert

- Search (instructing solicitors or counsel)
- Retain
- Confer
- Instruct
- Report
- Preparation (for Court)
- Presentation of Evidence



An example

Supreme Court	v Simmonds [1971] 1 WLR 1381
New South Wales	BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266
Case Name:	Secured Income Real Estate (Australia) Limited v St Martins Investments Pty Ltd (1979) 144 CLR 596
	Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd (1995) 41 NSWLR 329
Medium Neutral Citation:	Bowes v Chaleyer (1923) 32 CLR 159
Hearing Date(s):	Category: Principal judgment
4, 5, 6 April 2016	Parties: WIN Corporation Pty Ltd - Plaintiff Nine Network Australia Pty Limited - Defendant
Decision Date:	Representation: Counsel: A L Bannon SC with J R Williams and J Burnett - Plaintiff N C Hutley SC with E Peden - Defendant
28 April 2016	Solicitors: Atanaskovic Hartnell - Plaintiff Gilbert + Tobin - Defendant
Jurisdiction:	File Number(s): 2016/41896
Equity - Commercial List	
Before:	
Hammerschlag J	
Decision:	JUDGMENT
Proceedings dismissed	INTRODUCTION
Catchwords:	1 HIS HONOUR: Clause 2.1 of a written Program Supply Agreement (the PSA) entered into by the plaintiff (WIN) and the defendant (Nine) on 3 June 2013 provides:
CONTRACT – construction – meaning of “to broadcast” in a Programming Supply Agreement – whether by internet live streaming the plaintiff is broadcasting on and in the licence areas covered by the WIN Stations – implied terms – whether there is to be implied in the agreement a term that the defendant will not internet live stream into the plaintiff's licence areas – plaintiff seeks a final injunction restraining defendant from internet live streaming into the plaintiff's licence areas – HELD: internet live streaming is not broadcasting within the meaning of the Programming Supply Agreement	Nine grants WIN the exclusive licence to broadcast on and in the licence areas covered by the WIN Stations the program schedule broadcast by Nine on each of the channels known as “Nine”, “NineHD”, “9Go”, “9Gem”, “Extra” and “9Life” (the “Nine Channels”), to be picked up by WIN at Nine’s NPC.
Legislation Cited:	2 The PSA was to expire on 31 December 2015. However, by Variation Agreement signed by the parties on 31 December 2015, amongst others, its term was extended to 30 June this year.
Broadcasting Services Act 1992 (Cth) Supreme Court Act 1970 (NSW)	3 Nine is transmitting its program schedule by live internet streaming, which is available to recipients in the licence areas covered by the WIN Stations (the WIN licence areas). WIN claims that Nine is in breach of the PSA by broadcasting within the meaning of clause 2.1. WIN says that even if Nine is
Cases Cited:	
Electricity Generation Corporation v Woodside Energy Limited (2014) 251 CLR 640 Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 89 ALJR 990 Codelfa Construction Pty Limited v State Rail Authority of New South Wales (1982) 149 CLR 337 Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd [2016] VSCA 23 Giliberto v Kenny (1983) 48 ALR 620 at 623 [30]; Prenn	

not broadcasting, it is still in breach of an implied obligation not to do what it is doing. WIN moves the Court for an injunction restraining Nine from continuing to live stream into the WIN licence areas for the remainder of the life of the PSA.

- 4 For the reasons which follow, I have concluded that live streaming is not broadcasting within the meaning of the PSA, and that Nine is under no express or implied obligation not to do it. WIN's claim for an injunction must therefore be refused.



EXPERT REPORT PROCESS

Run through a few things on screen

Presentation of evidence in Court

GIVING EVIDENCE IN COURT

Witnesses make a necessary and valuable contribution to our justice system by giving evidence in court. The purpose of this pamphlet is to assist you understand your role as a witness.

Preparing for Court

Confirm your date for giving evidence in court.

The court process can take time and court dates often change. We recommend that you check the status of the court case and the time that you are required to arrive at court with the CDPP prosecutor the day before the scheduled court date.

Visit the court

You may find it helpful to go to court beforehand to see what a courtroom looks like and to know where everyone will sit on the day you give evidence. This will help you familiarise yourself with the courtroom environment.

Read over your statement

As a witness you would have made a statement to the investigator telling them in your own words everything you remember about what happened. You should read over your statement before going to court. Before you give evidence try to think about the matters covered by your statement such as dates, times, names, events and words used. It is important to remember not to discuss your evidence with any other witnesses. You may be requested to attend a conference with the prosecutor before giving your evidence. If there is anything in your statement you would like to add or change, bring it to the attention of the prosecutor in advance of the hearing.

Think about your attire

While there are no particular dress requirements, we would encourage you to wear something neat and tidy. The court room is a formal environment and the judge, prosecutor and defence counsel will be wearing professional dress and may in some instances wear wigs and robes.

Your day in Court

Once you arrive at court try and make contact with the investigator or CDPP prosecutor to let them know you have arrived. They will show you where to wait. Courts usually sit from 10am to 4pm, with a short

break for morning tea and an hour for lunch, though the practise of courts may vary. You will be advised beforehand, most likely in writing, of the time you are required at court.

Just because a trial or hearing starts on a certain day that doesn't necessarily mean that you will give evidence on that day. You may have to wait before the court is ready to hear your evidence. The CDPP prosecutor will do their best to keep you informed as to the status of the proceedings and advise you of when you will be required to give evidence. Every effort will be made to ensure you are not inconvenienced more than necessary.

You cannot be present in the court before you give your evidence. You might like to bring a book or magazine to read while you are waiting. A court officer will let you know when it is your turn to give evidence and show you where to sit. Once you have given your evidence you may sit in the public seating area of the courtroom. The CDPP prosecutor will advise you when you are no longer required by the court.

Well in advance of the trial or hearing you should advise the CDPP prosecutor if:

- You have concerns for your safety.
- You have difficulty speaking or understanding English.
- You have any special needs or a disability that may affect your ability to give evidence.

The Courtroom

The criminal prosecution process can be long and complex and it involves a lot of people. You can expect the following people to be present in the courtroom: the accused, the judge and their staff, the prosecutor, defence counsel, the court reporter, the court officer, and in some instances the Jury.

In court the prosecutor presents the case against the person accused of the crime. This person is referred to as the defendant in the Local or Magistrates' Court and the accused in the District, County or Supreme Courts. The accused is presumed to be innocent until proven guilty. The Magistrate in the Local or Magistrates' Court or the Jury in the District, County or Supreme Courts must be satisfied 'beyond a reasonable doubt' that the person committed the crime.

Giving Evidence

You must tell the truth in court when you give your evidence. When you first go into the witness box you will be asked to swear an oath or affirm to tell the truth.

When you give evidence in court you will be asked questions by both the CDPP prosecutor and the defence counsel. The CDPP prosecutor will generally ask you questions first. Then the defence counsel may ask you questions. This is called cross examination. The Judge or Magistrate may also ask you questions.

Below are some suggestions to assist you in the process of answering questions in court.

- Listen carefully to the questions and make sure you understand what is being asked before you answer.
- If you do not understand the question it is ok to say so.
- Never try to guess the answer to a question. If you do not know the answer to the question, or cannot remember it is important to say so. Don't feel pressured to answer the question quickly. Take your time to think before answering.

- Try to answer clearly and in a loud voice.
- You may be asked the same question more than once.
- You should address the Judge or Magistrate as "Your Honour", or if you forget sir or madam.

Contact with the CDPP

If you have any questions about your appearance in court, your evidence, or anything else to do with the case, talk to the CDPP prosecutor.

Cross-examination

What happens in a cross-examination?

Cross-examination is when a witness is asked questions by the other person or lawyer in the case, ie by the "side" that did not call the witness to give evidence. One reason for cross-examination is to test the witness' evidence. Another reason is to obtain evidence which the witness did not give and which may favour the other person.

There are a number of useful points to remember as a witness:

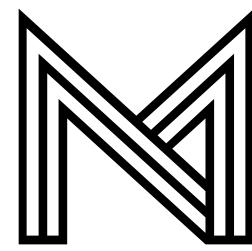
- You should listen carefully to the whole question, think about it and answer it by saying no more than what is necessary to answer it.
- It is important not to answer other questions which you think that you might be asked and not to use the opportunity to offer an opinion about the case.
- If you do not hear the whole question or are not sure that you did, ask for it to be repeated.
- If you cannot understand a question, say so, and the person or lawyer will try to express it better. Do not be afraid to say that you do not understand the question.
- Try to answer each question truthfully and to the best of your recollection.
- If you do not remember something or your memory is not good, do not be afraid to say so.
- You should never argue with or try to question the cross-examiner.
- If a question can be answered simply by 'yes' or 'no', answer it in that way. You should only say more if the question cannot be answered in this way.
- If you have a copy of your affidavit, take it with you into the witness box but do not read it or even open it in front of you unless you are asked to do so.
- If you are feeling ill, tired or distressed and would like a break for a few minutes, ask the Judge.
- All your evidence will be recorded through the microphone in front of you.
- Gestures, such as nodding of the head are not recorded. Try to speak clearly and audibly at all times so that everything you say will be clearly recorded.

Useful things to remember

- Be prepared (i.e. know your report)
- Be prompt
- Make sure you remember Court etiquette (Oath, Affirm, Sit, Stand, Water, Microphone...)
- Slow things down in your mind
- Reflect (where necessary)
- Clarify (if necessary)
- Respond
- Don't try to predict the destination
- Don't be in a rush to get out of there
- Don't try and be an expert in everything
- Breathe
- Remember, you are the expert!



Q & A



McGrathNicol