



Expert Evidence & Expert Witnesses

Parties wanting to use expert evidence and expert witnesses in a proceeding should be familiar with the [Evidence Act 1995](#) (including Part 3.3) and Part 23 of the [Federal Court Rules 2011](#) (Rules).

The Federal Court has also issued a number of practice notes which provide guidance on the use of expert evidence, which parties and their lawyers should be familiar with before seeking to prepare any expert evidence for use in the Court:

- [Expert Evidence Practice Note \(GPN-EXPT\)](#), which includes the Code of Conduct for Expert Witnesses and Guidelines for concurrent expert evidence
- [Central Practice Note \(CPN-1\)](#)
- [Survey Evidence Practice Note \(GPN-SURV\)](#).

Expert Witnesses

In some cases a party may retain a person who is a specialist in a subject for the purpose of providing his/her expert opinion on an aspect of the case. Such people may become an expert witness, if they are qualified in their area of expertise, training and specialised knowledge.

An expert witness may be retained to:

- give opinion evidence in the proceeding or
- in certain circumstances, to express an opinion that may be relied upon in alternative dispute resolution procedures such as mediation or a conference of experts.

In some circumstances an expert may be appointed as an independent adviser to the Court.

If parties intend to rely on expert evidence in a proceeding, then at the earliest opportunity, they should consider between them and advise the Court of their views on:

- the number of experts;
- the issues that it is proposed each expert will address;
- and how expert evidence may best be managed.

The role & duties of an expert witness

The role of an expert witness is to provide relevant and impartial evidence in their area of expertise. More information about the role of an expert witness is set out in the Expert Evidence Practice Note (GPN-EXPT). With the assistance of the expert evidence, the Court will reach its own conclusion in the proceedings.

Code of Conduct

Every expert witness giving evidence in this Court must read the Harmonised Expert Witness Code of Conduct (**Code**) and agree to be bound by it. The Code is attached to the Expert Evidence Practice Note (GPN-EXPT) as Annexure A.

The Code is not intended to address all aspects of an expert witness' duties, but is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them.

Survey Evidence

A party may seek to adduce evidence based on out-of-court statements or responses of respondents to a survey (**survey evidence**) (see Part 23 of the Rules and Parts 3.1, 3.3 and 3.11 of the Evidence Act).

The Court has issued the Survey Evidence Practice Note (GPN-SURV) which provides guidance to parties and their lawyers of the use of survey evidence in a proceeding, including common pitfalls relating to the preparation and use of survey evidence.

Survey evidence may be used in a variety of practice areas, although it is most often sought to be relied upon in the Commercial and Corporations and Intellectual Property National Practice Areas (NPAs). If a party seeks to adduce survey evidence, they should be familiar with:

- the Survey Evidence Practice Note (GPN-SURV) and
- the relevant National Practice Area practice note that the proceeding is commenced in (for example, the Commercial and Corporations Practice Note (C&C-1) or the Intellectual Property Practice Note (IP-1)).

Conference of experts

When the Court makes case management orders to prepare for trial, the Court may require experts (who are to give or have given reports) to meet for the purpose of identifying and addressing the issues in dispute between the experts (**conference**).

Where appropriate, the Court may appoint a registrar of the Court or some other suitably qualified person (**Conference Facilitator**) to act as a facilitator at the conference. Such an order may be made on the application of a party under Rule 23.15 of the Rules or on the Court's own initiative under Rule 5.04 of the Rules.

The purpose of the conference is for the experts to have a comprehensive discussion of issues relating to their field of expertise, with a view to identifying key issues and areas of agreement and disagreement.

The conference is attended only by the experts and any Conference Facilitator. Unless the Court orders otherwise, the parties' lawyers will not attend the conference but will be provided with a copy of any conference report.

Parties, their lawyers and the experts should be familiar with aspects of the Code which relate to conferences of experts and joint-reports (see clauses 6 and 7 of Annexure A of the Expert Evidence Practice Note (GPN-EXPT)).

Timing and location of a conference?

In each case the decision to require the experts to confer will be made by the judge based on the circumstances of the case and the views of the parties.

The timing and location of the conference of experts will be decided by the judge or a registrar who will take into account the location and availability of the experts and the Court's case management timetable.

The conference may take place at the Court and will usually be conducted in-person. However, if not considered a hindrance to the process, the conference may also be conducted with the assistance of visual or audio technology (such as via the internet, video link and/or by telephone).

Preparation for a conference of experts

Experts can prepare for a conference of experts by ensuring that they are:

- familiar with all of the material upon which they base their opinions and
- where expert reports (in draft or final form) have been exchanged, familiar with the opinions of the other experts.

Prior to the conference, experts should also consider:

- where they believe the differences of opinion lie between the experts and
- what process and discussions may assist to identify and refine those areas of difference.

What happens at the conference?

At the conference, it is expected that the experts will narrow the issues in respect of which issues they agree, partly agree or disagree. These will then be clearly and concisely outlined in a joint-report.

Concurrent Evidence

Depending on the nature of the expert evidence and the proceeding generally, the Court may order experts to give some or all of their evidence concurrently at the final (or other) hearing.

Parties and the experts should be familiar with the Concurrent Expert Evidence Guidelines in

Annexure B to the Expert Evidence Practice Note (GPN-EXPT). This guide is not intended to be exhaustive but indicates:

- when the Court might consider it appropriate for concurrent expert evidence to take place
- how that process may be undertaken
- what the Court expects of the experts.

