



ARTICLE

# Two Expert Roles: Expert Advisor and Expert Witness

Disputes and confrontations frequently arise on construction and engineering projects around the world and are often resolved through formal arbitration and/or litigation proceedings. In such circumstances, Expert Witnesses of various disciplines may be appointed to address technical issues, provide expert opinion and to generally assist the tribunal or court on matters that are within his or her field of expertise.

Commonly, however, Expert Witnesses are not appointed until late in the dispute resolution process, in line with the procedural timetable (and usually when the hearing is looming on the horizon) to review statements of claim and defence, factual witness statements, and to prepare an independent and impartial Expert Report on the matters on which he or she has been instructed.

Rather than leaving the appointment of experts until the tribunal or the court decides what expert evidence is required and to be adduced, the parties involved in the dispute (both claimant and defendant) should consider appointing Expert Advisors at an early stage in the development of a claim or in the preparation of a defence (and possibly a counter-claim). Often Expert Advisors are referred to as 'dirty' experts because they are perceived as not being independent and impartial<sup>1</sup>.

It is however possible in my opinion for both the role of 'Advisor' and 'Witness' to be performed by the same Expert, so the familiarity with and understanding of the issues in dispute can be transferred from one role to the other, but only where the Expert's independence,

impartiality and duty to the tribunal, under the Expert Witness role, is not compromised.

Strict caution must be exercised to ensure that all correspondence and communications with the Expert Advisor are channelled through the appointing party's legal team with appropriate wording such as, 'Confidential and Subject to Legal Professional Privilege' in order to preserve the legal privilege of all such communications. However, even by adding this type of wording, such communications may not be eligible to be privileged. Therefore, if that is the case then, when the role switch occurs, e.g. from an Expert Advisor role dealing with claims and disputes in general, to an Expert Witness role in a formal process, then this would need to be fully disclosed. Failure to do so could undermine the independence of the Expert Witness, and the weight given to the evidence provided by the Expert Witness.

However, if it is not possible to readily convert from the role of Expert Advisor to Expert Witness, the Expert Advisor can convey his or her accumulated knowledge and pass on any analysis undertaken together with his

<sup>1</sup>Caudill, David S., 'Dirty' Experts: Ethical Challenges Concerning, and a Comparative Perspective on, the Use of Consulting Experts (2017). 8 St. Mary's Journal on Legal Malpractice & Ethics (2018, Forthcoming). Available at SSRN: <https://ssrn.com/abstract=3083095>

or her working documents, to the Expert Witness who is ultimately appointed.

For this article, by way of example, I have assumed the role of Programme Delay Expert Advisor/Expert Witness.

### Early Expert Guidance

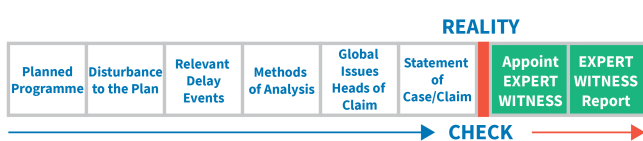
From my experience, the early involvement of an Expert Advisor, at the time when the project starts to encounter difficulties, offers significant benefits to the appointing party since it affords the claimant or the defendant a more practical understanding of:

- the project and the scope of work;
- the baseline programme and the as-planned intentions;
- the as-built programme of what actually happened;
- the effect and impact of events, and the extent of delay and/or disruption;
- the causes of the delay and the criticality of the delay;
- the notices of delay with reference to the relevant provisions of the contract; and
- the detailed particularisation required to support the claims and allegations.

It is essential to establish a sound basis from which to develop credible claims (or to defend claims) for delay and/or disruption, particularly where costs for prolongation, disruption and other time-related loss and expense are sought in addition to extension of time (EOT) entitlement. In addition, delay to non-critical activities also needs to be identified and understood, not for EOT, but for the assessment of costs.

### Late Expert Representation

When an Expert Witness is appointed late in the dispute process, the delays on the project will have already been prospectively and retrospectively analysed and so the effect and impact of the relevant delay events will already have been determined and the claims (for delay, disruption, costs, loss and expense) and the relevant defences will have already been developed and submitted. Often, by this stage, the parties have already established their entrenched respective positions.



The expectation of the appointing party is often that the Expert Witness will not only be able to support the statement of claim or defence as presented and submitted but, will also adopt a position that favours his or her client. More often than not, however, having been appointed at this late stage the Expert Witness, upon review of the pleaded claim or defence, has to deliver the sobering news that the position adopted by his or her client is unsupportable.

This late impartial reality check, particularly when on the claimant's side, often leads to a lowering of the claimant's aspirations, and is never welcome. On the rare occasion, the pleaded claim or defence is sufficiently credible to be adopted and supported by the Expert Witness. However, in my experience, this is more likely to occur on the defendant's side.

Some unscrupulous (or uninformed) Expert Witnesses (often referred to as 'hired guns<sup>2</sup>') may be willing to adopt and support cases that are exaggerated or inflated and which may be biased in favour of his or her client, despite the case as presented being unsupportable with very little chance of success and a high risk of failure.

### Expert Advisor Role

The engagement of an Expert Advisor early in the dispute process to impartially examine the issues on the project and the positions of the parties before formal claims progress too far, is likely to be advantageous and cost-effective in the long run.

Early engagement of an Expert Advisor is likely to assist parties in a number of ways. One particularly beneficial exercise, in my experience, is the provision of a realistic preliminary indication of the likely range of EOT outcomes, rating the potential success of each delay event. Based on the assessed strengths and weaknesses of the parties' positions, the Expert Advisor will be able to produce a risk assessment matrix, almost like an 'early warning' of any potential vulnerability or exposure. The early engagement of an Expert Advisor, is also likely to provide additional benefits including improvement of relationships, ensuring key issues are addressed as they arise, provide an ongoing dialogue, and ensure consistency of approach.

### Aim 'Big and High' Tactics

Claimants are usually intent on maximising their claims, based on the mind-set that, on average, they aim to secure approximately 50% of what they claim, with the rationale seemingly being, the higher the claim the greater

<sup>2</sup><http://www.bledenlex.com/training/publications/experts and their roles - A Hired Gun?>

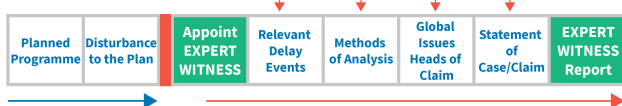
the potential return. In my experience there is some appeal to clients in this approach, and some claimants have had a degree of success in adopting this tactic. It is therefore not uncommon, for an Expert Witness, when acting for the claimant, to be faced with exaggerated and inflated positions which are both unrealistic and unsustainable. It should however be part of the Expert’s role in the early stages of appointment to manage his or her client’s expectations, which may involve significant reductions in the sums claimed to present a more realistic and sustainable claim going forward.

Hopefully, the Expert Advisor will be able to address this tactic early on and so prevent the proliferation of inflated claims. Often the point will need to be made to a claimant that it is both futile and inefficient to prepare exaggerated and unsupportable claims, which are likely to involve significant time and expense to produce but which are not credible and will inevitably fail in the fullness of time.

**Credible Cases**

It is advisable for a claimant to engage a credible and experienced Expert Advisor early on, to explain the futility of developing overstated and unsupportable claims, which only antagonise defendants, and create further confrontation. This early engagement would also likely improve the chances of the Expert Advisor securing an appointment to act as his or her client’s independent Expert Witness in the formal dispute resolution proceedings.

**Controlled and Informed Advice through the Dispute Process**



Defendants, in seeking to prepare credible and persuasive defence, are also likely to need the skills of an experienced Expert Advisor to objectively guide them to a fair and

reasonable assessment and evaluation of the claimant’s case.

From my experience, defendants generally wish to establish their potential exposure to the claims presented by the claimant. I have often been asked ‘where do we stand’ or ‘what’s the bottom line’ or ‘what is the claim really worth’ with defendants wanting to establish at an early stage which parts (if any) of the claim(s) they are responsible for. I have also been requested to provide an objective view on what would be reasonable entitlement and compensation, given the circumstances and what would be the expected outcome or likely settlement, taking into account the strengths and weaknesses of the cases put forward by both parties.

Personally, I consider, an Expert Advisor often has an easier task when engaged by the defendant and more readily can progress to being appointed as the defendant’s Expert Witness, often adopting and supporting the statement of defence in the process.

**Conclusion/Opinion**

It is my experience that many claims end up going to a formal hearing before an arbitral tribunal or in court because Expert Witnesses, rather than being impartial and independent, ‘tow the party line’ and make no legitimate attempt at a ‘reality check’ by removing the excesses in the quantification of inflated, over-stated and exaggerated claims, which may ultimately assist in narrowing the issues, reducing the differences between the parties and promoting a settlement.

The use of a credible Expert Advisor early on in the dispute process, particularly on the claimant’s side, would guide the dispute process and help produce credible claims, which allow the parties a better chance of negotiating a mutually acceptable commercial settlement, by being realistic, and so avoid a lengthy and potentially costly formal dispute.

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**CLIVE HOLLOWAY**

Senior Director  
Construction Solutions  
+852 3768 4717  
clive.holloway@fticonsulting.com