



Independence and conflict of interest in litigation

INTRODUCTION

All members of the Institute are expected to maintain high standards in their professional lives. The Institute produces guidance on various topics in the Members Handbook but that guide cannot cover all situations or deal with all the specific issues faced by members specialising in particular areas of practice. Members should therefore be prepared to apply not only the letter but also the spirit of the guidance and should in particular refer back to the fundamental principles that outline the minimum standards of behaviour expected of all members.

This practical perspective considers the principles concerning the role of the expert witness in civil and criminal litigation. In other jurisdictions, and in those not before the courts, it would be good practice to apply the standards and approaches outlined in this practical perspective.

INDEPENDENCE – CIVIL PROCEDURE RULES 1998 (CPR) REQUIREMENTS

CPR Part 35 states unequivocally that the overriding duty of an expert is to the court:

35.3.1: It is the duty of experts to help the court on matters within their expertise.

35.3.2: This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

The supplemental Practice Direction (PD35) adds: 'Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.' See also the document 'Guidance for the instruction of experts in civil claims' that came into effect on 1 December 2014.

These references to the duties of experts by the CPR, the Practice Direction and the Guidance emphasise the importance of the subject. The independence of the expert witness (together with integrity and objectivity) is the most important factor, although it is followed closely by relevant expertise.

INDEPENDENCE – CASE LAW – REQUIREMENTS OF INDEPENDENCE

There are many cases on the independence of experts but they are mostly re-workings of the leading case of the *Ikarian Reefer* [1993] 2 Lloyd's Rep. 68. The case of *Anglo Group plc v Winther Brown & Co Ltd* [2000] 72 Com. L.R.118. set out, in relation to independence, that:

- an expert witness should, at all stages in the procedure, on the basis of the evidence as he understands it, provide independent assistance to the court and the parties by way of objective unbiased opinion in relation to matters within his expertise. This applies as much

to the initial meetings of experts as to evidence at trial. An expert witness should never assume the role of an advocate; and

- the expert evidence presented to the court should be, and be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation.¹

The important strand running through the cases in this field is that the evidence given by an expert should be drawn from the facts and his professional experience and opinion, and not influenced by personal or business bias. It is also important that the expert's evidence should fulfil this requirement in appearance as well as in application. In the case of *EXP v Charles Simon Barker* [2017] the Court of Appeal explained that 'the adversarial system depended heavily on the independence of expert witnesses, on the primacy of their duty to the court over any other loyalty or obligation, and on the rigour with which experts made known any associations or loyalties which might give rise to a conflict.'

The case of *Kennedy v Cordia Services LLP* [2016] confirmed that a lack of independence or impartiality can go to the admissibility of expert evidence or to its weight.

Somewhat surprisingly in this context, in the case of *A Company v X, Y Z* [2020], the Court held that the defendant expert consultancy group owed a fiduciary duty of loyalty to the claimant arising out of engagement to provide expert services. Whilst the range of circumstances in which such a fiduciary duty may apply may be limited, the judgment could potentially preclude firms from accepting instructions on any dispute where a conflict of interest may arise and could prevent an appointed expert, or his firm, from ever acting against that appointing party on any other project.

Although the courts have not been forthcoming in providing examples of what constitutes independence, there are several examples of what does not. In general, the courts appear to expect an understanding of independent behaviour to be a fundamental component of professional behaviour in a field of expertise.

INDEPENDENCE – CASE LAW – FACTORS WHICH IMPAIR 'INDEPENDENCE'

Available guidance includes the following:

- being employed by one of the parties (*Field v Leeds City Council* [2000] E.G. 165 – the situation was undesirable but, if sufficient evidence was available as to the suitability of the expert, the evidence could be accepted although the court would weigh the expert's evidence in the light of his employment by one of the parties);
- acting as expert for a party who is a close friend (*Liverpool R.C. Archdiocesan Trustees Inc v Goldberg* [2001] 4 All ER 950) is not acceptable;
- acting as an advocate for one party during the case (*Gareth Pearce v Ove Arup Partnership Ltd and Others* [EWHC Ch; Lawtel 2 Nov 2001]) is not acceptable;
- remuneration being dependent on the outcome of the case is not acceptable; and

- receiving substantial remuneration from one of the parties (*SPE international Ltd v Professional Preparation Contractors (UK) Ltd* [2002] EWHC 881 (Ch)) is not acceptable.

Other considerations have been held to affect the apparent independence of an expert in some cases but not in others. These include:

- press articles in favour of one party over the other;
- persistently appearing for one party or type of party in a range of cases; and
- previous close connections with one or other party.

INDEPENDENCE – CRIMINAL PROCEDURE RULES 2020 (CRIMPR) REQUIREMENTS

CrimPR Part 19.2 states:

- An expert must help the court to achieve the overriding objective by giving opinion which is objective and unbiased and within the expert's area of expertise.

This duty overrides any obligation to the person from whom the expert receives instructions or by whom the expert is paid (CrimPR 19.2(2)). This duty includes an obligation to inform all parties and the court if the expert's opinion changes from that contained in a report served as evidence or given in a statement (Crim 19.2(3c)).

This effectively replicates in the criminal arena the obligations common in the civil area. It should be assumed that all of the requirements that apply in the civil area should be used in the criminal, and the guidance developed in the civil area would also apply to the criminal.

INDEPENDENCE – ICAEW PROFESSIONAL REQUIREMENTS

The ICAEW Code of Ethics combines integrity, objectivity, confidentiality and professional behaviour in its fundamental principles. These fundamental principles apply equally to all members in all their work. Section 100.1 reminds us that: 'A distinguishing mark of the accountancy profession is its acceptance of the responsibility to act in the public interest.' It 'provides a conceptual framework for applying those principles' which requires a professional accountant to identify, evaluate and address threats to compliance with the fundamental principles (100.2).

Integrity implies not merely honesty but fair dealing and truthfulness (110.1). A member's advice and work must be uncorrupted by self-interest and must not be influenced by the interests of other parties. Similarly, objectivity imposes an obligation 'not to compromise their professional or business judgement because of bias, conflict of interest or the undue influence of others' (120.1). The guide gives examples of possible threats to objectivity and independence. Those relevant to expert witness work include:

- **Financial or other self-interest conflicts** - This would include the situation where if one party won the case the expert could gain or suffer financially. This would expressly include the fear of loss of a client;

- **Advocacy** - This specifically prohibits acting as an advocate on behalf of an assurance client in litigation or disputes with a third party. This wording has led to debate about whether expert witness work is included in this form of advocacy. It is probably safest to assume that it does, and certainly it would be best practice to alert the client and their legal advisors to any such potential risk.
- **The familiarity or trust threat** - This includes too close a personal relationship with one party.

Although the ICAEW guidance considers possible safeguards to protect independence, the particular requirements of expert witness work for the courts suggest that the type of safeguards mentioned in the ethical guidelines may not suffice in an expert witness situation.

INDEPENDENCE – PRACTICAL CONSIDERATIONS

A practical way forward is to adopt a checklist approach. Each engagement will be different but the use of a checklist, such as the example at the end of this helpsheet, helps highlight possible threats to independence. Care should be taken to consider all the known circumstances of an assignment and not to rely on checklists alone.

It is important to remember that the independence that needs to be demonstrated is in respect of the lay client, i.e. the party to the action, and not the instructing solicitor. However, where there is a particularly close relationship with the solicitor, or an inappropriately large percentage of forensic work comes from one firm of solicitors, then this of itself could give rise to questions of independence.

If at any stage there is a question about an expert's ability to accept an expert witness appointment because of an independence issue, the first point of contact should be the instructing solicitor. It is in the instructor's interest to avoid a question over independence as this could arise at a late stage, have cost implications and weaken their case. However, care should be taken if the solicitor accepts the situation, as at the end of the day, it is the expert's reputation which may be under threat, and this is a matter of self-interest. In the event that discussion with the instructing solicitor does not resolve the difficulty, the expert has the option of approaching the court directly to ask for guidance, although this is not encouraged by the court and should be seen as an option of last resort.

Examples of threats to independence are:

- having already accepted appointment for one of the other parties to the case;
- another ongoing professional relationship with the client;
- a connection with the client, whether personal or firm related, which could suggest undue proximity;
- a fee arrangement whereby the amount of the fee is dependent on the outcome of the case; and

- a fee which will be of significance for the expert or his/her firm as compared to other fee income

Inexperience in the relevant area of professional expertise needed by the expert for the particular case in question.

The single most common area of discussion is a forensic assignment from an existing client. Many firms feel that this is inappropriate if there is an ongoing professional relationship with the client, and the FRC's Ethical Standard issued in December 2019 prohibits taking a forensic engagement from an existing audit client in most circumstances.

Furthermore, forensic work is likely to require a different ethos and a degree of detachment from the client, which may cause tension in the original relationship.

This is not to exclude the possibility of undertaking forensic work for an existing client, but particular care is necessary. The expert should be aware of the possible problem and the potential for criticism in court. As a minimum the expert's report should declare the nature of any existing relationship.

It is also important to remember that accepting the engagement may have an impact on other parts of the firm.

INDEPENDENCE – SOURCES OF HELP AND GUIDANCE

As mentioned above, where there is doubt about independence, the expert should consider approaching the instructing solicitor, and ultimately the court, for guidance. At an earlier stage the following options might provide assistance:

- the expert's own firm's guidelines on independence in relation to forensic and other areas of work;
- the Institute's Ethics Advisory Services by e-mail ethics@icaew.com or phone 01908 248 250; or
- the various expert witness bodies' help lines for their members.

Although there may be differing responses, the principles will be similar.

CONFLICTS OF INTEREST

There are few cases on conflicts of interest relating specifically to expert witness work. The first consideration is, 'Does a previous relationship compromise, or appear to compromise, the independence of the expert?' If it does, then it is an issue of independence, rather than of conflict of interest. The secondary question, 'Does a previous relationship that does not compromise the independence of the expert nevertheless raise a conflict of interest sufficient to prevent the acceptance of the instructions?'

Such a conflict arises for one of two reasons:

- confidentiality; or
- commerciality.

Confidentiality is a legal test. It concerns the possibility of information previously acquired about one client by the expert, or his firm, being used against that client's interests while working for a second client. Leading cases in this area include *Prince Jefri Bolkiah v KPMG* [1999] 2 WLR 215 and *Young and Others v Robson Rhodes and Another* [1999] 3 All ER 524. The result of these cases is that the onus is on the expert to prove that information gathered for a previous client could not, under any circumstances, come into the possession of a third party to the former client's disadvantage.

It is accepted by the court that the arrangements need not be systematic, but that they should be better than ad hoc. Examples might include staff working on a litigation assignment being in separate locations and refraining from professional contact, together with appropriate undertakings, and data separation and protection regimes.

However, in the case of *Meat Corporation of Namibia v Dawn Meats* [2011] the Court declined to exclude the evidence of an expert who had been consulted by the claimant and was subsequently instructed by the defendant. In the absence of a duty of loyalty, an obligation to preserve confidential and privileged information should not preclude an expert from acting, or giving evidence for, another party.

Commerciality is the test of whether undertaking the work is in the long-term interests of the expert or his/ her firm. For example, it might jeopardise a long-term relationship with an important client. Although this would not prevent acceptance of the work from a legal or ethical standpoint, the suitability of the appointment should be discussed internally before it is accepted.

The ICAEW Code of Ethics section 210, 'Conflicts of Interest', may prove useful in your considerations. It is also important to remember that conflicts of interest may arise between clients, and also between the firm and the client, although the later type of conflict will be rare.

EXAMPLE CHECKLIST

All partners have been circulated to check that they:

- have not accepted an appointment in respect of this case from any of the parties;
- do not have any ongoing professional relationships with any of the parties to this case;
- have not had any recent professional relationships with any of the parties to this case; and
- have not had any personal relationship with any of the parties to this case.

All members of the proposed team have been asked to state they:

- have not accepted appointments in respect of this case from any of the parties;
- do not have any ongoing professional relationships with any of the parties to this case;
- have not had any recent professional relationships with any of the parties to this case; and
- have not had any personal relationship with any of the parties to this case.

The expert has signed to confirm that:

- the proposed fee or fee structure is sufficient to allow proper consideration of the case;
- the parties to the case have been entered into the firm's database for all conflicts of interest;
- they are not aware of any other matters that might appear to compromise independence in this case; and
- only once all these requirements are satisfied should a letter of instruction be sent to the instructing solicitor for signature.

ETHICAL ADVICE

If you are ever in doubt as to whether or not your conduct is ethical, you should step back from the situation and analyse it. It often helps if you put your thoughts down on paper or take a second opinion. Section 100 of the Code of Ethics (paragraphs 100.16 – 100.20) includes a framework for ethical conflict resolution. This outlines a series of steps that can help you not only to identify the problem but also to resolve the ethical conflict. In resolving such ethical conflicts it is important that you make a file note to explain the rationale for your position. This will help if your conduct is later challenged.

ICAEW members, affiliates, ICAEW students and staff in eligible firms with member firm access can discuss their specific situation confidentially with the Ethics Advisory Service on +44 (0)1908 248 250, via webchat or via e-mail ethics@icaew.com.

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