Selection of Expert Witnesses by Australian Legal Practitioners: A Pilot Empirical Study

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by

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DECLARATION

I hereby certify that the material which is submitted in this thesis towards award of **Masters of Business Administration (M.B.A.)** is entirely my own work and has not been submitted for any academic assessment other than for part fulfilment of the award named above.

_____ _____

Picha Djohan Date

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Finally, I dedicate this thesis to Eddy Djohan, my father, whose belief in the power and value of study inspired me as a young child as it still does today.

ABSTRACT

Adversarial bias or partisanship has continued to be a focus of angst, criticism and reform in all Australian and Anglo-American legal systems.

The 'adversarial imperative', that is the desire of a party and his or her lawyer to win, creates a tension for both lawyer and expert witness in the discharge of their respective duties of independence and impartiality owed to the court.

Research in Australia to date on the use of expert evidence in litigation provides only limited exploration of the selection criteria employed by Australian legal practitioners in the selection of expert witnesses. This study addresses that deficit by providing preliminary empirical evidence on the views of lawyers when selecting expert witnesses to provide opinion evidence in litigation.

This study employed a self-completion survey distributed to 100 Australia senior legal practitioners receiving a valid response rate of 45%. Data were analysed using SPSS to obtain descriptive statistics for the distribution of frequencies of the responses received.

The results show that despite the paramount duty of an expert witness to the court to provide impartial and unbiased opinion evidence, most lawyers do not rank 'impartiality' as the most sought after attribute in an expert witness. The ability of a well credentialed, reputable and experienced expert witness to persuade a court to adopt his or her opinion appear to be the defining selection criteria for most of the lawyers who participated in this study.

TABLE OF CONTENTS

DECLARATION I

ACKNOWLEDGEMENTS II

ABSTRACT III

1 INTRODUCTION 1

1.1 BACKGROUND 1

1.2 LIMITATIONS OF EXISTING LITERATURE 2

1.3 OVERVIEW OF THE CONTEXT OF STUDY 3

1.4 AIMS OF THE STUDY 4

1.5 METHODOLOGY OF THE STUDY 5

1.6 CONTRIBUTION MADE BY THE STUDY 5

1.7 STRUCTURE OF THESIS 6

2 LITERATURE REVIEW 7

2.1 INTRODUCTION 7

2.2 BACKGROUND 7

2.3 PREVIOUS STUDIES IN THE UNITED STATES OF AMERICA 10

2.4 PREVIOUS STUDIES IN AUSTRALIA 12

3 CONTEXT 16

3.1 INTRODUCTION 16

3.2 A BRIEF HISTORICAL PERSPECTIVE 16

3.3 OBLIGATIONS OF AUSTRALIAN LEGAL PRACTITIONERS 23

3.4 OBLIGATIONS OF EXPERT WITNESS 26

4 METHODOLOGY 35

4.1 INTRODUCTION 35
4.2 RESEARCH JUSTIFICATIONS 35
4.3 RESEARCH DESIGN 36
4.4 RESEARCHER 37
4.5 SELECTION OF PARTICIPANT LEGAL PRACTITIONERS 37
4.6 ANALYSIS OF DATA 38

5 SURVEY FINDINGS AND DISCUSSION 39

5.1 INTRODUCTION 39
5.2 RESPONSE RATE 40
5.3 PROFILE OF RESPONDENTS 42
5.4 FREQUENCY OF USE OF EXPERT EVIDENCE 45
5.5 INVOLVEMENT IN SELECTION OF EXPERT WITNESSES 46
5.6 ATTRIBUTES AND CHARACTERISTICS OF EXPERTS 47
5.7 USEFULNESS OF EXPERT EVIDENCE 53
5.8 BIAS AMONGST EXPERT WITNESSES 54
5.9 DIFFICULTIES IN COMPREHENSION 56
5.10 EXPERTS VENTURING OUTSIDE OF THEIR EXPERTISE 57
5.11 NON-RESPONSIVENESS BY EXPERT 58
5.12 EXPERT OPINION CONTRARY TO CLIENT'S POSITION 59
5.13 FURTHER TRAINING OF EXPERTS 62
5.14 FURTHER TRAINING OF LEGAL PRACTITIONERS 64
5.15 SETTLING OF EXPERT REPORTS BY LEGAL PRACTITIONERS 66
5.16 SATISFACTION WITH IMPARTIALITY EXHIBITED BY EXPERTS 69
5.17 ADDITIONAL COMMENTS 69

6 CONCLUSION 71

6.1 INTRODUCTION 71

6.2 SUMMARY OF THE FINDINGS 71

6.3 CONCLUSIONS OF THE FINDINGS 74

7 REFERENCES 76

7.1 REFERENCES 76

7.2 ENDNOTES 81

APPENDIX A 80

APPENDIX B 88

TABLES

TABLE 2-1 CHARACTERISTICS LAWYERS CONSIDER WHEN EMPLOYING EXPERTS (SHUMAN, CHAMPAGNE AND WHITAKER, 1991) 12

TABLE 3-1 STATUTORY REGULATION OF EXPERT EVIDENCE 29

TABLE 5-1 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 1 42

TABLE 5-2 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 2 42

TABLE 5-3 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 3 43

TABLE 5-4 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 4 44

TABLE 5-5 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 5 44

TABLE 5-6 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 6 45

TABLE 5-7 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 7 46

TABLE 5-8 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 8 47

TABLE 5-9 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 9 51

TABLE 5-10 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 9 ATTRIBUTES OF EXPERTS RANKED NO. 2-12 52

TABLE 5-11 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 10 53

TABLE 5-12 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 11 56

TABLE 5-13 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 12 57

TABLE 5-14 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 13 58

TABLE 5-15 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 14 59

TABLE 5-16 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 15 60

TABLE 5-17 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 16 61

TABLE 5-18 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 17 62

TABLE 5-19 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 18 63

TABLE 5-20 COMPARISON TABLE – AREAS FOR FURTHER TRAINING OF EXPERTS 64

TABLE 5-21 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 19 65

TABLE 5-22 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 20 65

TABLE 5-23 FREQUENCY TABLE – QUESTION 21 67

TABLE 5-24 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 22 67

TABLE 5-25 THE DISTRIBUTION OF THE FREQUENCY OF RESPONSES TO QUESTION 23 69

FIGURES

FIGURE 5-1 INVOLVEMENT OF LEGAL PRACTITIONERS IN THE ENGAGEMENT OF EXPERTS 65

FIGURE 5-2 DESIRED ATTRIBUTES IN EXPERT WITNESSES 49

1 INTRODUCTION

1.1 Background

Kipnis describes legal ethics, *"as an area of ethical and jurisprudential inquiry',* that '*asks what principles lawyers must conform to, what ideals they must strive to achieve, and what professional review processes must be instituted in order to assure that the bar fairly achieves the two critical responsibilities it has assumed in the system of adjudication as we have created it"* (1991,p.573). Further emphasising the deontological roots of legal ethics, Wendel argues that within "*a moderately decent society, the ethics of lawyers acting as lawyers has to be oriented toward the law, not morality or justice*". (2012,p.740)

It is no surprise therefore that providing expert evidence within an adversarial legal system can be both professionally and ethically challenging. Expert witnesses bring with them the ethics and value systems of their own disciplines into a legal environment that is dominated by ethics of a different kind (Candilis, Weinstock & Martinez, 2007). Once an expert's opinion *'has been expressed and justified, the lawyer will select the most persuasive and cogently constructed opinion with which to convince the court'* (Beran, 2009, p.133).

The 'adversarial imperative', that is the desire to win by a party and his or her client, is alleged to be one of the causes of partisanship on the part of expert witnesses (Davies, 2005) even in a legal context that includes codes of conduct containing requirements and duties for experts to observe. Central to these codes of conduct are the concepts of impartiality and independence.

Lawyers involved in litigation also owe to the court a duty of independence. As a matter of practice, lawyers are heavily involved in the selection and appointment of expert witnesses on behalf of clients. It is of significant interest therefore to enquire to into the attributes or characteristics that legal practitioners seek in those experts appointed on behalf of their clients. The specific hypothesis that the study seeks to test is that '*Impartiality is not the most important attribute in an expert that lawyers seek when engaging an expert witness.'*

To examine the selection criteria used by Australian legal practitioners and to test the specific hypothesis, this study will first review literature on the use of and management of expert evidence. It will then report on and analyse the data received from a survey of 45 Australian legal practitioners to identify the preferred and predominant selection criteria used by legal practitioners to select expert witnesses to provide expert opinion evidence in litigation. To provide a basis for this examination, this chapter is structured as follows:

- **Section 1.2** presents the limitations of the existing literature
- **Section 1.3** provides an overview of the context of this study;
- **Section 1.4** presents the aims of this study;
- **Section 1.5** presents the methodology used;
- **Section 1.6** describes the contribution to knowledge and the significance of this study
- **Section 1.7** describes the structure of this thesis.

1.2 Limitations of Existing Literature

Although there is a plethora of existing literature on the use, management and problems associated with expert witnesses and their evidence, there is very little literature on what attributes lawyers focus on when selecting an expert witness.

In the existing literature, relevant to the Australian legal system, authors have examined the attitudes of Australian judges and magistrates (Freckelton, Reddy and Selby, 1999 and 2001 respectively), however no study has been conducted that focuses on the relationship between instructing lawyer and expert witness and specifically on what attributes lawyers seek when appointing an expert. Further, the context in which lawyers appoint experts to provide evidence in litigation is regulated by both common law duties and statutory duties owed by both lawyer and expert alike to the court.

Given the focus of previous Australian studies on the use and management of expert evidence, this research will provide an insight into the selection criteria that Australian legal practitioners employ when selecting an expert to provide evidence on behalf of a client.

1.3 Overview of the Context of Study

Not long after the development and proliferation of the modern expert witness in civil matters, criticism came from all quarters; lawyers, judges, the public and even experts themselves opined that the system for adducing expert evidence was simply not functioning effectively (Golan, 2004). Partisan pressure, or adversarial bias, was seen to have its structural roots in the fact that experts were paid by the side for whom they testified (Mnookin, 2007).

Following the publication of Lord Woolf's far-reaching final report, *Access to Justice on the Civil Justice System in England and Wales* (1996), far reaching civil procedure reforms were implemented in Australia to better manage expert evidence that ranged from changes to civil procedure legislation to the

implementation of case management practices addressing the issue, or a combination of both methods. These reforms make it clear that both advocates and expert witnesses owe a similar duty to a court when involved in litigation. This duty requires both stakeholders to ensure that they act independently of their client to properly inform the court of the real issues to be determined and to ensure that the court is not misled.

While the expectation of the judiciary of an expert providing opinion evidence in a court is to not be partisan to any one party's position, this may not be the prevailing quality that lawyers seek when selecting an expert on behalf of a client. In short an adversarial legal system asks expert witnesses to play conflicting roles (Shuman, Champagne and Whitaker, 1994). This selection process will take into consideration the reputation, experience, litigation history (including previous opinions expressed on similar facts), courtroom presence and ability to counter any opposing expert of the nominated expert.

1.4 Aims of the Study

The aims of this study were to:

1. Examine the legal context in which legal practitioners select expert witnesses;
2. Identify the attributes in experts sought by legal practitioners when selecting an expert witness;
3. Identify the predominant attribute in experts sought by legal practitioners;
4. Examine whether legal practitioners experienced bias on the part of experts that they appointed;
5. Examine whether legal practitioners desired further training in how to use and manage expert evidence;

6. Examine the level of involvement legal practitioners had in the final content of expert witness statements; and
7. Contribute to the academic knowledge base regarding professional ethics.

1.5 Methodology

In order to collect empirical data regarding the views of legal practitioners regarding the use and management of expert evidence, this study employed a written survey instrument distributed to 100 legal practitioners selected by the researcher. Analysis of the responses (provided anonymously to the researcher) was conducted using SPSS software package and descriptive statistics were used to identify the:

(1) profile of the respondents;
(2) attributes that lawyers sought in an expert witness; and
(3) extent to which lawyers had experienced bias on the part of expert witnesses that they had engaged.

Additional comments and observations provided by respondents to the researcher in addition to the responses to the questionnaire have also been included and discussed where relevant in the findings of the study.

1.6 Contribution made by the Study

As empirical examination of the views of legal practitioners on the use and management of expert evidence has been limited in Australia and no previous study has been undertaken on the selection criteria employed by legal practitioners when selecting and appointing expert witnesses, this study (even though based on

a convenience sample) provides valuable data to the legal profession and those involved in the administration of justice in Australia.

1.7 Structure of Thesis

This thesis consists of seven parts, beginning with **Chapter 1** that introduces the topic and describes the background to the thesis.

Chapter 2 reviews existing literature on the use and management of expert evidence in litigation that focuses on the involvement of lawyers in the presentation of such evidence. The limitations of the existing literature is also discussed.

Chapter 3 provides a brief historical perspective on the use and management of expert evidence in the Anglo-American legal systems and also identifies recent legal reforms in Australia that seek to provide direction and guidance to the use of expert evidence in litigation before Australian courts.

Chapter 4 describes the methodology used in the study, including the sample selection and the data collected.

Chapter 5 presents the empirical data collected by the study and discusses the implications of that data against the background of previous studies undertaken by other researchers.

Chapter 6 provides a summary of the findings of the study and the conclusions that are derived from the study. It also discusses the limitations of the study and future research directions that may be undertaken to further the topic.

2 LITERATURE REVIEW

2.1 Introduction

The purpose of this chapter is to review previous studies that are relevant to the topic of this thesis and the study described therein. Whilst the literature review that follows does not purport to be an exhaustive examination of the existing literature on the use and management of expert evidence in litigation in Australia it is extensive.

This chapter is structured as follows-

- **Section 2.2** contains a brief examination of the literature on the existence of the 'adversarial imperative';
- **Section 2.3** reviews previous studies in the United States of America that involved the examination of the views of lawyers regarding desirable characteristics in expert witnesses; and
- **Section 2.4** reviews previous studies in Australia that involved the examination of the Australian judiciary and magistracy on the use and management of expert evidence.

2.2 Background

In Australia, there has been little empirical examination of the criteria used by lawyers in the selection of experts to provide expert witness evidence in either civil or criminal litigation. Further, there is little research in Australia that examines whether, and to what extent, lawyers truly expect their chosen expert to be independent and provide impartial testimony in civil or criminal proceedings.

Beran (2009) argues that an expert's technical knowledge provided to assist a court in the administration of justice, does not deny a lawyer the right to use such an opinion to underscore his or her client's case. This dynamic has been widely held to contribute to claims of expert partisanship in litigation.

This dynamic is described by Justice Davies[1](2005) as the 'adversarial imperative' operating as an 'overlay' in litigation as follows –

> *The adversarial imperative, by which I mean no more than the strong urge of a client and his or her lawyer to win, requires the lawyer to 'sell' that client's version of the truth to the judge or jury. This includes expert 'truths' and it is the expert on whom the client and lawyer rely to sell their version of the 'truth' to the jury. The question which the expert is asked by the client's lawyer is not 'what is your opinion on this question?' but, in the first place, 'can you give me an opinion which will provide my 'truth'?' and then 'how can you express your opinion in a way which will best prove my 'truth'?'. That is not what is said. It is usually a good deal more subtle than that. But that is what is implicit in what is said. And the expert is not engaged unless he or she answers the first of those questions in the affirmative.'*

Lawyers are the 'scouts' that put professional expert witnesses in contact with parties requiring their services. Where a client's case cannot be made solely on the acceptance of facts admitted into evidence, and an inference or opinion is required to bridge that gap between the facts and the desired conclusion, lawyers look to 'join the dots' by examining whether the inference can be drawn through a specialised or expert 'lens' and if so, embark upon the process of selection of the appropriate person to undertake that task. There should be nothing controversial

or shocking about this practice - the need to 'join the dots' is what led to the development of special juries and court appointed experts since before medieval times.

The professionalisation of expert evidence, and the establishment (and healthy growth) of a litigation support industry, has now made things a little easier for the advocate and predicable for the judiciary –

> *'Many experts are predictable in the sense of it is easy to know in advance what tack they will take. They are honest, but not necessarily objective.'*
>
> *(Freckelton, Reddy and Selby, 1999, p.26)*

As a matter of practice then, the first of Justice Davies' questions do not always have to be asked, even subtly. Due to polarised but mostly legitimately formed views held by professional expert witnesses within specialised jurisdictions, an experienced advocate can often nominate with some degree of accuracy an expert that will express opinions that will favour his or her client's position. This selection process will take into consideration the reputation, experience, litigation history (including previous opinions expressed on similar facts), courtroom presence and ability to counter any opposing expert of the nominated expert.

While the expectation of the judiciary of an expert providing opinion evidence in a court to not be partisan to any one party's position, this may not be the prevailing quality that lawyers seek when selecting an expert on behalf of a client. In short an adversarial legal system asks expert witnesses to play inconsistent roles (Shuman, Champagne and Whitaker, 1994).

2.3 Previous Studies in the United States of America

At least in the United States, impartiality of an expert is not a highly prioritised characteristic considered advantageous by lawyers according to the findings of Champagne, Shuman and Whitaker. In two separate studies (1991 and 1994) Champagne, Shuman and Whitaker undertook empirical examinations of the use of expert witnesses in American courts.

The first part of these studies *An Empirical Examination of the Use of Expert Witnesses in American Courts*, consisted of a questionnaire survey of experts, lawyers, judges and jurors in Dallas County over a three month period in 1988. This study was to later be identified as the pilot study and the survey was distributed to 13 judges, 172 lawyers, 92 experts and 480 jurors involved in 90 civil trials during the three month period in 1988. The response rate for this pilot study was 76% judges, 40% lawyers, 45% experts and 24% jurors.

The 1991 pilot study found that, in Dallas –

- Civil litigation is not dominated by cadre of professional witnesses supplied by referring firms and reaping excessive financial rewards;
- Many expert witnesses testify frequently but do not appear to be tied to a particular lawyer;
- Fees charged for being an expert witness are consistent with non-witness expert work;
- Conflict exists between the adversarial system and the scientific method, with lawyers desiring strong favourable experts;
- Comparison shopping for experts was occurring;

- Lawyers want expert witnesses that are attractive, personable, articulate, strong credentialed, willing to be coached to draw conclusions that support their position;
- Referral firms have a limited role in referring an expert to a lawyer. Lawyers reported that when selecting expert witnesses, 37% take advice from other lawyers, 37% select from their own personal contact with experts, 27% take advice from other professionals in the relevant field.
- 45% of experts reported that lawyers commonly coached experts about their testimony;
- 12% of experts reported that they have experienced lawyers attempting to coach them to give evidence for which no scientific basis existed;
- 56% of experts reported that lawyers had coached them to be less tentative with providing their expert opinion.

The 1994 study, *An Empirical Examination of the Use of Expert Witnesses in the Courts – Part II*, based on a questionnaire survey was conducted in courts of general jurisdiction in Baltimore, Seattle and Tuscon. The overall response rate for this study was 70% judges, 42% experts, 30% lawyers and 19% jurors.

Insofar as the 1994 study examined lawyers' attitudes towards the use of expert witnesses, this study found that in Baltimore, Seattle and Tuscon –

- 42% of lawyers acknowledged that they did not assume impartiality on the part of the experts that they engaged;
- 65% agreed that if an expert was willing to be biased to the lawyer's position they would be inclined to retain that expert again;
- 43% of lawyers acknowledged that they shopped for experts;

- 65% of lawyers thought experts were willing to be coached about how their evidence should be presented;
- 39% of lawyers thought that experts would sway their evidence in favour of the side that paid for their services;
- 20% of lawyers thought that experts were hired guns and '*would say anything if their fee was large enough*' (Shuman, Champagne and Whitaker, 1991, p.202).

Table 2-1 Characteristics Lawyers Consider When Employing Experts (Shuman, Champagne and Whitaker, 1991, p.387)

Rank	Characteristic	Percent
1	Qualification/expertise	54
2	Appearance/demeanour	31
3	Honesty/integrity	30
4	Knowledge	26
5	Articulate/persuasive	21
6	Support for lawyer's position	21
7	Cost	14
8	Credibility	13
9	Preparation	10
10	Strength of opinion	10
11	Impartiality	7
12	Availability	4
13	If other side uses expert	4

2.4 Previous Studies in Australia

Following the implementation of the Australian Federal Court's Practice Direction in 1998 setting out guidelines for expert witnesses[2], a survey of 478 judges in Australia was conducted by Freckelton, Reddy and Selby, '*Australian Judicial*

Perspectives on Expert Evidence: An Empirical Study'.

That survey had no explicit preconceptions and did not seek to test a hypothesis. It was the first time that the whole of the Australian judiciary had been surveyed on any issue. The stated aim of the survey was to determine what Australian judges collectively thought about a number of controversial and non-controversial matters concerning expert evidence and it took place at a time when there existed argument that the legal profession should take responsibility for problems with expert evidence and that there existed a need for further training of lawyers in the use of emerging technologies and effective preparation for cross examination of experts (Cooper (1998) cited in Freckelton, Reddy and Selby, 1999).

The response rate of Australian judges was 51.05%, however as the study focussed on judges with trial experience, Freckelton, Reddy and Selby reported that the response rate could be approximated to be closer to 60% when the responses of judges that had only ever had appellate court experience were removed.

The study of Australian judges reported the following findings regarding the opinions of judges about bias and partisanship on the part of expert witnesses–

- 35% identified bias of experts as the most serious problem with expert evidence;
- 28% said they identified bias in experts 'often';
- 68% said that they encountered bias in experts 'occasionally';
- 85% said that they encountered partisanship (defined to be less than bias) in expert witnesses;

- 40% said that the partisanship encountered was a significant problem for the quality of fact-finding in their court.

In addition, most judges who expressed an opinion saw a value in facilitating experts conferring with one another before trial and in agreeing on what is an issue in dispute and what is not.

Freckelton, Reddy and Selby's study of Australian judges identified that there was a clear diversity of response to the survey instrument and the while the '*law yearns for absolute answers to complex questions, most disciplines have within them significant, legitimate differences of approach"* (1999, p.116*).*

Freckelton, Reddy and Selby continued their empirical investigation of judicial attitudes towards the use of expert evidence in their 2001 study of Australian magistrates, *'Australian Magistrates' Perspectives of Expert Evidence: A Comparative Study.*

In this study, the views of the Australian magistracy about expert evidence and its courtroom presentation were investigated. Again, the survey on which that study focussed was not based on any explicit preconceptions, despite availability of the data regarding the attitude of Australian judges from their earlier 1999 study. The authors stated that a particular aspect of the magistrates' survey was that it provided them with an opportunity to build on the results of the survey of judges reported on in 1999 and to enable a comparison between the answers given by magistrates and judges to comparable questions.

The response rate of Australian magistrates (of which at the time there were 401 in Australia) was 51% (n=203).

The study of Australian magistrates reported the following findings regarding the opinions of magistrates about bias on the part of expert witnesses–

- 19.80% said they identified bias in experts 'often';
- 71.57% said that they encountered bias in experts 'occasionally';

An additional phase of the Freckelton, Reddy and Selby expert evidence project originally contemplated was the survey of litigation lawyers. Such a survey was considered to have the *'potential to add another important perspective upon the litigation process in Australia to which expert witnesses contribute*" (1999, p117*)*.

To date that survey has not been undertaken and accordingly this survey of legal practitioners undertaken as part of this project provides an important perspective to the use of expert witness evidence in Australian litigation.

3 CONTEXT

3.1 Introduction

The purpose of this chapter is to -

- describe the emergence and development of the use of expert evidence in the United Kingdom and Australian legal systems;
- describe the emergence of partisanship or adversarial bias by expert witnesses;
- describe the historical and legislative background to the existence of the duties owed by an expert witness and a lawyer to the court; and
- identify the civil legislation and court imposed practice directions or policies that apply at the Federal and State levels in the Australian legal system.

This chapter is structured as follows-

- **Section 3.2** contains a brief historical perspective that provides background to the emergence and use of expert evidence;
- **Section 3.3** examines the content, and sources, of the lawyer's paramount duty owed to the court;
- **Section 3.4** examines the content, and sources of duty owed to the court y an expert witness to be impartial and independent.

3.2 A Brief Historical Perspective

Prior to the emergence of the professional expert witness, the common law legal system had three primary ways in which to make use of persons with specialised knowledge in the adjudication of matters –

1. *Special juries* - these were juries made up of persons with particular knowledge or qualifications relevant to the issues requiring adjudication and were assembled under specific writs (Oldham, 1983).

   From medieval times, it was not uncommon for juries to be made up of persons of a particular trade guild when determinations needed to be made about commerce or for juries to be made up of 'matrons' when determinations were required to be made about a woman's pregnancy or childbirth (Mnookin, 2007).

   Therefore, instead of having experts inform the jury, there were juries of experts that were both the finders of fact and the providers of specialised opinion (to themselves). Such expert jurors were seen as impartial and not partisan to either party.

   > '*…they might have better Knowledge of the Matters in Difference which were to be tried, than others could, who were not of the Profession."*
   >
   > (Learned Hand, 1901, p. 42)

2. *Court Experts or Assessors* – called by the court to assist the court and not the jury. The practice of deploying an independent expert nominated by the court to assist in the courtroom date back to as early as 1299 (Golan, 2004).

   It is to be noted that until the mid 18th century, there was no formal presentation of witnesses at all to the jury and if the jury needed to supplement information not known to it, members of the jury sought it out themselves from wherever it was available. In addition, the court could, and often did, summon skilled persons before it, to provide advice where its own

knowledge was lacking. If, the court accepted the advice given, and it was not assured that this would be the case, it put the court assessor's opinion before the jury as a fact to be taken into consideration in the final determination (Golan, 2004).

Interestingly, it was common for the English courts in the 15th, 16th and even 17th century to seek the advice of 'grammarians' regarding not only the meaning of 'doubtful words' in commercial instruments, but also in pleadings (Learned Hand, 1901).

3. *'Expert' Witnesses* – akin to modern day practices, parties called witnesses with relevant expertise to support their case. Such witnesses were not uncommon in 18th century English courtrooms. There were no special procedures to identify them or treat them as experts or specialist witnesses. An expert witness at that time, testifying for a party, was not differentiated from a common or lay witness.

Although it is the usual and necessary modern practice of calling witnesses to give testimony as to relevant facts of a matter in dispute, it was not until the middle of the 15th century that the summoning of witnesses before juries became a practice at all and it was some time after that before it became a formalised process before the courts (mid 18th century) (Learned Hand, 1901).

Gradually, rules about what a witness could and could not say evolved as a product of judges controlling the verdict after evaluating the mental calibre of the jury (Stone and Wells, 1991). Judges, utilising the then manifestation of case management developed, through successive decisions, the rule prohibiting witnesses from testifying as to mere opinion or as to a conclusion on the facts in

evidence before the court. Witnesses were to inform the court only of what they heard and saw. This rule was attributed to a desire to control the length of trials by leaving out irrelevant matters.

By 1807, the *admissibility* of expert opinion evidence was distinctly ruled upon by Lord Ellenborough in *Beckwith v Sydebotham* ((1807) 1 Camp 116, 170 ER).

The facts and relevant finding of Lord Ellenborough in that case are worth briefly recounting given their relevance to the topic of this thesis. The matter involved the seaworthiness of a ship and a maritime insurance policy. The defendant called several surveyors, who although had not seen the ship in question, testified from facts already in evidence as to their opinion as to its seaworthiness. Counsel for the plaintiff objected on the basis that it was the jury's job to make a determination on the facts and not for the defendant's surveyors to provide an opinion on those same facts. Lord Ellenborough overruled the objection holding, in respect of the surveyors' testimony, –

> *'As the truth of the facts stated to them was not certainly known their opinion might not go for much; but still it was admissible evidence. The prejudice alluded to might be removed by asking them in cross examination, what they should think upon the statement of facts contended for on the other side."*

Therefore, by the beginning of the 19th century, the expert witness was very much a participant in the adversarial style of litigation that had developed over the previous 100 years. Expert testimony had become a permissible and useful tool used by judges to shield verdicts from the fragilities attributed to juries (Freckleton

and Selby, 2013) and a powerful tool of persuasion of the advocate investing in those very same fragilities.

Not long after the development and proliferation of the modern expert witness in civil matters, and perhaps not surprisingly, there emerged misgivings about the independence of these specialised witnesses. This criticism came from all quarters; lawyers, judges, the public and even experts themselves opined that the system for adducing expert evidence was simply not functioning effectively (Golan, 2004).

Wollman proffered that expert testimony '*is the subject of everybody's sneer, and the object of everybody's derision. … The public has no confidence in expert testimony'* (1899, p.20).

The two main criticisms at that time directed at expert evidence were –

- that partisan pressure corrupted expertise; and

- the regularity and extent to which experts contradicted each other and themselves (Mnookin, 2007)

Partisan pressure, or adversarial bias, was seen to have its structural roots in the fact that experts were paid by the side for whom they testified (Mnookin, 2007).

Historically until 1562, a witness (whether common or specialised) was not paid for providing evidence as it was considered the duty of all members of the community to assist in the administration of justice. From 1562 to 1843, all witnesses were given their reasonable charges according to their calling. Although this enabled expert witnesses to be compensated at a higher rate than witnesses with no

expertise, it only entitled expert witnesses to a basic statutory fee (Freckelton and Selby, 2013).

From 1843, expert witnesses were entitled to special fees for provision of their evidence (both oral and written) as a common law right (*Webb v Page* (1843) 174 ER 695). Despite the law recognising an expert's common law right to be remunerated (rather than compensated) for participation in litigation, this right did little to subdue complaints of partisanship.

The harshest expression of adversarial bias is arguably reflected in another of Wollman's observations (1899, p.28) –

> *'The public believes that expert testimony is a hired, a purchased commodity, and that the number of experts on each side is measure by the size of the purse of the respective sides. That is just as easy to obtain the same expert on one side as on the other, if you only 'have the price''. That the expert has no conscientious scruples about the side he is on. That he doesn't think about the side, only the money.'*

A less professionally offensive form of the complaint is that even experts of the highest integrity are affected unconsciously by a desire to please those who pay their bills.

> *"Now it is that his mind, however honest he may be should be biased in favour of the person employing him and accordingly we do find such bias. I have known the same thing apply to other professional men, and have warned young counsel again that bias in advising on an ordinary case. Undoubtedly there is a natural bias to do something serviceable for those*

> *who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them."*
>
> (*Lord Arbinger v Ashton* (1873) 17 LR Eq 358 at 373-4)

Adversarial bias or partisanship of professional expert witnesses has continued to be a focus of angst, criticism and reform in all Australian and Anglo-American legal systems.

Arguably it was the continued ineffective use of expert evidence in litigation, in the United Kingdom that laid the foundations for the findings in Lord Woolf's far-reaching final report, *Access to Justice on the Civil Justice System in England and Wales* (1996). That report concluded, amongst many other things, that people were being kept out of litigation, in part, because of the substantial costs involved due to the use of expert evidence and the proliferation of the litigation support industry of professional expert witnesses.

Although wanting to 'keep the best of the adversarial tradition', a primary recommendation of that report was to bring the use of expert evidence under the direct control of the court and preferably through a single court appointed expert. In Lord Woolf's view a single expert is more likely to be objectively of assistance to a court.

As a consequence of the findings of Lord Woolf's *Access to Justice* report, the most far-reaching reforms to civil procedure rules in England and Wales in 125 years were implemented. The Civil Procedure Rules (Part 35) set out new requirements for expert testimony, both oral and written, based upon an

unambiguous statement that the duty of the experts is to help the court within the confines of his or her expertise and that obligation overrides any obligation to any other person.

The fact that expert partiality was considered to be an international legal issue requiring redress is demonstrated by the reforms across a number of international jurisdictions following England's lead, including Australia.

Reforms in the United Kingdom[3] and Australia [4]to better manage expert evidence range from changes to civil procedure legislation to the implementation of case management practices addressing the issue, or a combination of both methods.

Both advocates and expert witnesses generally owe a similar duty to a court when involved in litigation requiring both stakeholders to ensure that they act independently of their client to properly inform the court of the real issues to be determined and to ensure that the court is not misled.

3.3 Obligations of Australian Legal Practitioners

As a matter of professional regulation, the source of an Australian legal practitioner's obligations and responsibilities are the general law and statute law including professional conduct rules.

An 'advocate' has a common law duty to the court, and as described by Chief Justice Mason in 1988, that duty is paramount –

> *'The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his*

client. Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case.

…The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. … [A] barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case.'[5]

This paramount duty to the court '*carries with it a level of independence'* (Dal Pont, 2016, p.549) and similarly to the duty owed by an expert witness to the court, a lawyer is not a 'hired gun' for a party.

In *Rondel v Worsely* ([1969] 1 AC 191 at 227), Lord Reid described the lawyer's duty to the court as –

'Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the

standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court.'

Apart from lawyers in Victoria and New South Wales, that are regulated under the Legal Profession Uniform Law (since 1 July 2015), the legal profession in Australia is still essentially regulated on a state and territory basis. Even though there are no national professional conduct rules applying to legal practitioners, most jurisdictions have adopted some form of the Law Council of Australia's *Model Rules of Professional Conduct and Practice (2002)* with the effect that the professional conduct rules now applying to Australian lawyers are largely uniform.

The model rules and those on which they are based, all impose a duty on a practitioner not to act as a mere mouthpiece of their client or the instructing practitioner, and to make independent forensic judgments in the conduct of litigation.[6] Furthermore, a practitioner must not suggest, or condone another person suggesting in any way to any prospective witness (whether expert or lay) the content of any particular evidence that the witness should give at any stage in the proceedings.[7]

A practitioner does not breach the professional conduct and practice rules by-

- questioning and testing the version of evidence to be given by a prospective witness; or
- drawing the witness' attention to inconsistencies or other difficulties with the evidence,

but must not coach or encourage the witness to give evidence different from the evidence the witness believes to be true.

In most jurisdictions, including the Federal jurisdiction, legislation governing civil procedure, specifically imposes obligations and duties on practitioners in the conduct of litigation that largely reflect the professional conduct and practice rules applying to legal practitioners in Australia.

3.4 Obligations of Expert Witness

An expert witness' obligations and responsibilities in Australia are also found in the common law and have been embodied in statute law and rules of court.

Well before Lord Woolf delivered his findings, a series of English decisions had endorsed a common law 'code of ethics' for expert witnesses.

The most quoted summation of this code is found in the judgement of Justice Cresswell in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1995] 1 Lloyd's Rep 45 at 496 –

> *The duties and responsibilities of expert witnesses in civil cases include the following-*
>
> 1. *Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (Whitehouse v Jordan [1981] 1 WLR 246 at 256).*
>
> 2. *An expert witness should provide independent assistance to the court by way of an objective unbiased opinion in relation to matters within his expertise (see Polivitte Ltd v Commercial Union Assurance Co PLC [1987]*

1 Lloyd's rep 379 at 386 per Mr Justice Garland and Re J [1990] FCR 193 per Mr Justice Cazalet). An expert witness in the High Court should never assume the role of the advocate.

3. *An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (Re J, above).*

4. *An expert witness should make it clear when a particular question or issue falls outside his expertise.*

5. *If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (Re J, above). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (Derby & Co Ltd v Weldon, The Times, 9 November 1990 per Lord Justice Staughton).*

6. *If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report of for any other reason such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.*

7. *Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports*

(see 15.5 of the Guide to Commercial Court Practice).

In Australia, not all jurisdictions have implemented statutory reforms to address to better manage expert evidence. The extent to which the common law duty finds expression in civil procedure legislation and rules of court varies considerably.

The table on the following page summarises the statutory regulation of expert evidence in the jurisdictions therein nominated.

Table 3-1 Statutory Regulation of Expert Evidence

Court	Rules	Specific Expert Code	Practice Direction /Note	Exhaustive expression of Duty	Specific Sanction
Federal Court **Duty**	*Federal Court Rules* 2011 Part 23.2	No	GPN-EXPT *Expert Evidence Practice Note*: *Harmonised Expert Witness Code of Conduct* *Concurrent Expert Evidence Guidelines*	No	No
Federal Circuit Court **Duty**	*Federal Circuit Court Rules* 2001 Chapter 1 Division 15.2	No	Rule 15.7 refers to Federal Court Practice Direction	No	No
Family Court **Duty**	*Family Court Rules* 2004 Rule 15.5.5	No	Schedule 5 – *Expert Conferences – Guidelines for expert witnesses and those instructing them in the Family Court of Australia*	No	No
NSW Supreme Court **Duty**	*Uniform Civil Procedure Rules* 2005 Part 31 Division 2	Yes. Rule 31.23 in Sch. 7	SC Gen 11- *Joint Conferences of Experts* (17.8.2005)	No	Yes
NSW Land & Env. Court **Duty**	UCPR in most cases	Yes See above	*Conference of Expert Witnesses Policy* (12.6.2015) *Joint Expert Report Policy* (12.6.2015)	No	No
Victorian Supreme Court **Duty**	*Supreme Court Rules* 2005 Order 44 *Civil Procedure Act* 2010	Yes Form 44A	Practice Note 2/2014 – *Expert Evidence in Criminal Trials*	No	Yes

	Part 2.3 – 'Overarching obligations'				
Victorian Civil & Administrative Tribunal **Duty**	*Victorian Civil & Administrative Tribunal Act* 1998 Section 94 -96 Schedule 3	No	PNVCAT 2 – *Expert Evidence* (Oct 2014)	No	No
Supreme Court Queensland **Duty**	*Uniform Civil Procedure Rules* 1999 Part 5 CH 11 rules 423 429S	No	2005/2 – *Expert Evidence*	No	No – but note rule 429D re costs
Queensland Planning and Environment Court **Duty**	*Planning and Environment Court Rules* 2010 Part 3 – D 3 (Note rule 29) UCPR above	No	PEC 2/2014 – Case Management	No	No
Queensland Civil & Administrative Tribunal **Duty**	*Queensland Civil & Administrative Rules* 2009 (no provisions specifically dealing with expert witnesses)	No	Practice Direction No 4 of 2009 -*Expert Evidence*; -*Guide to Expert Conferences*	No	Yes (r217)
Supreme Court Tasmania **No Duty**	*Supreme Court Rules* 2000 514-517	No	No	No	No
Supreme Court South Australia **No Duty**	*Supreme Court Civil Rules* 2006 *Supreme Court Supplement-ary Rules* 2014	No	No	No	No
Supreme Court	*Rules of the*	No	No	No	No

Western Australia **No Duty**	*Supreme Court* 1971				
Supreme Court of the Northern Territory **No Duty**	*Supreme Court Rules*	No	No	No	No
Australian Capital Territory **Duty**	*Court Procedure Rules* 2006 Reg 1200 – requires compliance with Code of Conduct for Experts	Yes Sch. 1	No	No	Yes

[Duty/No Duty in the above table identifies whether there is there is an expressed duty or not, and if so where it can be found.]

In October 2016, the Federal Court of Australia issued new guidelines managing expert evidence in proceedings before that Court. In addition, the '*Harmonised Expert Witness Code of Conduct'* was implemented representing the first code of conduct for expert witnesses issued by the Federal Court.

The language of both the new guidelines and the code leave little room for misunderstanding the nature of an expert's duty to the court or the interaction of a party or his or her legal representative with that expert. Guidelines 3.1 and 3.2[8] are particularly instructive in the context of this research and instruct that –

> *3.1 Parties and their legal representatives should never view an expert witness retained (or partly retained) by them as that party's advocate or "hired gun". Equally, they should never attempt to pressure or influence an expert into conforming his or her views with the party's interests.*

3.2 A party or legal representative should be cautious not to have inappropriate communications when retaining or instructing an independent expert, or assisting an independent expert in the preparation of his or her evidence. However, it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a "consulting expert" in order to avoid "contamination" of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.

In Queensland, the expert's duty to the court is expressed generally as one to *'assist the Court'* that overrides any other obligation the expert may have to party or to a person responsible for paying the expert's fees or expenses.

In the New South Wales Supreme Court (and the NSW Land and Environment Court) and the Victorian Supreme Court, the duty extends to assisting the court '*impartially on matters relevant to'* the expert's area of expertise. In NSW, practice policies on the management of expert witness conferences and reports were implemented in June 2015 in response to the Productivity Commission's 2014 recommendations and in recognition of the success of the Queensland Planning and Environment Court in this area.

In Victoria, under the *Civil Procedure Act* 2010 -

- An expert witness must comply with the 'overarching obligations' to the court to further the administration of justice in any civil proceeding[9] the expert witness has involvement[10];
- The requirement to comply with the 'overarching obligations' is in addition to any other existing obligations that an expert may have[11];

- Subject to the "paramount duty', the 'overarching obligations' prevail over any other obligations (legal, contractual or other) that an expert witness may have[12];
- An expert has a paramount duty to the court further the administration of justice[13];
- The 'overarching obligations' include an obligation to –
- act honestly at all times[14];
- to have a proper basis for any claim or response to a claim made;
- not to engage in conduct that will mislead or deceive or is likely to mislead or deceive[15];
- to narrow the issues in dispute[16]; and
- to ensure that costs are reasonable and proportionate[17].
- Sanctions in the way of a costs order against an expert witness can be ordered[18].

Arguably, the combination of the provisions of the *Civil Procedure Act* 2010 and Order 44 of the *Supreme Court Rules* (Vic) (which requires an expert witness to comply with the Expert Witness Code of Conduct) is currently the most comprehensive statutory expression of an expert's duty to the court in Australia. Moreover, it also provides the court with an effective means by which to sanction an expert witness for failing to comply with his or her paramount duty and overarching obligations to the court by requiring the expert to pay costs where the circumstances warrant[19]. Those same sanctions can, and do apply to legal practitioners that are involved in conduct that amounts to breach of an expert witness' duty to the court and thereby a breach of the overarching duty of a legal practitioner to the court. Effective management of expert evidence cannot only rely on self-regulation of professional expert witnesses acting in a manner protective of

their professional reputations.

As the content of an expert's duty to the court is not exhaustively expressed in those Australian jurisdictions that implemented civil procedure reform, guidance (for both expert witnesses and those instructing them) as to appropriate conduct can still be gained from the Justice Cresswell's code of conduct for experts.

To the extent that the common law duty of an expert witness to the court, as expressed in the *Ikranian Reefer*, is an expression of the ideal manner in which expert witnesses go about preparation and presentation of their evidence[20], the civil procedure reforms in Australia referred to above make it clear that compliance with the duty to assist the court by provision of independent opinion evidence is no longer merely aspirational and requires lawyers who engage expert witnesses and appear as advocates for clients that rely on expert evidence to also bring independent judgment to the preparation and presentation of that expert evidence. This study aims to collect empirical data on the preferred and predominant selection criteria used by litigation lawyers when recruiting expert witnesses to investigate whether the adversarial imperative, the desire to win for a client, is kept in check by a lawyer's paramount duty to the court.

4 METHODOLOGY

4.1 Introduction

The purpose of this chapter is to describe the research methodology of this study. As the aim of the study was to collect data on the preferred and predominant selection criteria used by legal practitioners when appointing expert witnesses on behalf of clients, the design of the study was based on primary data collected from senior legal practitioners through a survey instrument.

This chapter is structured as follows-

- Section 4.2 describes the research justifications for the study and the method of research adopted;
- Section 4.3 describes the research design and the formulation of survey questions from previous relevant studies undertaken;
- Section 4.4 provides a brief background of the researcher;
- Section 4.5 identifies the sample selection process of those legal practitioners invited to participate in the study; and
- Section 4.6 identifies the method of data analysis.

4.2 Research Justifications

Review of past research in Australia regarding the use of expert evidence in litigation identified that there has not been prior research of senior legal practitioners regarding the selection criteria used to engaged expert witnesses for litigation.

The research examines the selection process used by legal practitioners when identifying and engaging expert witnesses to assist in the presentation of client cases before a court or tribunal.

Against the background of the duty owed by expert witnesses to the Court to provide impartial opinion evidence, there is value in conducting this research to provide information on the dominant selection criteria used by legal practitioners when selecting expert witnesses and whether impartiality is a dominant criterion.

4.3 Research Design

This study employed a cross-sectional research design, specifically survey, a self-completion questionnaire for the collection of data.

The questionnaire comprised of questions that were based on questions used by Freckelton, Reddy and Selby in their 1999 survey of Australian judges and 2001 survey of Australian magistrates.

The questionnaire was forwarded to 100 participants by direct email. Participants were provided with instructions to send completed questionnaires to a specifically set up survey email address (via Survey Monkey) with a function that allowed for the responses to be de-identified by removing the IP address of all participants (thereby providing anonymous responses to the researcher).

Participants were informed in the invitation to participate, that completion and return of the questionnaire would convey implied consent to participation in the survey. A copy of the survey instrument forms **Appendix A**.

Approval for the conduct of the survey and of the content of the survey instrument itself was obtained from the Victoria University's Ethics Committee prior to the conduct of the survey. A copy of the Ethics Committee's approval is found at **Appendix B**.

4.4 Researcher

The researcher's legal experience involves 21 years as an Australian legal practitioner (6.5 years as a barrister and 15 years as a solicitor) in areas of litigation that make high use of expert witness evidence. The experienced gained by the researcher provides practical and current insight across aspects of the selection, engagement, management and use of expert witness evidence in courts and tribunals.

4.5 Selection of Participant Legal Practitioners

Selection criteria was based on the following:

Participants must be a qualified legal practitioner in Australia. Participants must have been practicing as a legal practitioner for 10 years or more.

Participants were approached by an email invitation to participate in the survey with the survey instrument embedded in the email for ease of completion.

Participants were selected by the researcher three states, Victoria, New South Wales and Queensland using legal directories. The sample of legal practitioners used in this survey is therefore a convenience sample and the findings of the survey cannot be generalised as representative of Australian legal practitioners who select and use expert witnesses before Australian courts and tribunals. It does

however assist in the formulation of appropriate questions for a future study on this issue.

4.6 Analysis of Data

Primary data were collected from the responses to the survey questions and using the SPSS software package, was analysed to produce distribution of frequencies of the responses.

5 SURVEY FINDINGS AND DISCUSSION

5.1 Introduction

The purpose of this chapter is to present the findings of the study and where relevant to discuss the implications of those findings to the aims of the study.

The findings are presented by first analysing the responses for each of the survey questions provided by respondents, followed by, where appropriate, a discussion of the implications that may be drawn from those findings.

This chapter is structured as follows-

- **Section 5.2** identifies the response rate of the survey and compares that rate to the previous studies undertaken in Australia;
- **Section 5.3** examines of the findings of the survey relevant to the profile of the respondents;
- **Section 5.4** examines the frequency use of expert evidence by respondents;
- **Section 5.5** examines the involvement of legal practitioners in selection of expert witnesses;
- **Section 5.6** examines the attributes and characteristics in experts sought by legal practitioners;
- **Section 5.7** examines the views of legal practitioners regarding the usefulness of expert evidence;
- **Section 5.8** examines the incidence of bias in experts experienced by legal practitioners;

- **Section 5.9** examines the occurrence of difficulties in comprehension of expert evidence by legal practitioners;
- **Section 5.10** examines the incidence of experts venturing outside of their areas of expertise;
- **Section 5.11** examines the occurrence of non-responsiveness by experts;
- **Section 5.12** examines the occurrence of contrary views being expressed by experts;
- **Section 5.13** examines the views of legal practitioners on the desirability of further training of expert witnesses;
- **Section 5.14** examines the views of legal practitioners on desirability of further training of legal practitioners of the use and management of expert evidence;
- **Section 5.15** examines the incidence of settling of expert statements by legal practitioners;
- **Section 5.16** examines the level of satisfaction of legal practitioners with the impartiality exhibited by experts;
- **Section 5.17** consists of the direct comments and observations provided by respondents.

5.2 Response Rate

Of the 100 legal practitioners invited, 46 responded, providing a raw response rate of 46%. On analysis of the individual responses, one response was only partially completed and to such a limited extent that it could not be considered a valid response. Allowing for this invalid response, the response rate of 45% is still encouraging given the small sample size and the relatively short survey response time (of 3 weeks) provided. Participants were emailed the survey on 29 October

2016 and were requested to submit completed surveys by 12 November 2016.

Further, senior legal practitioners (for the purpose of this survey are defined to mean - a legal practitioner with 10 or more years in legal practice) accounted for all but 2 of the total number of respondents and accordingly the response rate of senior legal practitioners to this survey is 95.5% of the total responses.

In the 2001 survey of Australian magistrates and the 1999 survey of Australian judges undertaken by Freckelton, Reddy and Selby, the response rates were 50.62% and 51.05%[21] respectively (2001).

According to the *2014 Law Society National Profile Final Report* (Urbis, 2015) there are 66,211 practising solicitors in Australia (51.5% male and 48.5% female). *The Statistical Profile of Australian Barristers* by the Australian Bar Association in 2015 states that there are 6005 barristers in Australia (that are members of a State based Bar Association; with 76.87% male and 23.13% female). The total number of legal practitioners in Australia can be estimated to be around 72 200 (not accounting for any growth or contraction in either group of practitioners since the reports cited were published).

As the sample of legal practitioners invited to participate in the survey was a convenience sample, it is not possible to generalise the findings of this study as representative of the views and opinions of Australian legal practitioners. The resources available to the researcher did not allow for such an extensive study to be undertaken. The findings of this pilot survey are nonetheless valuable in providing results that may be compared to the limited previous studies undertaken in Australia and the USA regarding the use and management of expert evidence in litigation.

5.3 Profile of Respondents

Of the 46 respondents, all acknowledged that by participating in the survey, consent to the use of their responses was provided.

Table 5-1 The distribution of the frequency of responses to Question 1

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	46	100.0	100.0	100.0

Respondents were asked to identify how long they had been legal practitioners (**Question 2**) with the majority (85.6%, f=43) having been in legal practice for more than 10 years. This characteristic emphasises the level of relevant practical experience that the respondents applied to the responses provided to the survey.

Table 5-2 The distribution of the frequency of responses to Question 2

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greater than 15 years	34	73.9	75.6	75.6
	Between 10 years – 15 years	9	19.6	20.0	95.6
	Less than 10 years	2	4.3	4.4	100.00
	Total	45	97.8	100.0	
Missing	System	1	2.2		
Total		46	100.0		

All but two of the respondents (95%) are involved in litigation as part of their legal practice and it can therefore be reasonably assumed that these respondents are familiar with the criticisms directed towards the use, management and usefulness

of expert witnesses in litigation.

Any future survey should include more detailed questions regarding a respondent's predominant area of litigation practice (for example whether the legal practitioner predominantly practised in criminal or civil litigation) to permit correlation analysis with other questions to identify whether those practitioners that had predominantly criminal law practices desired different attributes or characteristics from expert witnesses than their civil litigation counterparts.

Table 5-3 The distribution of the frequency of responses to Question 3

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Equally split between advocacy and advice	28	60.9	62.2	62.2
	Litigation	15	32.6	33.3	95.5
	Advice	2	4.3	4.5	100
	Total	45	97.8	100.0	
Missing	System	1	2.2		
Total		46	100.0		

There were 10 female respondents and 35 male respondents. Of the female practitioners invited to participate in the survey 28% responded. Of the male practitioners invited to participate in the survey 52% responded.

Table 5-4 The distribution of the frequency of responses to Question 4

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Male	35	76.1	77.8	77.8
	Female	10	21.7	22.2	100.00
	Total	45	97.8	100.0	
Missing	System	1	2.2		
Total		46	100.0		

Of the respondents who were engaged in litigation or advocacy practices, the majority (43.1%) appeared in jurisdictions other than Victoria or the Federal jurisdiction. 18.8% of respondents have multi-jurisdictional practices.

Each State judicial system and individual courts and tribunals have differing practice directions and rules regarding the use and presentation of expert witness evidence. Those practitioners who have multi-jurisdictional practices are required to be proficient in all relevant practice directions, rules and legislation dealing with the use and presentation of expert witness evidence.

Table 5-5 The distribution of the frequency of responses to Question 5

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Other States	19	41.3	43.2	43.2
	State (Vic)	12	26.1	27.3	70.5
	Combination of the above	8	17.4	18.2	88.7
	Federal	5	10.9	11.3	100
	Total	44	95.7	100.0	
Missing	System	2	4.3		
Total		46	100.0		

5.4 Frequency of Use of Expert Evidence

Respondents were asked whether expert witnesses were frequently engaged to assist the court in making its determination in their practice area. An overwhelming 86.7% (39/45) of respondents answered that in their practice area, expert witnesses were frequently engaged to assist the court in making its determination.

This response does not identify the range of practice areas of the respondents, for example, whether the relevant jurisdictions were common law practice areas such as workers' compensation or statutory based practice areas such as planning and environment or native title.

Future surveys could seek to identify on a more detailed level the nature of the practice areas of respondents beyond the general classification of litigation or advocacy.

Table 5-6 The distribution of the frequency of responses to Question 6

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	39	84.8	86.7	86.7
	No	6	13.0	13.3	100.0
	Total	45	97.8	100.0	
Missing	System	1	2.2		
Total		46	100.0		

5.5 Involvement in Selection of Expert Witnesses

A little over half of the respondents (51.1%) answered that they were involved 100% of the time that an expert witness was engaged on behalf of their client. A further 22.2% answered that they were involved more than 75% of the time but less than 100% when an expert witness was engaged on behalf of their client.

Table 5-7 The distribution of the frequency of responses to Question 7

		Frequency	Percent	Valid Percent	Cumulative Percent
	100 %	23	50.0	51.1	51.1
	More than 75% but less than 100%	10	21.7	22.2	73.3
	More than 50% but less than 75%	5	10.9	11.2	84.1
	More than 25% but less than 50%	3	6.5	6.7	91.2
	Not relevant - answered no to the above question	2	4.3	4.4	95.6
	less than 25%	2	4.3	4.44	100.0
	Total	45	97.8	100.0	
Missing	System	1	2.2		
Total		46	100.0		

These results indicate a significant involvement by legal practitioners in the selection of expert witnesses and this in turn provides a foundation for enquiring into the attributes or characteristics of an expert witness that a legal practitioner considers desirable or important when making such a selection.

Given the 'adversarial imperative' and the co-existing duties of a legal practitioner to the court and to his/her client, this issue has significance both in terms of identifying the-

- prevailing attribute on which expert witnesses are selected by legal practitioners on behalf of clients; and
- discharge of a legal practitioner's prevailing duty to assist the court in making its determination.

5.6 Attributes and Characteristics of Experts

Respondents were asked to select the attributes that they look for when engaging an expert witness. The attributes that respondents were provided to select from were included in a fixed list of 12 attributes, however an opportunity was provided for respondents to nominate other attributes that they looked for when engaging an expert witness.

Table 5-8 The distribution of the frequency of responses to Question 8

		Responses (N)	Percent of Cases
Attributes sought	Prior experience as an expert witness	38	86.4%
	Reputation as an expert witness	35	79.5%
	Qualifications and educational credentials	33	75.0%
	Articulate and persuasive	31	70.5%
	Strength of opinion	23	52.3%
	Honesty	24	54.5%
	Impartiality	24	54.5%
	Credibility amongst peers	29	65.9%
	Willingness to support your position	12	27.3%
	Appearance and demeanour	13	29.5%
	Availability	23	52.3%
	Cost	16	36.4%
	Other	3	6.8%
Total		304	690.9%

Three respondents nominated other attributes that were not included in the list provided in Question 8. The other characteristics or attributes nominated were:

- *has the expert been referred by someone we know?*
- *breadth of experience across disciplines;*
- *not a 'prima donna';*
- *ability and willingness to see other points of view and address;*
- *all the above matters are relevant however some factors may be rated higher than others depending on the nature of the litigation;*
- *the issues and the witnesses proffered by the other side.*

The fixed list of attributes provided to respondents was modelled in part on the list of persuasive factors included in the Freckelton, Reddy and Selby surveys of Australian judges and magistrates (1999 and 2001).

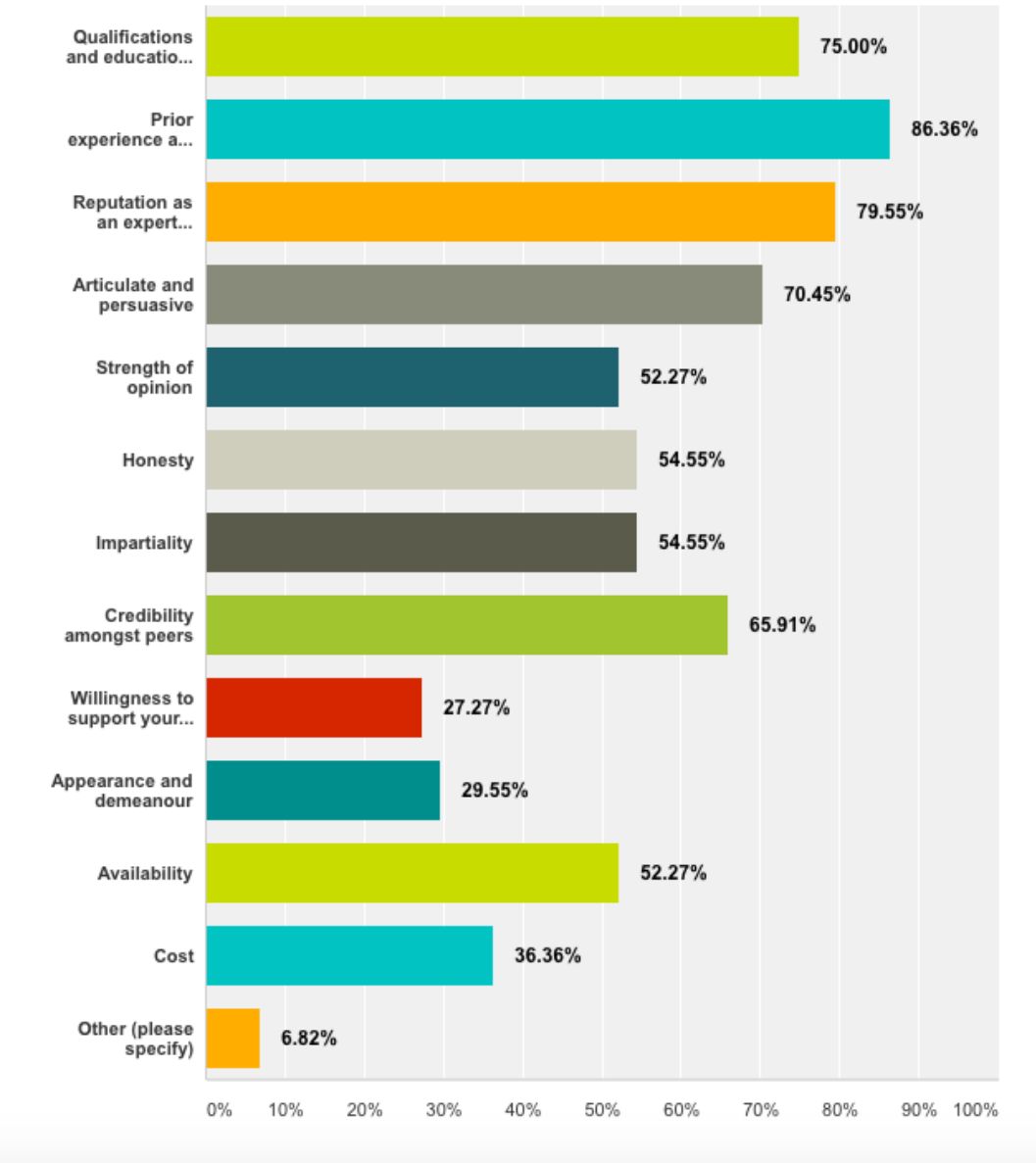

Figure 5-1 Desired Attributes in Expert Witnesses

The high selection rate of most attributes by respondents indicate that respondents did not feel constrained in nominating the attributes that they looked for prior to engagement.

The attributes sought after by respondents can be classified in three broad bands-

- *Most sought after*– Prior Experience, Reputation, Qualifications and Educational Credentials, Articulate and Persuasive;

- *Next sought after* – Credibility, Honesty, Impartiality ,Strength of Opinion, Availability;
- *Least sought after* – Cost, Appearance and Demeanour, Willingness to support your position;

Although qualifications, prior experience and reputation are attributes that are highly sought by respondents, the inclusion of articulateness and persuasiveness in the 'most sought after' band demonstrates that the respondents highly value the ability of an expert to communicate their opinion to the ultimate decision maker, the judge.

Using the list of the twelve attributes provided to respondents as part of Question 8, respondents were asked in **Question 9** to rank each attribute from 1 to 12 with 1 being the most important attribute and 12 being the least important attribute.

In order of frequency of being ranked as 1, the twelve attributes are listed below with the corresponding percentage of respondents that ranked that attribute as most important, that is as 1.

Table 5-9 The distribution of the frequency of responses to Question 9

Attribute	Valid % ranked 1 by Respondents
Qualifications and Educational Credentials	25.6
Strength of opinion	15.8
Reputation as an expert witness	15.4
Availability	14.0
Prior experience as a witness	13.2
Honesty	10.0
Impartiality	7.3
Willingness to support your position Articulate and persuasive	2.6
Credibility amongst peers	2.5
Appearance and demeanour	0.0
Cost	0.0

The above results show that 'qualifications and educational credentials' are the most important attribute looked for by the respondents when selecting an expert witness, with 'strength of opinion' ranking the second most important. Only 7.3% of respondents ranked 'impartiality' as the most important attribute in expert witnesses. The specific hypothesis of this research that '*Impartiality not the most important attribute in an expert that lawyers seek when engaging an expert witness'* appears to have been proven and whilst 'impartiality' is not the least important attribute on the above findings it cannot be concluded to be the most important attribute to a significant number of respondents.

None of the respondents ranked either 'appearance and demeanour' or 'cost' as the most important attribute looked for when engaging an expert witness.

Table 5-10 The distribution of the frequency of responses to Question 9 Attributes of Experts Ranked no. 2-12

Attribute	2 %	3 %	4 %	5 %	6 %	7 %	8 %	9 %	10 %	11 %	12 %
Qualifications and educational credentials	15.4	5.1	15.4	10.3	2.6	2.6	10.3	5.1	5.1	0.0	2.6
Strength of opinion	7.9	5.3	0.0	0.0	21.1	15.8	7.9	10.5	5.3	10.5	0.0
Reputation as an expert witness	17.9	15.4	10.3	15.4	7.7	5.1	2.6	7.7	2.6	0.0	0.0
Availability	0.0	4.8	0.0	2.4	11.9	4.8	7.1	11.9	16.7	21.4	4.8
Prior experience as a witness	15.8	18.4	18.4	5.3	5.3	10.5	2.6	2.6	7.9	0.0	0.0
Honesty	2.5	12.5	20.0	15.0	12.5	7.5	12.5	2.5	2.5	0.0	2.5
Impartiality	12.2	4.9	7.3	22.0	14.6	4.9	7.3	12.2	2.4	2.4	2.4
Willingness to support your position	7.9	5.3	5.3	0.0	0.0	10.5	7.9	10.5	2.6	7.9	39.5
Credibility amongst peers	10.0	5.0	2.5	17.5	7.5	7.5	20.0	2.5	5.0	7.5	12.5
Articulate and persuasive	13.2	21.1	15.8	7.9	13.2	18.4	5.3	2.6	0.0	0.0	0.0
Appearance and demeanour	5.0	2.5	0.0	0.0	2.5	2.5	10.0	15.0	32.5	22.5	7.5
Cost	0.0	7.1	2.4	7.1	7.1	4.8	2.4	11.9	11.9	16.7	28.6

The four attributes for expert witnesses that were most classed as the 'most important attribute' were 'prior experience', 'reputation', 'qualifications and educational credentials' and the ability to be 'articulate and persuasive'.

Attributes such as 'strength of opinion', 'honesty' and 'impartiality', although nominated by over 50% of respondents, were not nominated at all by a significant number of respondents as attributes that were looked for when engaging an expert witness. Impartiality was not considered to be an attribute to be looked for in expert witnesses by 45.5% of respondents. Given that impartiality and independence by

an expert witness is required to be demonstrated through an expert witness conduct and evidence, this is a result that should receive further attention and investigation.

5.7 Usefulness of Expert Evidence

Respondents were asked whether they found expert evidence useful for the fact-finding process (**Question 10**). Courts and tribunals ultimately are the finders of fact, but legal practitioners (both solicitors and barristers) are involved in the collection, collation and presentation of facts on behalf of their respective clients. It is as part of the fact gathering and presentation that legal practitioners may turn to expert witnesses to assist in the identification of facts that are relevant to the expert witness' opinion and the presentation of those facts to assist the expert explain his or her opinion to the court.

Table 5-11 The distribution of the frequency of responses to Question 10

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid					
	Often	20	43.5	47.6	47.6
	Occasionally	12	26.1	28.6	76.2
	Always	7	15.2	16.7	92.9
	Never	3	6.5	7.1	100
	Total	42	91.3	100.0	
Missing	System	4	8.7		
Total		46	100.0		

Very few respondents answered that they were 'never' assisted by expert witnesses in the fact-finding process (that is 3 out of 42) with the remainder of the respondents reporting that they have been assisted by expert witnesses to varying degrees. Seven of the respondents answered that they are 'always' assisted by

expert witnesses in the fact-finding process. The results show that over 90% of respondents are assisted by use of expert witnesses.

5.8 Bias Amongst Expert Witnesses

Previous surveys by Freckelton, Reddy and Selby (1999, 2001) provide some perspective on how serious the problem of bias amongst forensic experts is in practice.

The results of the 1999 survey of Australian judges, showed that 68.10% of judges occasionally encountered bias on the part of experts, 27.59% experienced bias from experts 'often'.

In the 2001 survey, Australian magistrates were also asked whether they had encountered a number of problems that could impact on the utility of expert evidence. The results of this survey were similar to those of the survey of Australian judges; 71.57% of magistrates reported that they had encountered bias on the part of experts "occasionally'. Magistrates reported experiencing bias less often than judges with 19.80% answering that they had encountered bias 'often'.

In reporting the results of both surveys, Freckelton, Reddy and Selby opined that the incidence of judges and magistrates experiencing bias on the part of experts 'often' was the more important result to consider. In their view, the prevalence of this phenomenon experienced by both judges and magistrates has implications for the functioning of the civil and criminal trial process.

In this survey, respondents reported experiencing bias on the part of experts engaged on behalf of their clients 'occasionally' at 67.44%, while 11.63% reported

experiencing bias ‘often’ and 2.33% experiencing bias ‘always’.

These results should be considered against a number of relevant factors –

unlike the judges and magistrates that responded to the Freckelton, Reddy and Selby surveys, the legal practitioners that responded to this survey provided their view as to the existence of bias by experts engaged by one party – that is their own client;

- the high percentage of respondents to this survey that are always consulted (51.1%) when an expert is engaged on behalf of their client (see response to **Question 7**);
- the low percentage of respondents to this survey (7.3%) that ranked ‘impartiality’ as the most important attribute to look for when engaging an expert on behalf of a client (see response **Question 9**).

The responses to this question also raise implications for the functioning of civil litigation in Australia as these results show that even though legal practitioners are more often than not involved in the engagement of experts on behalf of their clients, they also encounter bias from those experts at least ‘occasionally’. The challenge is to investigate the lawyer – expert relationship to determine whether this bias phenomenon is produced by a willingness on the part of the expert to please a practitioner that often retains his or her services as an expert; or whether the bias on the part of the expert is pre-existing and recognisable forming part of the lawyer’s selection criteria (overt or implied).

Table 5-12 The distribution of the frequency of responses to Question 11

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid					
	Occasionally	29	63.0	67.4	67.4
	Never	8	17.4	18.6	86.0
	Often	5	10.9	11.7	97.7
	Always	1	2.2	2.3	100.0
	Total	43	93.5	100.0	
Missing	System	3	6.5		
Total		46	100.0		

5.9 Difficulties in Comprehension

Where experts are used to provide opinion evidence on a technical or forensic matter to a court or tribunal, the effectiveness of that evidence in persuading the decision maker to adopt that opinion lies at least in part on how 'understandable' that opinion is against all other relevant matters in the case.

Just over 70% of Australian magistrates reported that they 'occasionally' encountered evidence that was difficult to comprehend and 14.72% reported they had 'often' had such difficulty (Freckelton, Reddy and Selby, 2001, p.26). Australian judges reported similar figures as the respondents to this survey with 76.72% reporting that they 'occasionally' encountered difficulty in comprehending experts and 14.22% 'often' experiencing that difficulty.

Respondents were asked whether they had encountered difficulties in understanding oral or written language used by experts engaged by them (**Question 12**) with 76% responding that they 'occasionally' experienced such difficulties and 19% reporting that they 'often' experienced such difficulties.

Table 5-13 The distribution of the frequency of responses to Question 12

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid					
	Occasionally	32	69.6	76.2	76.2
	Often	8	17.4	19.0	95.2
	Never	2	4.3	4.8	100.0
	Total	42	91.3	100.0	
Missing	System	4	8.7		
Total		46	100.0		

The results for this question require further consideration. If over 75% of legal practitioners have difficulty occasionally in understanding an expert engaged on behalf of their own client, what course of action do they take to ensure that judges or magistrates do not experience similar difficulties to ensure the best possible presentation of their client's case?

5.10 Experts Venturing Outside of their Expertise

Respondents were asked whether they had ever experienced experts, engaged on behalf of their client, straying outside of their expertise (**Question 13**).

Table 5-14 The distribution of the frequency of responses to Question 13

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid					
	Occasionally	37	80.4	88.1	88.1
	Never	3	6.5	7.1	95.2
	Often	2	4.3	4.8	100.0
	Total	42	91.3	100.0	
Missing	System	4	8.7		
Total		46	100.0		

The response to this question was revealing – 88% of respondents reported having experienced their own expert straying outside his or her area of expertise. Such a result warrants further investigation, particularly as to what, if any, means are employed by legal practitioners to manage this conduct. The incidence of legal practitioners 'often' experiencing experts venturing outside areas of expertise is less dramatic at 4.76%, however when both figures are considered together, there is a basis to find that legal practitioners face a challenge in managing experts provide opinion evidence that is admissible.

5.11 Non-responsiveness by Expert

Freckelton, Reddy and Selby opined that the frequency of expert witnesses not being responsive in providing evidence in court *"will be a product of the forensic experience and preparation of both experts and advocates…"* (1999, p.35). In this survey, respondents were asked whether they had ever encountered non-responsiveness on the part of their own expert to questions that the expert was asked to address (**Question 14**). This scenario is different to the conduct or performance of an expert in providing his or her evidence in court and goes to the completeness of the answers provided by the expert to legal practitioners. The

results to this question are dramatic with 83.72% of respondents reporting that they 'occasionally' encounter this phenomenon and a further 6.98% responding the experience is 'often' encountered. This result requires further investigation to identify the reasons why an expert may be non-responsive in such circumstances. Possible reasons may include (and there are likely to be others) failure by the expert to comprehend the question to be addressed, failure by the legal practitioner to limit the question or issue to the expert's area of expertise, refusal by the expert to provide a response that is unhelpful to his or her ultimate opinion.

Table 5-15 The distribution of the frequency of responses to Question 14

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid					
	Occasionally	36	78.3	83.7	83.7
	Never	4	8.7	9.3	93.0
	Often	3	6.5	7.0	100.0
	Total	43	93.5	100.0	
Missing	System	3	6.5		
Total		46	100.0		

5.12 Expert Opinion Contrary to Client's Position

Respondents were asked whether they had ever encountered a 'failure' by an expert to support their client's position and if so, what course of action did the legal practitioner take (**Questions 15 and 16**).

With hindsight, it is acknowledged that the use of the word 'failure' in Question 15 may have the effect of attributing judgment on the conduct of the expert – this was unintended.

86.36% of respondents reported that they had experienced 'occasionally' the situation where an expert engaged on behalf of their client did not support the client's position with 4.55% reporting that this experience occurred 'often'. This result indicates that experts do not always provide opinions that accord with the interest of the client and do express such contrary opinions to legal practitioners engaged on behalf of that client, indicating independence on the part of the expert from those who pay for his or her services.

Almost one in ten respondents however, reported that they had 'never' had the experience of an expert providing an opinion that did not support the client. This result should be further investigated given that majority of respondents to this survey have been in legal practice for over 10 years or more, the reasons for nearly 10% to report that they had never received a contrary opinion from an expert witness is likely to have practical significance.

Table 5-16 The distribution of the frequency of responses to Question 15

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid					
	Occasionally	38	82.6	86.4	86.4
	Never	4	8.7	9.1	95.5
	Often	2	4.3	4.5	100.0
	Total	44	95.7	100.0	
Missing	System	2	4.3		
Total		46	100.0		

Of interest is the action taken by respondents when faced with a contrary opinion. Only one respondent that had received a contrary opinion to that favouring their client, immediately terminated the expert's retainer. The remainder of the respondents, all answered that they would most likely confer with the expert to

ascertain whether there was a possibility of reconciling the expert's opinion with the client's position. In any future surveys, a possible further question could be directed to enquiring how successful such consultations between legal practitioners and experts are in reconciling expert opinions with the needs of clients.

None of the respondents answered that they would persuade the expert witness to change his or her opinion to accord with the client's position and this result contrasts with the results of both the 1991 study and the 1994 study by Champagne, Shuman and Whitaker that showed that 'coaching' of expert witnesses by lawyers is not an uncommon occurrence.

Table 5-17 The distribution of the frequency of responses to Question 16

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid					
	Confer with the expert witness and ascertain the basis of the opinion and determine whether there is a possibility for reconciling that opinion with the client's position	43	93.5	97.7	97.7
	Immediately recommend termination of the expert's retainer	1	2.2	2.3	100.0
	Total	44	95.7	100.0	
Missing	System	2	4.3		
Total		46	100.0		

5.13 Further Training of Experts

Respondents were asked their views on the further training of experts and, if further training was considered at least desirable, in which areas would further training of experts be helpful (**Questions 17 and 18**).

Nearly three quarters of respondents (74.09, f=44) answered that further training of experts would be helpful with 50% (f=22) responding 'desirable', 25% (f=11) responding 'necessary', and 9.1% (f=4) responding 'essential'.

Table 5-18 The distribution of the frequency of responses to Question 17

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid					
	Desirable	22	47.8	50.0	50.0
	Necessary	11	23.9	25.0	75.0
	Unnecessary	7	15.2	15.9	90.9
	Essential	4	8.7	9.1	100.0
	Total	44	95.7	100.0	
Missing	System	2	4.3		
Total		46	100.0		

Respondents were asked to nominate the areas of training of experts that would be helpful and were also provided with the opportunity to nominate other areas.

Nearly two thirds of respondents answered that further training of experts in the areas of *'limits of the forensic expert's role'* (60.53%, f=23/38), '*communication skills in the courtroom'* (63.16%, f=24/38) and '*what an expert witness' obligation to the court requires of them'* (65.79%, f=25/38). Almost three quarters of respondents reported that further training of experts was at least desirable on the '*preparation, content and layout of written reports'* (73.68%, f=28/38).

Table 5-19 The distribution of the frequency of responses to Question 18

		N	Percent of Cases
Expert Training			
	Preparation, content and layout of written reports	28	73.7%
	What an expert witnesses' obligation to the court requires of the expert	25	65.8%
	Communication skills in the courtroom	24	63.2%
	Limits of the forensic expert's role	23	60.5%
	Knowledge of the law about expert evidence	21	55.3%
	Knowledge of the law which relates to their field of expertise	12	31.6%
	Other	3	7.9%
Total		136	357.9%

Three respondents offered comments on other areas of training that would be helpful–

- *"How to and the limits of communication with instructor";*
- *"Understanding the pleaded issues in the case and staying within those issues";*
- *"In terms of the limits of the expert's role, I often encounter experts attempting to negotiate on behalf of the client and reach a compromise during the expert meeting process. I have had to counsel against this on a number of occasions given the limitations it may place on the expert giving evidence at trial."*

A comparison between these results and those of the Freckelton, Reddy and Selby

surveys of Australian magistrates (2001) and Australian judges (1999)[22]is instructive in identifying the differing views of legal practitioners from judicial decision makers. The following table sets out the comparative results across the three surveys.[23]

Table 5-20 Comparison Table – Areas for Further Training of Experts

	Legal Practitioners		Magistrates		Judges	
Area	Frequency	%	Frequency	%	Frequency	%
Limits of Expert Role	23	63.53	61	19.06	113	27.3
Knowledge of law of expert evidence	21	55.26	39	12.19	55	13.35
Knowledge of law relating to field of expertise	12	31.58	45	14.06	33	8.01
Preparation, content and payout of reports	28	73.68	66	20.63	84	20.39
Communication skills in the courtroom	24	63.16	108	33.75	115	27.91
Other	25	65.79	1	0.31	12	2.91
Valid Responses	38	100	320	100	412	100

5.14 Further Training of Legal Practitioners

Respondents were asked their views on the further training of legal practitioners and, if further training was considered at least desirable, in which areas would further training be helpful (**Questions 19 and 20**).

Just over 86% (n=38 of 44) of respondents reported that further training of legal practitioners should be made available with 54.55% (n=24) responding '*desirable'*, 20.45% (n=9) responding '*necessary*' and 11.35% (n=5) responding '*essential*'.

Table 5-21 The distribution of the frequency of responses to Question 19

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid					
	Desirable	24	52.2	54.5	54.5
	Necessary	9	19.6	20.5	75.0
	Unnecessary	6	13.0	13.6	88.6
	Essential	5	10.9	11.4	100.0
	Total	44	95.7	100.0	
Missing	System	2	4.3		
Total		46	100.0		

Regarding the areas that legal practitioners were of the view further training would be helpful the results could be said to be dramatic with 92.1% reporting that they would find training and instruction on what their own obligations to the court requires of them regarding the use of expert evidence. In practical terms, this equates to a desire by those in the legal profession that responded to this survey for further training to assist them properly and effectively use expert evidence and to manage expert witnesses.

Table 5-22 The distribution of the frequency of responses to Question 20

Area	**Frequency**	**%**
Limits of Forensic Expert's Role	24	63.16
What an expert witness' obligation to the court requires of them	25	65.79
What a lawyer's obligation to the court requires regarding the use of expert evidence	35	92.11
Other	3	7.89
Total	87	228.95

Three respondents provided comment on the areas in which further training of legal practitioners may be helpful:

- *"The drafting of letter of instruction and to what extent he can communicate with the expert";*
- *"Preparation of expert reports including content, layout etc.";*
- *"Disclosure rules in relation to briefs for experts and draft reports produced etc.";*
- *"…training on the effective use of experts may be of some assistance, particularly to some lawyers who, on occasion, seem to use the expert as their advocate."*

A respondent also contacted the researcher directly in person to offer his opinion that "*most solicitors do not know how to brief an expert properly."*

5.15 Settling of Expert Reports by Legal Practitioners

Failure to comply with the paramount duty owed to the court can have severe consequences for expert and lawyer alike. The decision of Justice Dixon in *Hudspeth* v *Scholastic Cleaning Consultancy Services Pty Ltd & Ors* (No. 8) [2014] VSC 567, provides a pertinent example of the sanctions that can be imposed (ordering costs against an expert and lawyers involved) on an expert and lawyers that fail to discharge their overarching obligations to the court.

The settling of expert reports by lawyers is fraught with difficulty if one or both expert and instructing lawyer are either not familiar with, or are dismissive of, their respective duties to the court in discharging their respective roles in the litigation. The involvement in the content of an expert's report can range from being innocuous to genuinely interfering with the substance of an expert's opinion (Freckelton, Reddy and Selby, 2001).

Respondents to this survey reported that 52.3% either review or revise or combination of both methods, expert statements or reports with a further 22.7% reporting that settling expert statements was dependent on the area of expertise involved. A quarter of respondents (25%) reported that they did not settle expert statements at all.

Table 5-23 Frequency Table – Question 21

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	23	50.0	52.3	52.3
	No	11	23.9	25.0	77.3
	Depends on area of expertise	10	21.7	22.7	100.0
	Total	44	95.7	100.0	
Missing	System	2	4.3		
Total		46	100.0		

Of those respondents that did settle expert statements, the predominant method of settling (88.2%) was by reviewing the draft statement and discussing its contents with the expert author. Far fewer respondents (5.9%) actually reviewed expert statements by making comments within the statement or report itself.

Table 5-24 The distribution of the frequency of responses to Question 22

		Responses		Percent of Cases
		N	Percent	
Report Settling	By reviewing the draft statement and making comments within the report	2	5.6%	5.9%
	By reviewing the draft statement and discussing it with expert	30	83.3%	88.2%
	Other	4	11.1%	11.8%
Total		36	100.0%	105.9%

Three respondents responded by providing other means of settling expert

statements or comments as set out below:

1. *'Usually a combination of the both. Some changes (typos/formatting/factual issues) can be resolved without getting close to influencing an expert. In terms of opinion or expression of opinion, I separate those out for the expert to consider and come back to me for discussion.'*
2. *'To make the document clear and ensure that it is in admissible form.'*
3. *'Reviewing and conferring but not necessarily discussing changes.'*

The results of this survey show that the predominant involvement by respondents in the settling of the contents of expert reports involves the reviewing of draft expert statements and discussion between lawyer and expert on same. In any future study it would be instructive to enquire to what extent these kind of discussions lead to a change in to the content of an expert's report, particularly to a change in an opinion originally expressed by the expert.

5.16 Satisfaction with Impartiality Exhibited by Experts

Table 5-25 The distribution of the frequency of responses to Question 23

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid					
	Generally satisfied	28	60.9	63.6	63.6
	Very satisfied	11	23.9	25.0	88.6
	Moderately satisfied	5	10.9	11.4	100.0
	Total	44	95.7	100.0	
Missing	System	2	4.3		
Total		46	100.0		

None of the respondents answered that they were 'not at all satisfied' with the degree of impartiality exhibited by experts that they have engaged and given the degree of involvement that the respondents to this survey have in the engagement of expert witnesses, this result is not surprising. What is surprising is that only 25% of respondents answered that they were 'very satisfied' with degree of impartiality exhibited by experts particularly when these experts are for most respondents, experts of their own choosing (see results for **Question 7** as to the involvement of lawyers in the engagement of expert witnesses).

5.17 Additional Comments

The following additional written comments were provided (by direct email) by a respondent, who gave his permission for the following comments to be published in this thesis. This respondent is a senior legal practitioner in Queensland.

Imagine this. Two expert witnesses in a joint expert meeting. One is being

combative/adversarial on a particular point. Who holds that expert to account? No one. The other expert can't do it. He (she) can argue till he's blue in the face. But his view will be dismissed by the combative expert cause the person trying to hold him to account works for the other side. Imagine the same situation, but with a third-party expert witness in attendance. I don't think it so easy to be combative, then. I think the Court appointed expert, or a Court appointed mediator, is going to pull up the combative expert and say "bollocks - that argument won't fly" I'd rather a back down happened then, rather at the door of the Court, or during cross-examination. I am not saying this would work on every occasion. But we have to stop joint expert reports being used as an adversarial tool, and simply as a tool to get to the truth. Waiting until the time when an expert witness can be cross-examined in order to hold them to account is too late. The parties have spent too much money by then. Even at the door of the Court is too late. How often have we seen the combative expert witness tell their client to concede, despite their joint expert opinion, very late during trial preparation? Holding the expert to account has to happen long before a trial. Joint reports based on an expert stretching the strength of their position simply emboldens their client, and drags the litigation out. It shouldn't happen this way.

These comments, although representing the views of a single respondent, reveal frustration at the use of expert evidence as an adversarial tool and the increased costs of litigation because of the alleged practice. In essence, the views of this practitioner are reminiscent of the findings of Lord Wolf's *Access to Justice Report* of 1996. If these or similar views are widely held by legal practitioners then it is reasonable to query the effectiveness of the civil procedural reforms in Australia since 1998.

6 CONCLUSION

6.1 Introduction

The purpose of this thesis has been to examine the selection criteria that legal practitioners use to select and appoint expert witnesses against the background of the duties owed to the court by both lawyers and experts.

This study used a direct written survey of legal practitioners to obtain empirical data on the attributes in expert witnesses sought after by legal practitioners and other aspects of the use and management of expert evidence in litigation. The analysis of primary empirical data from practitioners on this topic has contributed to the academic knowledge of deontology by examining specific criteria that Australian lawyers regard important while discharging their overarching duty to the court.

This chapter is structured as follows:

- Section 6.2 contains a summary of the findings of the study;
- Section 6.3 contains conclusions that may be derived from the findings of the study.

6.2 Summary of the Findings

The responses to this study reveal that:

- Expert witnesses are frequently engaged by 86.7% of respondents to assist present a client's case to a court.
- There is a significant involvement by legal practitioners in the selection of expert witnesses with 51.1% of respondents are involved in every appointment of expert witnesses in matters that they conduct.

- The attributes sought after by respondents can be classified in three broad bands-
    - *Most sought after*– Prior Experience (86.36%), Reputation (79.55%), Qualifications and Educational Credentials (75.00%), Articulate and Persuasive (70.45%);
    - *Next sought after* – Credibility Amongst Peers (65.91%) , Honesty (54.55%), Impartiality (54.55%) ,Strength of Opinion (52.27%), Availability (52.27%);
    - *Least sought after* – Cost (36.36%), Appearance and Demeanour (29.55%), Willingness to support your position (27.27%).
- Qualifications and Educational Credentials is the attribute in experts ranked 1 most by respondents.
- Only 18.6% of respondents have never experienced bias on the part of an expert engaged by them.
- Only 4.8% of respondents have never experienced difficulty in comprehending oral or written language used by an expert witness engaged by them.
- Only 7.1% of respondents have never experienced experts engaged by them venturing outside of their expertise.
- A majority of respondents desire further training for expert witness and legal practitioners regarding the use and management of expert evidence.
- There is significant involvement by respondents (at least 52.3%) in the settling of expert statements of evidence.
- No respondent reported as being not at all satisfied with the degree of impartially of an expert engaged by them with the majority of respondents (88.6%) both as being either very satisfied or moderately satisfied.

- None of the respondents answered that they would persuade the expert witness to change his or her opinion to accord with the client's position and this result contrasts with the results of both the 1991 study and the 1994 study by Champagne, Shuman and Whitaker that showed that 'coaching' of expert witnesses by lawyers is not an uncommon occurrence.

6.3 Conclusions of the Findings

Adversarial bias by expert witnesses was considered to be sufficiently problematic to the delivery of justice in Australia that civil procedural reform since the late 1990's has sought to specifically address this phenomenon.

Based on this study, it appears that the degree to which an expert presents as impartial to a party's cause is not the defining attribute that legal practitioners' use to select expert witnesses. Rather, when required to rank the most important attribute sought after in an expert, only 7.3% respondents to this study ranked 'impartiality' as the number 1 attribute required in an expert.

The four most sought after attributes by legal practitioners that participated in this study were 'prior experience', 'reputation', 'qualifications and educational credentials' and the ability to be 'articulate and persuasive' giving a reasonable basis to conclude that the manipulation of appearances and the existence of a demeanour that is persuasive to the ultimate decision maker is what lawyers expect of their chosen expert.

This study demonstrates that 'qualifications and educational credentials' is the most important attribute looked for by the respondents when selecting an expert witness, with 'strength of opinion' ranking the second most important. Only 7.3% of respondents ranked 'impartiality' as the most important attribute in expert witnesses. The specific hypothesis of this research that '*Impartiality is not the most important attribute in an expert that lawyers seek when engaging an expert witness'* appears to have been proven.

Due to the limited sample of legal practitioners invited to participate in this study,

the results provide a preliminary view of the expectations of legal practitioners and further study is required to draw conclusions that may be accepted as representative of Australian legal practitioners. At least the views of the respondents to this study indicate that the exhibition of bias in expert witnesses is not an uncommon phenomenon even where lawyers are involved in the selection of the expert. Further study of whether the existence of such bias is recognisable by lawyers at the time of selection of an expert and forms part of a lawyer's selection criteria will assist in drawing further conclusions regarding the role lawyers play in the presentation of impartial and independent expert opinion in litigation.

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7.2 Endnotes

[1] Former Justice of Appeal (1991-2005), Court of Appeal, Supreme Court of Queensland

[2] Federal Court of Australia, Practice Direction, *Guidelines for Expert Witnesses 1998*

[3] The Civil Procedure Rules, Part 35: Experts and Assessors; Draft Protocol of the Best Practice in the Instruction and Use of Experts; Draft Code of Guidance for Experts and Assessors.

[4] Federal Court of Australia, Practice Direction, *Guidelines for Expert Witnesses 1998*

[5] Giannarelli v Wraith (1998) 165 CLR 543 at 556

[6] Model Rule 13.1

[7] Model Rule 17.2

[8] page 2

[9] Subject to the exceptions contained in section 4

[10] Section 10 (3)

[11] Section 10(4)

[12] Section 12

[13] Section 16

[14] Section 17

[15] Section 18

[16] Section 23

[17] Section 24

[18] Section 65C(1)

[19] See Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors [2014] VSC 567

[20] *FGT Custodians Pty Ltd (formerly Feingold Partners Pty Ltd) v Fagenblat* [2003] VSCA 33 per Ormiston JA [15]

[21] The 51.05% response rate from Australian judges is a rate which approximates to 60% of judges in trial practice.

[22] Freckelton, Reddy and Selby, 2001, "Australian Magistrates' Perspectives on Expert Evidence: A Comparative Study'

[23] Omitted from this table are the '*what the expert witness' obligation to the court requires of them'* area option available in this survey as such an option was not provided to magistrates and judges in the surveys quote