



New South Wales

Local Courts (Civil Claims) Amendment (Expert Witnesses) Rule 2001

under the

Local Courts (Civil Claims) Act 1970

The Local Court (Civil Claims) Rule Committee made the following rule of court under the *Local Courts (Civil Claims) Act 1970* on 26 September 2001.

Stephen Olischlager

Secretary to the Rule Committee

Explanatory note

The object of this Rule is to amend the *Local Courts (Civil Claims) Rules 1988* to insert provisions concerning expert witnesses that are consistent with provisions contained in Part 36, rules 13C and 13CA and Part 39 of the *Supreme Court Rules 1970*.

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Clause 1 Local Courts (Civil Claims) Amendment (Expert Witnesses) Rule 2001

Local Courts (Civil Claims) Amendment (Expert Witnesses) Rule 2001

1 Name of Rule

This Rule is the *Local Courts (Civil Claims) Amendment (Expert Witnesses) Rule 2001*.

2 Amendment of Local Courts (Civil Claims) Rules 1988

The *Local Courts (Civil Claims) Rules 1988* are amended as set out in Schedule 1.

3 Notes

The explanatory note does not form part of this Rule.

Schedule 1 Amendments

(Clause 2)

[1] Part 1 rule 3 (1)

Insert in alphabetical order:

expert means a person who has specialised knowledge based on the person's training, study or experience.

[2] Part 23 rules 1D and 1E

Insert after rule 1C:

1D Expert witnesses

(1) For the purposes of this rule and rule 1E:

expert witness means an expert engaged for the purpose of:

- (a) providing a report as to his or her opinion for use as evidence in proceedings or proposed proceedings, or
- (b) giving opinion evidence in proceedings or proposed proceedings.

the code means the expert witness code of conduct in Schedule 1.

(2) Unless a court otherwise orders:

- (a) at or as soon as practicable after the engagement of an expert as a witness, whether to give oral evidence or to provide a report for use as evidence, the person engaging the expert must provide the expert with a copy of the code, and
- (b) unless an expert witness's report contains an acknowledgment by the expert witness that he or she has read the code and agrees to be bound by it:
 - (i) service of the report by the party who engaged the expert witness is not valid service for the purposes of these rules or of any order or practice note, and
 - (ii) the report is not to be admitted into evidence, and

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- (c) oral evidence is not be received from an expert witness unless:
 - (i) he or she has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the code and agrees to be bound by it, and
 - (ii) a copy of the acknowledgment has been served on all parties affected by the evidence.
- (3) If an expert witness furnishes to the engaging party a supplementary report, including any report indicating that the expert witness has changed his or her opinion on a material matter expressed in an earlier report by the expert witness:
 - (a) the engaging party must forthwith serve the supplementary report on all parties on whom the engaging party has served the earlier report, and
 - (b) the earlier report must not be used in the proceedings by the engaging party, or by any party in the same interest as the engaging party on the question to which the earlier report relates, unless paragraph (a) is complied with.
- (4) This rule does not apply to an expert engaged before this rule commences.

1E Conference between experts

- (1) A court may, on application by a party or of its own motion, direct expert witnesses to:
 - (a) confer and may specify the matters on which they are to confer, and
 - (b) endeavour to reach agreement on outstanding matters, and
 - (c) provide the court with a joint report specifying matters agreed and matters not agreed and the reasons for any non agreement.
- (2) An expert so directed may apply to the court for further directions.

- (3) The court may direct that such conference be held with or without the attendance of the legal representatives of the parties affected, or with or without the attendance of legal representatives at the option of the parties respectively.
- (4) The content of the conference between the expert witnesses is not to be referred to at the hearing or trial unless the parties affected agree.
- (5) The parties may agree, at any time, to be bound by agreement on any specified matter. In that event, the joint report may be tendered at the trial as evidence of the matter agreed. Otherwise, the joint report may be used or tendered at the trial only in accordance with the rules of evidence and the practices of the court.

[3] Part 23 rule 2 (2)

Omit “A”. Insert instead “Subject to rule 1D (2) (b) (ii), a”.

[4] Part 38B

Insert after Part 38A:

Part 38B Court appointed expert and assistance to the court

Division 1 Court appointed expert

1 Selection and appointment

- (1) Where a question for an expert witness arises in any proceedings a court may, at any stage of the proceedings, on application by a party or of its own motion, after hearing any party affected who wishes to be heard:
 - (a) appoint an expert (in this Division referred to as *the expert*) to inquire into and report on the question, and
 - (b) authorise the expert to inquire into and report on any facts relevant to the inquiry and report on the question, and

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- (c) direct the expert to make a further or supplemental report or inquiry and report, and
- (d) give such instructions (including provision concerning any examination, inspection, experiment or test) as the court thinks fit relating to any inquiry or report of the expert.

- (2) The court may appoint as the expert a person selected by the parties affected or a person selected by the court or selected in a manner directed by the court.

2 Code of conduct

- (1) A copy of the expert witness code of conduct in Schedule 1 (*the code*) must be provided to the expert by the registrar or as the court may direct.
- (2) A report by the expert is not to be admitted into evidence unless the report contains an acknowledgment by the expert that he or she has read the code and agrees to be bound by it.
- (3) Oral evidence is not to be received from the expert unless the court is satisfied that he or she has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the code and agrees to be bound by it.

3 Report

- (1) The expert must send his or her report to the registrar.
- (2) The registrar must send a copy of the report to each party affected.
- (3) Subject to compliance with this rule, the report is taken to have been admitted into evidence in the proceedings unless the court otherwise orders.

4 Cross-examination

Any party affected may cross-examine the expert and the expert must attend court for examination or cross-examination if so requested on reasonable notice by the registrar or by a party affected.

5 Remuneration

- (1) The remuneration of the expert is to be fixed by the court.
- (2) Subject to subrule (3), the parties specified by the court are jointly and severally liable to the expert to pay the amount fixed by the court for his or her remuneration.
- (3) The court may direct when and by whom the expert is to be paid.
- (4) Subrules (2) and (3) do not affect the powers of the court as to costs.

6 Other expert evidence

Where an expert has been appointed under this Part in relation to a question arising in the proceedings, the court may limit the number of other experts whose evidence may be adduced on that question.

Division 2 Assistance to the court

7 Assistance to the court

The court may in any proceedings obtain the assistance of any person specially qualified to advise on any matter arising in the proceedings, may act upon the adviser's opinion and may make orders for the adviser's remuneration.

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Schedule 1 Amendments

[5] Schedule 1

Insert after Part 39:

Schedule 1 Code of conduct for expert witnesses

(Part 23, rule 1D and
Part 38B, rule 2)

EXPERT WITNESS CODE OF CONDUCT

Application of code

1. This code of conduct applies to any expert engaged to:
 - (a) provide a report as to his or her opinion for use as evidence in proceedings or proposed proceedings, or
 - (b) give opinion evidence in proceedings or proposed proceedings, or
 - (c) inquire into and report on a question under Part 38B as a court appointed expert.

General duty to the court

2. An expert witness has an overriding duty to assist the court impartially on matters relevant to the expert's area of expertise.
3. An expert witness's paramount duty is to the court and not to the person retaining the expert.
4. An expert witness is not an advocate for a party.

The form of expert reports

5. A report by an expert witness must (in the body of the report or in an annexure) specify:
 - (a) the person's qualifications as an expert, and
 - (b) the facts, matters and assumptions on which the opinions in the report are based (a letter of instructions may be annexed), and
 - (c) reasons for each opinion expressed, and

- (d) if applicable—that a particular question or issue falls outside his or her field of expertise, and
- (e) any literature or other materials utilised in support of the opinions, and
- (f) any examinations, tests or other investigations on which he or she has relied and identify, and give details of the qualifications of, the person who carried them out.

6. If an expert witness who prepares a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.

7. If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.

8. An expert witness who, after communicating an opinion to the party engaging him or her (or that party's legal representative), changes his or her opinion on a material matter must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect which must contain such of the information referred to in paragraph 5 (b), (c), (d), (e) and (f) as is appropriate.

9. Where an expert witness is appointed by the court, the preceding paragraph applies as if the court were the engaging party.

Experts' conference

10. An expert witness must abide by any direction of a court to:

- (a) confer with any other expert witness, and
- (b) endeavour to reach agreement on material matters for expert opinion, and
- (c) provide the court with a joint report specifying matters agreed and matters not agreed and the reasons for any non agreement.

11. An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.