

# Instructions to the Expert Witness

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# Speaker



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# EWI (Expert Witness Institute)



Professional organisation to service and support experts. It acts as a voice for the expert witness community, supporting experts from all professional disciplines and lawyers who use the services of experts. The Institute functions to encourage, train and educate experts and to improve and maintain their standards and status.

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# Expert Evidence International



Expert Evidence International Limited covers all the main areas of dispute resolution. We act as joint appointed or party appointed experts and have substantial experience in providing assistance to clients in dispute.

We provide Expert Witness Services, Dispute Resolution, Mediation, Arbitration and Adjudication services. We are committed to professionalism and client service. A wide range of experts cover the different means of dispute resolution in the financial and construction sectors.

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# Aims for an Expert Witness

- Credibility.
- Impartiality
- Independence

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# Al Khorafi v Sarasin Alpin and Bank Sarasin



- Main Issues
  - Documentation – retail client or professional client
  - Meaning of “Capital Guaranteed”
  - Operation of a DIFC Investment Advisor
- Appeal - rejected
  - Exemplary Damages

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# Al Khorafi v Sarasin Alpin and Bank Sarasin



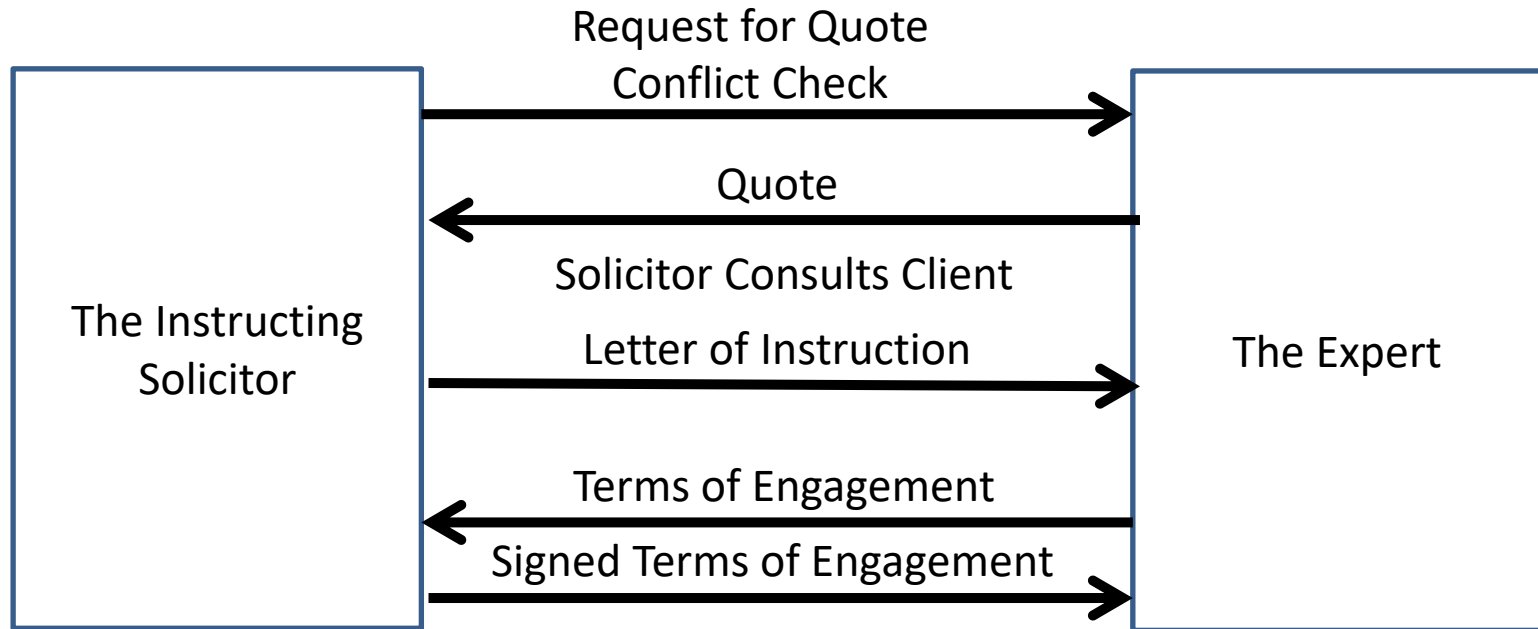
- 5 years to come to trial + 2 to appeal
  - Jurisdictional Issues
- All judgements taken to appeal

<http://expert-evidence.com/rafed-al-khorafi-and-others-v-bank-sarasin-alpen-me-ltd-and-bank-sarasin-co-ltd/>  
<http://expert-evidence.com/update-al-khorafi-judgment-of-10-45m/>  
<http://expert-evidence.com/further-award-in-al-khorafi-v-sarasin-case/>

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# Setting up the relationship with an expert





# The Quote



- What does an expert need?
  - Amount of Evidence to be reviewed
  - What are the questions to be answered?
    - How many?
    - Complexity
  - Costs of third party research, market data etc

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# Instructions



- In writing
- Clear and concise
- Specify exactly what you want the expert to do.
- Specify exactly what will be available to him in terms of evidence.
- Specify exactly the questions you want him to answer.

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# Instruction Template



- Available from the EWI website
- Is it to be as a consultant/advisor or expert?
  - What's the difference?
- What should it contain?

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# Instruction Template Contents (1)



Thank you for agreeing to act as an expert [adviser OR witness] in this matter. This will involve:

- [advising on [SPECIFY WHICH ASPECTS YOU WILL NEED ADVICE ON] **OR** producing an expert report on [SPECIFY SUBJECT MATTER OF REPORT],
- responding to questions in relation to your report,
- participating in discussions with the opponent's expert, as directed by the court,
- giving oral evidence at the trial,] and
- carrying out any other duties appropriate to the role of an expert [adviser **OR** witness], as directed by the court of instructed by us.

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# Instruction Template Contents (2)



## Background facts

- [SET OUT BACKGROUND FACTS] re history & inter-relationships
- Salient Facts
- The points at dispute
- The most relevant evidence
- Usual length 2-4 pages

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# Instruction Template Contents (3)



I enclose the following documents:

- Pleadings
- [NAME OF DOCUMENT]
- [NAME OF DOCUMENT]
- Notes for experts on their duties and their evidence.
- A copy of the reference materials which are referred to in the Notes.

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# Instruction Template Contents (4)



The following issues will need to be addressed in you [advice **OR** report]:

- [ISSUE 1]
- [ISSUE 2]
- If, having read this, you feel that you may not, after all, have the appropriate experience and expertise, please let me know immediately.

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# Instruction Template Contents (5)



## Duties of an expert

You have a duty to exercise reasonable skill and care in carrying out your instructions and should comply with any relevant professional code of practices, but your overriding duty as an expert is to the court. Your primary function is to assist the court and, in this capacity, you must provide your unbiased opinion as an independent witness in relation to those matters which are within your expertise.

An expert's duties are set out more fully in the attached Notes for experts on their duties and their evidence, and you should ensure that you comply with these duties and all other requirements set out in the reference materials.

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# International Rules



English Civil – [Civil Procedure Rules Part 35](#), [Practice Direction 35](#) and the [Protocol for the Instruction of Experts to give Evidence in Civil Claims](#) and the [Guidance for the instruction of experts in civil claims 2014](#).

English Criminal – [Criminal Procedural Rules part 19](#).

Scotland – Case law similar to [Ikarian Reefer](#) principles.

Northern Ireland – [Codes of Practice](#) for Experts [PD 1/2015](#) , [PD 7/2014](#) , [PD 2/2009](#) & [PD 6/2002](#). Please note that the expert declaration in 6/2002 has been replaced by 7/2014.

Jersey – [Civil Evidence \(Jersey\) Law 2003](#) revised to 1 January 2013.

Guernsey – [The Evidence in Civil Proceedings \(Guernsey and Alderney\) Rules 2011](#).

Switzerland – [Article 272 of Swiss Civil Procedure Code](#).

Council of Europe – Human Rights and Rule of Law – European Commission for the Efficiency of Justice (‘CEPEJ’) – [Guidelines on the role of court-appointed experts in judicial proceedings of Council of Europe’s Member States](#).

Spain – Ministerio de Justicia – [Civil Procedure Act 2013](#).

Dubai International Financial Centre (‘DIFC’) [Rules part 31](#) and [Schedule A](#).

Bermuda uses the [Ikarian Reefer](#) precedent.

US – [Federal Rules of Civil Procedure, Rule 26](#) and also by [Federal Rules of Evidence, Rule 706](#).

Canada – [Rule 53.03 Code of Conduct for Expert of the Federal Court Rules](#) and [The Advocates’ Society – Principles governing communications with testifying experts](#).

Australia – [Practice Note CM7](#).

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# Reference

<http://expert-evidence.com/what-constitutes-bias-in-an-expert-witness/>

or

<http://bit.ly/1LJ2nST>

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# Instruction Template Contents (6)



Your report

You will also find a checklist of the points which must be covered in your report in the Notes for experts.

Please let me know immediately if, at any time after producing your report, you change your views.

It is also important to let me know promptly if you feel that it is necessary to update your report after it has been served, for example because new evidence has come to light, so we can consider whether an amended version of your report or a supplementary report should be served.

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# Instruction Template Contents (7)



## Timetable

[There are no court proceedings as yet and therefore there are no court directions in relation to when the expert reports must be ready. However, it would be helpful if you could review the enclosed documents in the next [SPECIFY TIME PERIOD], and I will then call you to discuss the relevant issues and timing before you begin to write your report.

OR

At this stage we are aware of the following dates in relation to these proceedings:  
[SET OUT DATES]

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# Instruction Template

## Contents (8)



### The Experts Meeting

It is likely that the court will direct that there should be a discussion between the experts with the aim of producing a joint statement setting out:

The issues on which you agree.

The issues on which you disagree and a summary of the reasons for disagreeing.

The discussion itself will be without prejudice and, therefore, what is said at the discussion should not be disclosed at trial unless the parties agree otherwise. However, the joint statement will be an open document which the court will see (although it is only binding on the parties if they choose to be bound by it). I will contact you nearer the time to suggest how you should approach this discussion.

Since it is likely that you will be required to give oral evidence at trial, please could you let me know if there are any dates on which you would be unable to attend trial in the next [SPECIFY PERIOD].

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# Instruction Template Contents (9)



- Supplemental Reports
- Additional Evidence
- Consultation with Counsel

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# Instruction Template Contents (10)



## The Trial

Finally, please note that the trial date has been set for [DATE]. It is expected to last for [SPECIFY PERIOD]. Please let me know immediately if, at any time between now and then, you become aware of any difficulty in attending the trial. I will, of course, let you know if any of these dates should change.

It is important to meet deadlines set by the court as failure to do so can lead to costs sanctions or even a refusal to allow us to use your expert evidence.

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# Instruction Template Contents (11)



Right to ask for directions from court

Experts are entitled to ask the court for directions to assist them in carrying out their functions if they feel that this is necessary. I would be grateful to you for notifying me if you intend to make an application for directions, in case it is a matter on which I can help (either by resolving any difficulties you may be experiencing and thereby avoiding the need to ask for directions altogether or by assisting with formulating the request).

If you still feel the need to ask for directions, unless the court has directed otherwise, you are required under Civil Procedure Rules to:

Let me have a copy of your proposed request for directions at least seven days before filing it at court; and

Provide all other parties with a copy of your request at least four days before the request is filed.

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# Instruction Template Contents (12)



Questions on experts' reports

Once your report has been served the other part has the right to ask “proportionate” questions within 28 days in order to seek clarification of the report. Please let me know as soon as you receive them if the other party sends any such questions to you instead of me, so we can discuss the appropriate action. Provided that the questions are proportionate, you have a duty to answer them within [NUMBER] days, as directed by the court, and your answers will form part of your report. Please let me see a copy of your answers before finalising them.

I may also consult you on any questions which should be put in relation to the other party's report.

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# No Nos – Points to avoid

- Make sure that the summary of the case in the instruction letter is clear and fair. No leading questions or bias.
- Provide all the relevant evidence at the beginning.
- Vague questions for the expert to answer.
- Lack of constructive criticism leads to poor reports.
- Ensure that final particulars of claim or defence conflict with the experts report.

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# Further Solicitor Role



- Review Report(s)
- Act as a conduit between the expert and the court
- Points to be covered at the Experts Meeting – Agenda
- Submission of the Reports and Joint Statement to Court
- Confidant/Confidente

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# Experts Role



- Duty to the court
- Ikarian Reefer Rules
- CPR 35
- Kennedy v Cordia (Services) LLP [2016J UKSC 6  
<https://www.supremecourt.uk/cases/uksc-2014-0247.html>

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# Kennedy v Cordia 1

- Whether the proposed **expert evidence will assist the court** in its task. With regards to opinion evidence, the threshold for admissibility will be one of necessity, however, the test for admissibility of expert evidence of fact will not be as strict necessity, as this may deprive the court of the benefit of an expert who is able to collate and present to the court efficiently the knowledge of others in that field of expertise.
- Whether the **witness has the necessary knowledge and experience**. An expert witness must demonstrate to the court that she has relevant knowledge and experience to give either factual evidence which is not exclusively based on personal observation, or opinion evidence. Where such knowledge and experience are established the expert may draw on the general body of knowledge and understanding of the relevant expertise.

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# Kennedy v Cordia 2

- Whether the **witness is impartial in his or her presentation** and assessment of the evidence. The requirement of independence and impartiality is one of admissibility rather than merely the weight of the evidence.
- Whether there is a **reliable body of knowledge or experience** to underpin the expert's evidence. Where the subject matter of the proposed expert evidence is not within a widely recognised scientific discipline or body of knowledge, the party seeking to rely on the evidence will need to evidence not only the qualifications and expertise of the witness, but the methodology and validity of that field of knowledge or science.

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# Questions

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# Contact Details



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