

Building Stronger Cases Through Early Expert Engagement

Foreword

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Introduction

Independent expert witnesses can be pivotal to the success or failure of a case, but only if engaged at the right time. If a lawyer or client waits too long, the risk is not just that the expert may miss key facts due to time constraints; it could also mean the expert delivers an opinion that the case, as constructed, is fundamentally flawed. Getting experts involved early helps build a stronger, more focused case from the very start.

A late-stage expert assessment can reveal that a case was doomed from the outset, highlighting weaknesses that should have been addressed much earlier. In such instances, parties may realise, only after expending significant time and resources, that a settlement would have been the wiser course.

What does an expert do? And potential pitfalls of not instructing an expert

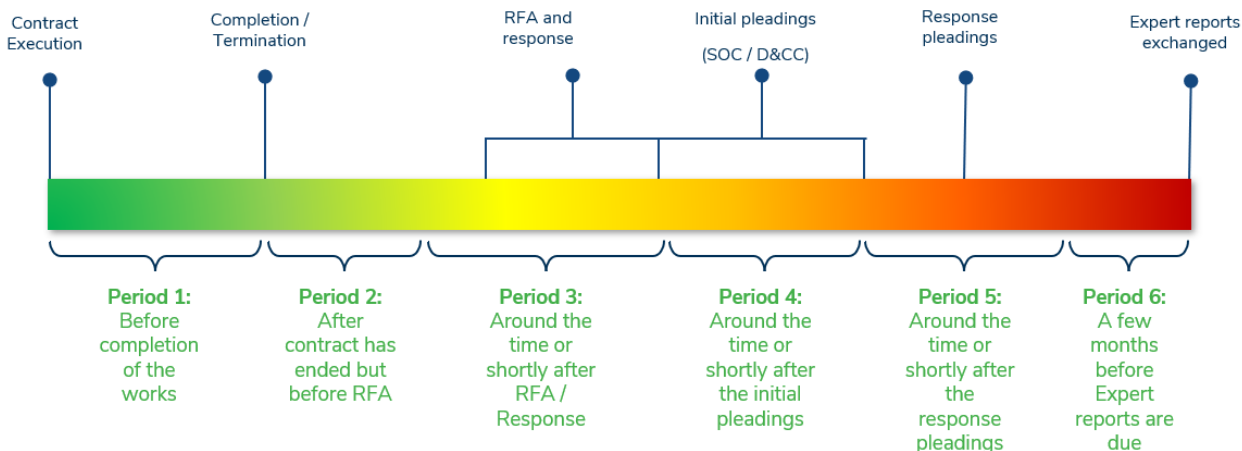
In the initial phase of a dispute, lawyers are often faced with several critical questions. Is there sufficient evidence to proceed? What are the potential risks? What damages can be substantiated? An independent expert witness can help in answering these questions by reviewing records, identifying industry standards, or analysing events that led to a breach. Overall, experts can help shape the basis and direction of a matter. Expert guidance is especially important in technical areas like construction, engineering, and finance. Without this input, a case may be based on assumptions rather than facts.

Experts do not just independently review a case; they can help build it. Experts lean on their knowledge and experience to identify strengths and weaknesses in the case. Their involvement can be crucial in ensuring that all relevant facts are considered.

Independent experts must also ensure they are aware of their professional duties. For example, in litigation in England and Wales, an expert owes a duty to the court, and therefore the expert should be mindful of this from the outset of any engagement. A client's legal team will usually be able to guide a client and the appointed expert on these key issues.

What is the optimum stage to appoint an expert?

We have set out below, an example timeline with a focus on arbitration. The timeline is split into six periods, each representing a point in the proceedings when an expert could potentially be engaged. The first being “before completion of the works”, and the last being “shortly before the expert reports are due”. The question that experts are often asked is: When is the right time to appoint an expert?



As you may have already predicted, there is no single universal answer. It very much depends on the type of project, the dispute and the case as understood (at each point in time). From the figure below, looking at the two project types most are familiar with: standard and complex. For standard projects, it is not uncommon for experts to be appointed as late as Period 5 or even Period 6. In more complex projects the period of engagement is earlier around Period 3. When it comes to giga projects (and even large EPC projects in the UK due to adjudication), experts are being engaged during the execution of the works and in some cases even pre-contract.

Giga Projects¹	Period 1: During the construction phase integrated as part of the team, but maintaining independence
Complex Projects²	Period 3: Around the time of, or shortly after the RFA / Response
Standard Projects³	Period 5: Around the time or shortly after the response pleadings

¹ Giga Projects - a large-scale infrastructure or capital project investment consisting of numerous large scale and complex projects.

² Complex Projects – large scale EPC contracts and complex infrastructure projects.

³ Standard Projects – projects adopting a common method of delivery and characterised by their routine nature, adherence to established standards and specifications.

Ultimately, the engagement of experts in either an advisory or more formal capacity can be of fundamental importance for a client. Having early conversations with an expert coupled with the support from a legal team can potentially assist a client in devising a strategy to best utilise expert evidence, whether that be in respect of input during the course of a project, or during formal proceedings, whether that be adjudication, arbitration or litigation.

Late engagement of an expert

When experts are constrained by limited time, the ability to conduct thorough analysis and gather supporting evidence is compromised. This can lead to incomplete or rushed conclusions, increasing the risk of overlooking critical details. As a result, the overall quality, credibility, and persuasiveness of the expert's findings may be diminished, weakening both the effectiveness of the reports and the reliability of testimony.

Tight deadlines can also lead to either the late submission of reports or restrictions on the analysis and investigations which can be carried out. Missed deadlines can weaken a legal team's ability to present strong evidence, potentially reducing their chances of success. Furthermore, the case may suffer overall if the expert analysis is incomplete or restricted.

Decision-makers may also perceive late engagement negatively, leading to adverse judgments. When experts are brought in too late, their input may appear unconvincing or poorly developed. Additionally, last-minute expert engagements can result in increased costs, straining the client's budget and resources.

Reputational damage is another risk associated with late or rushed expert involvement. If the expert's testimony is seen as unreliable or insufficient, both the legal team and the expert may face consequences. This can impact future engagements and professional standing. Moreover, the opposing party may gain a strategic advantage if they have engaged experts earlier and have had more time to prepare their case thoroughly.

Poor instructions

Regardless of the point of engagement, ambiguous instructions can lead to misunderstandings and inaccurate assessments. When directions are not clear, experts may interpret them differently, resulting in diverse and potentially conflicting opinions. This ambiguity can hinder effective communication between legal teams and the expert, thus compromising the reliability of the expert's testimony.

When provided with partial or insufficient information, their analysis may lack depth and fail to address critical aspects. A lack of information will inevitably impair the expert's opinion, reducing their value and effectiveness in assisting the tribunal or court. If an expert's opinion is not properly researched because the expert considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one.

Poorly defined expectations can misalign expert findings with legal strategies, affecting case effectiveness. Clear guidelines help ensure that the scope of the expert's work is aligned with the objectives of the legal team. If expectations are vague or not clearly communicated, there is a risk

that the expert's output may not meet the needed targets. This misalignment can undermine strategic planning and decision-making.

Contextual understanding is vital for experts to identify relevant factors and nuances that may influence their findings and opinions. Absence of context can lead to overlooking significant issues, thereby limiting the thoroughness and relevance of their assessment.

Highlighting key questions ensures the expert's work meets the legal team's objectives and aligns with the expert's duty to the court. By emphasising questions and areas of focus, legal teams can guide experts towards producing insightful, accurate, and valuable contributions. This practice not only supports the legal strategy but also adheres to ethical obligations and judicial standards.

Experts cannot hide behind their instructions. Receiving a very specific set of instructions which could be perceived as biased in favour of their instructing lawyer's client's case, will not only hinder the expert, but it will inevitably strain the relationships between all parties involved. Independent expert witnesses must clearly state the facts and assumptions underpinning their opinions. They must also not omit material facts; even those that might undermine their conclusions.

Advantages of early engagement

Early expert engagement offers several advantages. Experts can ensure the integrity of key project records, reducing the risk of missing, incomplete, or unreliable evidence in the event of a dispute. For example, experts can recommend adaptations to daily records to include crucial information such as disrupting events, additional hours, and unique IDs within timesheet systems. Furthermore, they can provide input into accounting systems to ensure accurate cost tracking, strengthening the evidentiary basis should a dispute arise.

Early involvement also allows for the timely identification of potential issues or weaknesses, enabling proactive resolutions before matters escalate. With ample time to conduct a comprehensive and detailed analysis, an expert can produce more accurate and reliable conclusions that contribute to a stronger legal position.

Collaboration between the expert, legal team, and client benefits significantly from early engagement. This fosters better communication and increases confidence, knowing that a claim or defence is supported by a well-prepared, thoroughly analysed expert assessment. This results in a high quality, well-supported report, that enhances the creditability which may also help to achieve a settlement.

From a financial standpoint, early engagement is cost-effective as it minimises unplanned fees. Furthermore, proactive engagement allows for a more targeted review process, reducing the need for exhaustive investigations by identifying areas unlikely to be disputed. Early collaboration with the opposing expert can facilitate agreement on methodology, streamlining analysis and minimising the extent of detailed investigative work required, ultimately reducing overall costs.

Credibility and persuasiveness are also strengthened when an expert is engaged from the start. A thorough, independent understanding of the issues enhances an expert's credibility, making their testimony more compelling. Additionally, having sufficient time to familiarise themselves with

project and case details ensures that the expert is better prepared for cross-examination, allowing them to anticipate potential challenges and respond effectively.

For the client and legal team, success hinges on foresight: identifying which principles must be resolved early, having the clarity to discern what will have minimal impact, and possessing the wisdom to differentiate between the two is crucial. That said, early expert input, even if only to assess the financial implications of these distinctions, can be extremely beneficial financially.

Improving the chances for early settlement

Early expert reports play a crucial role in promoting realistic settlement discussions. By providing valuable insights and assessments, these reports help both parties gain a clearer understanding of the case's realities. With this knowledge, lawyers and clients can engage in more productive negotiations and fostering the possibility of an amicable resolution. Strong early expert support puts pressure on the opposing side, showing the claimed positions are realistic and supported with clear data. For instance, when an expert provides detailed substantiated opinions early in a dispute, it provides clarity on the validity and strength or weaknesses of the claim. This approach can save time and resources for both parties by encouraging settlement negotiations instead of embarking in prolonged proceedings. Additionally, it assists in identifying frivolous claims and encourages the parties to concentrate their attention on the critical areas of dispute.

Maintaining independence

At the outset, the expert's role must be clearly defined to avoid any ambiguity that could affect their independence. If engaged solely for proceedings, legal professional privilege may apply, safeguarding communications. However, if an expert takes on an advisory role that influences strategic decision-making, independence may be compromised, and privilege protections could be weakened.

Experts must:

- Maintain neutrality and base opinions on evidence rather than advocacy. Preserving independence requires that experts maintain their analytical integrity even in light of discussions with a client and their legal team; and
- Be consistent and maintain a transparent methodology. Experts should adopt a repeatable approach to their analysis, ensuring that conclusions are derived through sound reasoning rather than preference or predisposition. By maintaining transparency, experts enhance the reliability of their findings and support the integrity of their professional assessments.

When an expert provides advisory services before a dispute arises, the role must be clearly defined to prevent any suggestion of involvement in project decision-making. Maintaining separation from project delivery teams is vital in ensuring that their analysis remains independent and unaffected by operational considerations.

A client's legal team plays an important role in managing and advising on the formal engagement of experts to ensure that appropriate privilege protections are in place, especially when formal dispute resolution is anticipated e.g. litigation.

Furthermore, clear communication is paramount to safeguarding an expert's independence. Experts must maintain appropriate boundaries with the legal and project teams, ensuring that their opinions are not influenced by others.

Advantages of delaying expert engagement

Delayed expert involvement can be advantageous when key principles are in dispute and would affect whether expert evidence is required. For example, interpretation of valuation principles would be better to be decided on first rather than having experts provide valuations in multiple ways. Experts often invest significant time, and consequently, fees evaluating multiple scenarios that may be discarded due to underlying principles. The challenge is in determining when these principles will not impede the process to the extent that they significantly increase costs. Early engagement helps to identify issues which if decided early would help to minimise the costs incurred by both parties at a later stage.

Where foundational principles are already settled, delaying expert engagement can ease the financial burden on the client. For example, in disputes over final accounts, valuation is generally, though not invariably, governed by contractual provisions that define specific principles.

Strategic benefits of phased expert engagement

A phased approach to expert involvement where experts provide initial guidance before an in-depth analysis, can help refine the legal team's strategy. Early engagement does not necessarily mean full-scale analysis, it can instead involve preliminary discussions that help establish a framework for later actions. This approach maximises efficiency while ensuring expert contributions remain relevant and actionable.

Key takeaways

Here are the key takeaways to consider. Early expert engagement can significantly impact the success of a case as it:

- Helps identify weaknesses before the opposing side does
- Helps focus claims around facts that can be substantiated, avoiding time wasted on unsupported claims
- Ensures the integrity of key project records, reducing the risk of missing or unreliable evidence
- Identifies potential issues early, enabling proactive resolutions before matters escalate
- Fosters better collaboration between the expert, legal team, and client
- Minimises last-minute rushes and allows for a more targeted review process
- Enhances the credibility and persuasiveness of the expert, making testimony more compelling
- Can lead to quicker settlements due to the assistance provided in clarifying the key issues
- Can lead to reduced costs if key principles are considered and resolved early
- Can assist in ensuring the instructions provided to the expert are clearer and reduce the likelihood of unnecessary scope being included

About the Author



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