

Planning Pains? Don't Panic!

Questions about planning issues.

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Questions - I am an expert witness in an RMA hearing. My client is settling out of court and has asked me to agree to not provide evidence for any other party. The client also says I could not act for any other party in anyway, as I would be conflicted due to my provision of professional services to my client in this case. I have been approached by another party to appear for them.

Is it appropriate for a client to demand that an expert witness not be available to other parties as part of an out of court settlement of an appeal? Second, how could my expert advice to a client prevent me from giving expert advice to another client in the same case?

Response – A number of lawyers and clients insist that expert witnesses they employ cannot appear for other clients in the same proceedings. Some experts believe the same.

However, the client does not have property in a witness. The

expert witness is a friend of the court, there to aid the court, not the client. The witness could not be prevented from appearing for another client if the witness was prepared to do so. It is also worth noting that if the client has settled out of court then there is unlikely to be any conflict because the former client is no longer involved in the case.

An out of court settlement between an appellant and a defendant that contained a clause ostensibly preventing a court from hearing a witness for the other side would not prevent the witness from doing so. It is worth recalling that a witness can be subpoenaed regardless of any such agreements. The expert opinion would not have changed because of a change in client, unless new information led to some change in the opinion.

With regard to the second question, some lawyers take the view that the witness, especially planning witnesses, play such a key role in case preparation that they are inherently compromised. However, if the witness has played a key role in deciding how the case should be run such that it would lead him to be compromised as an expert witness for another party, then the witness is also compromised as an expert witness for the original client. The opinion of an expert witness should not be influenced by the nature of how a case is to be argued, rather they provide their expert opinion as advice to the lawyer.

Show me an expert witness who says they cannot appear for a party because they are already appearing for another party and I would suggest that in reality you are showing me a 'hired gun', not an expert witness.

Having said this, depending on your contractual relationship with your original client, it would not necessarily be appropriate for you to present material and analysis that had been paid for by your original client. Here you need to tread warily and many would advise against further involvement in the case. The original client might claim ownership of source material and there could be a question of partiality. Although the witness has an overriding responsibility to the Court, there is a secondary obligation to the former client in relation to the information collected/collated.

A number of situations arise where clients do some 'bulk shopping', essentially buy up all the expertise in a particular field critical to a case, and then suppress that information by not calling the witness or not funding research beyond that which the client considers is in its best interests. Under the Environment Court's Code of Conduct for Expert Witnesses, not being able to conduct a full range of tests or samples should be divulged to the hearing if it might affect your evidence or opinion.

Some companies may have longstanding relationships with particular clients and not wish to offend them by allowing their staff to appear for opposing parties in a case. In such situations your contractual relationship with your employer becomes significant, but will not prevent you from being subpoenaed. Note that you can be subpoenaed by council hearings under the RMA, not just at the Environment and higher Courts. If clients and suppliers of expert services 'lock up' experts, we may see increasing use of subpoena.