



Extreme consulting: Is being an expert witness for you?

Article 3/6 for ISA Arborist News (June 2012)

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In this third article in a series on professionalism, UK consultant Jeremy Barrell explores the demands of the pinnacle of professional practice — acting as an expert witness. It is easy to claim to be an expert, but the cold reality of standing in a hostile court with some of the finest legal minds doing their best to pick your credibility apart, word by word, is a different world from the comfort of your warm, cozy office amongst friends. There are certainly easier ways of earning a living, which raises obvious questions: is the pressure worth it, and do you have what it takes to get to the top? If you have expert aspirations, then check out Jeremy's tips that may make the difference between ending up a winner or a loser in court.

The following article was adapted from an item first published in The ARB Magazine, the quarterly magazine for members of the Arboricultural Association (www.trees.org.uk).

The UK Expert Witness Arena

In the UK, the majority of arboricultural expert witness activity is providing specialist advice on trees split between the planning and legal sectors. Taking the legal side first, experts are required in criminal proceedings, where the law has been broken and the state prosecutes the offense, as well as in civil cases, where disputes are settled through an independent judiciary. Typical expert involvement includes a review of relevant information that may necessitate data collection on site, the preparation of a written report, and a formal court appearance to examine the position of each party.

In a planning context, the UK is highly regulated; space for development is scarce and all construction projects require planning permission. If existing trees may be adversely affected, there is a legal obligation to consider them when assessing the merits of the proposal. Experts on both sides will assist the process, and in the event of a failure to reach an agreement, an independently

appointed inspector will hear the evidence at a Public Inquiry before making a decision. Common issues explored include tree quality, the impact of construction activity on trees, and appropriate protective measures. Serving as an expert witness can often be highly adversarial, with all the formality of the courtroom. Although this article focuses on the legal context and the civil arena specifically, similar principles apply wherever experts are required to assist in formal proceedings.

Are you thinking of acting as an expert witness?

Acting as an expert witness can be particularly demanding because the focus in court is on confrontation and survival, as opposed to the cooperation and teamwork ethic that is typical of the more mainstream tree consultancy. This is the front end, where the finest legal minds do their best to challenge your credibility and expose even the smallest weaknesses for all to see, including your client! It is a hostile and unforgiving environment in which only the best

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succeed, so it is wise to think very carefully before making this a career choice.

Previously, I have advocated that ASCA's core principles of competence, due care, impartiality, independence, integrity, objectivity, and public trust, should be the foundation of professional behavior. Of course, expert witnesses must enthusiastically engage with these ideals, but what are the practical implications in their daily work? How do everyday procedures get upgraded to meet these most demanding standards, and are they

practically attainable or just hopeless aspirations? If being an expert witness interests you, there is no simple recipe for making the grade. Instead, success is likely to depend on the accumulated impact of lots of small improvements across the spectrum of normal working practice. Most of these qualities can be learned rather than relying on a rare aptitude to perform the job, which is good news for the majority and not just the fortunate few who are naturally good at it.



Assessing tree quality and demonstrating how the retained trees can be protected through construction activity is a busy area of work for UK expert witnesses.

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For those who may be tempted, it is good to start early — at least 20 years before you plan to appear in court is ideal! There is no substitute for having put in the time. The very best have been in the field for many years with full careers, and they draw on all of that experience to deliver their finely crafted reports and court appearances. If being an expert witness is the right path for you, then here are a few pointers that may be useful along the way.

Qualifications and Experience: An essential cornerstone for providing reliable tree management advice, and therefore the best possible foundation for an outstanding expert witness career, is practical experience. Those who do not have this experience will try to play down its importance, but there can be little doubt that the experts of tomorrow are out there today climbing around in trees, digging them up, or planting them. Of course, there are academics who would argue that qualifications come first in the wish list of credentials for an expert witness, but without experience to place the theory into context, even the most impressive qualifications count for very little. Armchair arborists can be eloquent and articulate, and frequently turn up as entry-level experts. However, as they progress up the skill ladder, the bluff becomes increasingly hard to sustain, and it is only a matter of time before any weaknesses are exposed. The most potent combination is extensive practical experience with heavy-duty qualifications, but that is a rare recipe and takes time to compile. It is not a quirk of statistics or an unfortunate coincidence that the most accomplished expert witnesses are over 40-years old. There is simply no substitute for years of experience; no books, no courses, no

way, except to use painful mistakes to hone vital skills. There will always be the young upstarts trying to make names for themselves, but with them comes a lament of stumbling and embarrassment before they get anywhere near the top. There is no shortcut to success — to be wise, you have to put in the time.

Organization and Accurate Records: To be well-organized takes time. It is a delicate balance between doing so much in the background that there is scarcely time to do any work, and not doing quite enough to avoid being compromised when you need the detail. Keeping reliable and meticulous records is a hallmark of the best experts. The test will be a simple one, and it will come when you are in court, where your paying client is likely to see your success or failure first hand. If you can answer where, when, why, how, and what, without delay, you will have passed the test. Immense credibility flows from being able to retrieve simple facts, quickly and correctly. It is very hard to appreciate that what seems burdensome and unnecessary when there is no pressure, can suddenly become pivotal in the cauldron of the courtroom. The most successful experts are highly organized in every aspect of their work. If you are not naturally organized, it is an essential skill that can be learned. However, if you have no enthusiasm for it, then it may be best to avoid this career path.

Reputation: One of the most valuable assets of a successful expert is an impeccable reputation, with an unblemished record. However, judges will not hold back on criticizing experts if they have not complied with appropriate standards of behavior, and this can have a devastating career impact. Written

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judgments remain in the public domain in perpetuity and so do any criticisms of experts recorded therein. It is very difficult to sustain a good reputation with serious written criticisms that can be accessed by opposing lawyers and brought to the attention of judges in future cases. There will always be pressure on experts from clients who desperately need to win and lawyers whose fees may depend on the outcome of the case. Experts who succumb to those pressures and compromise independence or objectivity by allowing interference from lawyers in the preparation of any written submissions run a real risk of being found out in court, with potentially career-ending consequences.



On-site reconstructions, such as re-fitting a fallen branch back onto the tree it fell from, can assist the court in understanding the visibility of defects before the failure. This was the case for *Atkins -v- Scott* (www.aie.org.uk).

Consistency of Opinion: Whenever providing advice, there is an understandable subtle compulsion for experts to be as helpful as possible to their clients; it's human nature. Clients can be very persuasive. They have a vested interest in promoting their own position, which often manifests as an exaggeration of the positives and turning a blind eye to the negatives of their situation. Inexperienced experts who say what the client wants to hear, rather than deliver bad news, are likely to pay a high price if the case ever gets to court. The jackpot for the cross-examining lawyer is an expert who changes position from one view in the written report (given in the comfort of friendly company) to a different view in the face of hostile verbal examination in front of a judge. Such changes are common and can be fatal to the case. There are always two sides to every story, each one often as compelling as the other when heard in isolation. Consistency of opinion, irrespective of the forum where it is expressed — the core quality of independence — is essential for long-term survival and success as an expert witness.

Writing the Report

The way an individual writes is a personal preference, and what helps one person may do quite the reverse for another! Legal reports are complex and require full, focused attention. Any distractions can have very serious consequences, so dipping in and out for a few hours at a time while drafting a report probably isn't a good idea. Most accomplished experts have the ability to concentrate on the case issues to the extreme. Once they start working on a case, it is all they do. Almost every available minute is spent thinking about the relevant issues, from

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waking in the morning until lying down to sleep at night.

There are a number of writing principles that must be observed in penning a report of this type: always separate facts and opinions; keep it simple; avoid jargon; focus on the issues; and do not decide on issues that are for the judge. *Be warned: Although these may seem quite obvious, they are also the most common failings, so ignore them at your peril.*

One misconception in report writing is that the more technical references an expert uses, the better the argument or the more robust the opinion. In practice, it is very much the reverse. Almost invariably, a close analysis will reveal that the references have been used selectively. In these cases, extracts that do not support the argument have been omitted, or the included extracts are hardly relevant to the point being made. Inexperienced experts will frequently rely on references because they simply do not have the confidence to run the argument based on their own, firsthand knowledge. In contrast, more seasoned operators will have the confidence to base their remarks on what they have seen and

know. Technical referencing is not a reliable measure of competence. In the very subjective world of trees, it is wise to use it sparingly and with caution.

A primary expert role is to assist the court in understanding often complicated technical issues, and there are very few rigid boundaries on how to do it. Traditionally, expert evidence has been text orientated, but photographs, animations, models, and even video can be of great benefit, especially if they enhance a comprehension of concepts or sequences of events that are difficult to visualize. This can even extend to reconstructions on site, such as re-fitting fallen branches back onto the tree to clarify the visibility of defects before the failure. Creative and innovative explanations of complex issues within the report can be the difference between winning and losing, and can elevate an expert's reputation from average to exceptional.

Of course, there is much, much more to being a successful expert witness than the few points outlined here, but this article should provide a glimpse into a world that few ever experience.

In his next article in this series, the author will explore some essential preparation for that rare appearance in court. Find out if you have what it takes to perform on the witness stand or whether you may be happier avoiding it altogether.



Jeremy Barrell has worked with trees all his life, building up a modest contracting business in the early 1980s and 1990s before concentrating on full-time consultancy in 1995. From those humble beginnings, Barrell Tree Consultancy (www.barrelltreecare.co.uk) now has six consultants advising on planning and legal issues throughout the UK.