

THE ROLE OF THE EXPERT WITNESS

Some Preliminary Observations

[1] First, the following views are of necessity rather general. While there is a high level of consistency amongst the various Divisions of the Environment Court there can be minor differences born of the personal styles of the Judges. It can be said with certainty however that there are some basic “givens” about such things as objectivity and avoidance of advocacy that will always be required of the expert witness. Reference should be made by all intending expert witnesses, to the Court’s Practice Note on the subject, effective as from 31 March 2005. (More detail on that Practice Note is provided later in this paper.

[2] Secondly, be aware that the thoughts in this presentation should not be taken as a magic potion that will guarantee an overnight doubling of performance and ability.

[3] Impressiveness as an expert witness, like advocacy in lawyers, is an art that some lucky people possess inherently, but for most people is developed gradually with the benefit of practical experience as a witness, careful self-criticism, and yet more experience.

Qualities and Qualifications

[4] It will be helpful to reflect on what qualifies a person as an expert witness and why his/her opinion is receivable in evidence.

[5] By way of background (and in some contrast to the expert witness) non-expert witnesses (we call them “witnesses of fact”), are not in Court to tell us what they think or believe about aspects of the case. The function of that witness is to state facts, not his/her personal opinion. The reason for this rule is that it is for the Court to draw inferences from the facts. The Court must form its own judgment on the facts brought before it. In contrast, expert witnesses offer a combination of facts and opinions. When expert witnesses are called the Court needs to be assured of their special competency to form an opinion. Such witnesses are peculiarly placed to assist the Court because of their special sphere of study and their experience qualifying them as experts.

[6] The function of the expert witness is to explain logically and objectively the reasoning for the opinion advanced, in order to assist the Court. The Court's function is to weigh the expert's opinion and the reasons for it against the opinions and reasons offered by similar experts called by other parties, and thus arrive at its own properly informed opinion.

[7] Sometimes it may not be easy to determine when a person can be said to be an expert or not. In essence, the expert must be skilled by special study or experience. But the fact that the person has not acquired his/her knowledge professionally goes merely to weight, not to admissibility.

[8] For example, a planner with no degree or diploma who has, nonetheless, worked in a council's planning department for some years advising the council on resource consent applications, may well be suitably qualified to express his/her opinion to the Court on an appeal from a decision of the council, as an expert. It was not uncommon in years past for council building inspectors and other officers to have long practical experience but no formal degree. Those people were often called to voice their opinions as experts, but that is much less common now.

[9] These days, experts called in the Environment Court usually have formal qualifications. However the Court always looks for two things:

- (a) is the person called as an expert qualified to give an opinion on all aspects to which his/her evidence relates?

(In this context, an expert planning or resource management witness will often state specifically that he/she relies on other expert evidence, eg as to traffic or noise. Obviously if an assumption that another expert's evidence will be accepted by the Court proves wrong, then the weight afforded in the planner's opinion will, in turn, be revised).

- (b) Secondly, is the person's experience commensurate with his/her qualifications?

(The Court here is concerned to have regard to the person's whole background in assessing the quality of his/her evidence. On occasion, for instance, an expert witness's opinion may lack the maturity that comes from practical "on the ground" experience, despite the apparent standing of his/her qualifications. Alternatively, an expert witness may be found deficient because of a failure to demonstrate to

the Court's satisfaction sufficient knowledge of technical terms or relevant concepts in the witness's particular filed).

Cardinal Rule 1 – Avoid being an “Advocate”

[10] The first cardinal rule for an expert witness is not to be an advocate. Do not sacrifice the vital quality of independence and objectivity on which the expert witness's credibility depends.

[11] The contrast between the role of the advocate and that of the expert witness may be seen from the following.

(a) The Advocate

An advocate (often a lawyer) presents the case of one of the parties. An advocate may make representations about what the facts are, and what the outcome of the case should be. By their nature, those representations are partisan - they are urging the Court to a particular decision in the case.

However persuasive an advocate's representations may be, they are not enough alone for the Court to make a decision. The Court needs more than bare assertions - it needs the evidence of witnesses as a basis for its findings. The evidence is exposed to testing in cross-examination by other parties or their advocates, to questioning by the Court, to criticism in submissions, and to the possibility of contradictory evidence of other witnesses.

(b) The Expert Witness

The functions of an expert witness include:

- providing the Court with the general grounding in the witness's specialist discipline that it needs to decide the question involved;
- collating and describing the material facts that the witness has obtained; and
- stating the witness's own conclusions and opinions and the grounds on which they have been formed.

In the case of a discipline with which the Environment Court is familiar, such as planning, the first function may be omitted.

Cardinal Rule 2 – Objectivity

[12] An expert witness is expected to be independent and objective. The witness is to give his or her own opinion, not that of the employer or client.

Application of Principles

[13] In Environment Court cases, there is often little dispute about primary facts. More often, the real issue is the application of principles and professional practice to the facts. This is often where expert opinions differ. It is important that the expert witness resists pressure to be less than independent and objective in forming an opinion to give in evidence. Whether employed by a public authority, a private enterprise, or engaged as a consultant, a professional person will often be well aware of the opinion that the employer or client hopes will be reached. In some cases, the expert may feel that the consequences of being unable, in good conscience, to reach that opinion may have unfortunate implications for future employment or engagement.

[14] However, if the professional is unable independently and objectively to reach that conclusion, it is unacceptable to present it in evidence. It is not acceptable for a professional person to take the attitude that the employer's or client's case is "arguable", and if it finds favour with the Court it is probably right, and if it does not then no harm will have been done. That attitude may be appropriate for the advocate, but not the expert witness. If a professional person fails to maintain objectivity and independence, it is likely to be apparent to the Environment Court, which will soon learn to place little weight on that person's evidence. His or her credibility with the Environment Court may be undermined. That person would then be of little value to employers or clients.

The Committed Crusader

[15] Another risk to objectivity may arise when an expert is asked to give opinion evidence that relates to a topic on which the expert holds a strong view. Professional people are often leaders of thought in the community. They should not be expected

to forgo public life in case they are asked to testify on a subject in which they have contributed to public debate. However, where two experts, equally eminent in their profession, express differing opinions and one has come new to the topic, while the other has campaigned on one side of the debate for years, there is a chance that a decision-maker may prefer that of the dispassionate professional, over that of the committed crusader.

Conflict of Interest

[16] Objectivity will not be presumed by the Environment Court, if a witness (or someone closely associated with the witness) has a personal interest in the outcome of the proceedings. This may arise even in a normal professional engagement, if it is from a regular client from whom further work may be expected. The position of an employee may be even more difficult. If an expert is not clearly independent of the outcome, it is better that a more clearly independent person is engaged.

The Task of the Expert Witness

[17] A word now about the task of the expert witness, particularly the planning witness. Clearly, such a witness must understand the legal framework within which the Court's decision is to be given. The facts of the case, the scientific and technical opinions of other witnesses, and the relevant considerations under the Resource Management Act, must be drawn together in a coherent and orderly manner, with an objective assessment and view emerging in the result. It is important that the witness's understanding of the legal position corresponds with that of legal counsel. But note that it is for counsel to persuade the Court of the soundness of the legal position propounded.

[18] The expert planning or resource management witness cannot be blamed if, having following counsel's advice as to the legal position, he/she proceeds to formulate his/her evidence and to arrive at an opinion against the background of that position when that legal position later proves to be in error.

[19] Where a litigant chooses not to engage legal counsel and wishes a consultant planner/resource manager to act in the dual role of advocate/expert witness, the witness can be faced with a dilemma.

[20] The two roles do not sit at all comfortably with each other – one (as expert witness) requiring objectivity and proper professional concessions on occasion, and the other (the advocate) essentially involving the urging of one particular view of a case. It sits uneasily with the Court for a planner to appear as both advocate and expert witness, just as the Court is unlikely to be impressed with counsel offering expert planning or resource management opinion. As already emphasised, the expert witness's position of independence and objectivity is of utmost importance in the discharge of his/her role. Hence, a planner who is prepared to “change hats” and appear before the Court as both advocate for the client and expert witness does not make his/her task as an expert at all easy. The Court has not banned the practice, but actively discourages it.

Some Practical Suggestions

[21] Here are some practical suggestions concerning preparation for your appearance as an expert witness in the Environment Court, and the hearing itself.

- (a) Forgive the repetition, but first remember the cardinal rules. Don't over-step the mark by seeking to promote your point of view as though you were an advocate. If a view is soundly based, it will best be conveyed in an objective manner. A reputation of independence and objectivity is precious to maintain, and can easily be eroded.

Be objective at all times. Closeness to a particular client (or, in the case of council witnesses, an employer), coupled with a natural desire to please, must not be allowed to influence your professional evidence.

- (b) Do take the trouble to familiarise yourself with the critical issues before the Court, the relevance and scope of your own expertise in relation to those issues, and the extent of the Court's jurisdiction in the proceedings.
- (c) Do candidly acknowledge and objectively take into account a good opposing point raised, say, in cross-examination. Don't hedge or seek to deny that the point has any validity. If you take that stance instead of conceding the point, you run the risk of an adverse inference being drawn as to that point, and in an extreme case your credibility overall may suffer in the eyes of the Court.

- (d) Do make sure that the data on which your evidence relies is accurate. Attach such information as may be needed adequately to understand your reasoning, as an appendix to your brief of evidence.
- (e) Don't regale the Court with a large amount of marginally relevant evidentiary material in an effort to impress, because you run the risk of the core information and reasoning being lost or having a reduced impact.
- (f) Do remember that the Environment Court is an expert forum, used to hearing expert views on various topics, especially planning. Therefore, you should try to be succinct. This is not to say, however, that statements of evidence should incorporate shortcuts, based on over-confident assumptions that "it's obvious, so it needn't be said".
- (g) Do remember to give a resume of your qualifications and experience, no matter how well-known you may believe yourself to be in the Court's eyes.
- (h) Don't allow impatience to exhibit itself in response to apparently simplistic, let alone ill-informed, questions raised in the course of proceedings. Maintain courtesy and control, the hallmark of the good expert witness, and answer all questions as clearly and straightforwardly as possible, without condescension or irritation. The Court will not be slow to recognise the polite restraint of a witness' responses against the background of his/her knowledge and experience!
- (i) Do endeavour to adopt the practice, in liaison with counsel, or working with the other parties to compile an agreed dossier of relevant district/regional planning provisions and background documents and facts for presentation to the Court. The presentation of such an agreed statement will remove the need to repeat much common ground material in the several planning witnesses' briefs (especially in cases where more than 2 planners may be involved), thus enabling the Court to focus more speedily and directly on each witness's process of reasoning. The Court has an increasing concern at hearing times being extended in the presentation of expert planning evidence where several planning witnesses are involved, each

laboriously outlining material that previous witnesses have already covered.

Environment Court Practice Note

[22] The Environment Court has issued a new Practice Note about the nature and work of expert witnesses, effective from 31 March 2005. In particular it introduces a significant new section on the duties of expert witnesses and of the parties/counsel who call them. The requirements essentially formalise and make transparent, many of the “good practice” suggestions we make in this paper. In addition, there are requirements concerning conferences of experts (which the Court has long encouraged whether formally directed in any case, or not); the preparation by all parties of a statement of facts and issues agreed and those remaining contested; and a schedule of the provisions of plans, policy statements, and other statutory documents to which witnesses and counsel will refer. Succinctness and the avoidance of needless repetition are encouraged, and there are some constructive suggestions about the way in which Court decisions are cited and presented.

CONCLUSION

[23] To conclude: Expert witnesses often face a difficult and complex task in the framing of their evidence. The Court is well aware of this. In reality, the Court’s task could not be discharged without the assistance of expert witnesses skilled in a wide range of fields.

[24] From the Court’s perspective, the vital role played by expert witnesses is one of the keys to its work in society. The input that such experts provide is almost invariably respected and appreciated.

Environment Judges/Commissioners
February 2005



PRACTICE NOTE ON ALTERNATIVE DISPUTE RESOLUTION, EXPERT WITNESSES, AND AMENDMENT TO PRACTICE NOTE ON CASE MANAGEMENT

1. ALTERNATIVE DISPUTE RESOLUTION (ADR)

Introduction

[1] Paragraph 11 of the Practice Note of the Environment Court [1998] NZRMA 282, is revoked from the date on which this Practice Note takes effect.

[2] Section 268 of the Resource Management Act 1991 empowers the Environment Court to arrange mediation and other forms of alternative dispute resolution (ADR). For the purpose of encouraging settlements of cases it can authorise its members (Judges or Commissioners) or other persons to conduct those procedures.

[3] The Environment Court actively encourages forms of ADR, for example through its case management techniques as set out in its Practice Note on Case Management that came into force on 30 April 2004, [2004] NZRMA 237.

[4] The Court offers a mediation service run by its Environment Commissioners who receive comprehensive professional training for the purpose, and bring other professional skills and specialist knowledge to the task.

[5] Other types of ADR can also be offered, whether by Environment Judges, Environment Commissioners, or other persons appointed for the purpose. Examples of other forms of ADR may include conciliation,

conferences to narrow issues, meetings of relevant expert witnesses, arbitration, expert determination and judicial settlement conferences.

[6] The Court regards mediation and other forms of ADR as particularly well-suited to resolution of many environmental disputes. ADR techniques are often highly cost-effective compared to proceeding to full hearing before the Court, but sound preparation and input are important. The protocol contained in this Practice Note is intended to provide guidance and encouragement to that end.

[7] The Court is not required by statute to, and does not for itself, make the use of ADR processes mandatory. It is widely recognised that ADR processes offer the most value when they are voluntary, as they then offer flexibility, an interests-based approach, ownership of resolution of the dispute, and are often more conducive to the preservation of inter-party relationships than is litigation.

[8] The Court recognises that not all environmental disputes are apt for resolution by ADR processes. Because every case is different, it is not sought to nominate types of cases as being more suited to this form of resolution than others. The Court expects parties in all cases to give due and proper consideration to undertaking ADR processes. It is important, however, that parties wishing to achieve resolution through mediation or other means short of a hearing by the Court act swiftly, so as to avoid delay in the allocation of a hearing fixture should resolution not be achieved and Court hearing time be needed.

[9] Even in cases where ADR processes might be less likely to produce a complete settlement, the Court expects the parties to give full consideration to the use of them to narrow and settle issues within disputes.

[10] During all stages of the life of cases, the Court will expect parties to continue to address the applicability of ADR, be willing to consider it on an objective basis, and to employ it constructively.

[11] Proceedings in which ADR has been undertaken will often become the subject of documentation referred to a Judge with a request for a consent order. The Judges will give due consideration, in exercising their overall

decision-making discretion, to the making of consent orders, either in the terms sought by parties, or with modifications approved by them (whether to correct mistakes or ambiguities, or to bring the order within jurisdiction, or to meet any other point of concern).

[12] Mediation and other ADR processes can sometimes produce, in addition to resolution within the case, outcomes that are beyond the jurisdiction of the Court. Such additional matters will not be included in a draft consent order placed before a Judge for approval, but may instead be made the subject of a separate agreement that may be enforceable in other forums.

[13] Where parties agree to undertake ADR, the case before the Court may either be placed into the Parties' Hold Track (refer paragraphs 17 and 18 of the Court's Practice Note on Case Management), or if directed by a Judge, commence or continue in preparation for a hearing in parallel with the ADR process.

[14] The protocol that follows is for use in mediations, because that is the most common form of ADR offered by the Environment Court (noting, however, that mediation in this Court can at times encompass elements of conciliation and negotiation). If parties seek assistance through some other ADR method, application should be made to a Judge who will progress matters with them and make directions or otherwise assist to such end. Equally, it should not be forgotten that direct negotiation, constructively focussed, should be within the contemplation of parties at all times.

Mediation protocol: EC-assisted mediations

1. Initiation of mediation

1.1 Mediation may be initiated at any time during the life of a case, whether at the time of the first report to the Court under the case management track procedures, or subsequently. The agreement to mediate may come from the parties or be offered by the Judge.

1.2 Subject to any flexibility in procedure initiated or authorised by a Judge or a Commissioner, the parties

will be deemed to agree to be bound by this protocol and guided by the preceding paragraphs of this Practice Note.

2. Appointment of mediator

2.1 Subject to such consultation with the Principal Environment Judge as is appropriate in the circumstances, the case managing Judge or Registrar (subject to any direction of a Judge) shall appoint an Environment Commissioner to mediate, or may appoint a person who is not a member of the Court. If the latter, agreement will be needed between the parties and the Registrar as to who will bear the costs of the mediation.

2.2 The mediator shall have no personal interest in the matters in dispute, neither will he or she be acquainted or connected with any of the parties, nor have knowledge of the dispute, except to the extent disclosed to the parties and accepted by them for the purpose of proceeding with the mediation.

3. Role of mediator

3.1 The mediator is an independent intermediary who will seek to act impartially, fairly and objectively, and to treat the parties in an even-handed way. The role of the mediator is to assist the parties to arrive at agreement to settle the dispute or issues within it.

3.2 The mediator's role does not involve making a determination to be imposed on the parties.

3.3 The mediator will seek to commence and conclude the mediation as promptly and efficiently as possible in all the circumstances of the case. He or she will aim to

conclude the mediation in one session if possible, and the preference of the Court is that mediation will not go beyond three sessions except in exceptional circumstances.

4. Representation and attendance at mediation

- 4.1 Parties are at liberty to be represented by one or more persons who may have particular qualifications. The names and contact particulars of such persons shall be provided to the Court and to the other participants in the manner required by the Court's Registry.
- 4.2 Each party shall have at least one representative who retains consistency in that role through all sessions, who shall be fully authorised to participate (for instance by answering questions and co-operating in the mediation in any manner appropriate from time to time), and who is able to be present (save in exceptional unforeseen circumstances) during the whole of every session.
- 4.3 Where a party appoints a representative to attend the mediation, the party represents that, through the party's nominated representative, full authority exists to settle the dispute or issues at stake. Where such authority is not available in the case of any party, that party shall advise the other parties and the Court prior to the mediation, and the mediation shall not proceed unless all parties and the mediator agree to proceed on that basis. Bodies such as councils, corporates, and groups, are encouraged to provide their representative(s) with full delegated authority to settle.

5. Documents to be exchanged prior to mediation meetings

- 5.1 Depending on the nature of the case, the mediator may request from the parties prior to, or at, the first meeting, a written synopsis recording the nature of the dispute, relevant facts (whether agreed between the parties or in contention in the proceedings), and the respective interests and concerns. This step is entirely at the discretion of the mediator as to whether it occurs and/or how. The mediator will seek input from the parties on these matters.
- 5.2 Such a synopsis may include written statements of factual information or expert opinion.
- 5.3 Copies of relevant documents may be attached to any such synopsis, or at least referred to with sufficient clarity for the mediator and other parties to understand what they are, the nature of them, and the particular aspects of them that are to be referred to or relied upon.
- 5.4 Copies of any synopsis and other documents provided to the mediator are to be provided to all other parties. If, however, a party wishes to communicate confidential information to the mediator, the party is to work with the mediator to put appropriate arrangements in place concerning the information and concerning consequent appropriate conduct of the mediation.
- 5.5 Any communication with the mediator outside of a mediation session shall occur only through the Court's Registry and with notice to all other parties.

6. Conduct of mediation

- 6.1 The mediator may conduct the mediation in such a manner as he or she thinks fit, having regard to the nature and circumstances of the dispute and the wishes of the parties.
- 6.2 The Court's Registry will arrange premises and appropriate furnishings and equipment for the mediation, and the mediator will arrange an appropriate timetable with assistance from the Registry.
- 6.3 The parties will be expected to co-operate in good faith with the mediator and with each other in attempting to settle the dispute or issues at stake. They will also be expected actively and constructively to assist the process by duly participating in it, and providing documents, information, submissions, and other assistance suggested or requested by the mediator.
- 6.4 The mediation shall not be conducted pursuant to formal procedures or rules of evidence, and will be guided at all times by the mediator.
- 6.5 At the commencement of the mediation the mediator will usually be expected to make an opening statement covering issues such as the role of the mediator, the conduct of the mediation and the confidential nature of the process.
- 6.6 The mediator may conduct joint or separate meetings with any one or more of the parties.
- 6.7 The mediator may ask questions and seek clarification, and may request the parties to exchange further information, or further explain their submissions and any information provided.

- 6.8 The mediator will refrain from providing any assessment of matters in dispute (whether legal, factual, or of expert opinion, or relating to possible outcomes for any aspect of the dispute). The parties and the mediator, however, may agree to depart from this protocol.
- 6.9 In mediations involving large numbers of parties, and in others involving complex issues, the Court may arrange for co-mediation to be undertaken by more than one mediator. Co-mediators and peer-reviews may also occasionally be undertaken in the interests of maintaining and enhancing the quality of the Court's mediation service.

7. Settlement

- 7.1 The mediator does not have the power to impose a settlement on the parties, but will endeavour to assist them to reach settlement of the whole or parts of their dispute.
- 7.2 The scope and terms for settlement which the parties may develop may not necessarily be limited by the subject matter within the jurisdiction of the Court in the dispute. The parties may request that aspects of their agreement that are within jurisdiction be referred to a Judge for the making of consent orders, and may enter into separate agreements on matters outside jurisdiction.
- 7.3 It is preferable for the parties to make a binding commitment to the settlement of the dispute, and they should either have all necessary legal advice before mediation commences, or have access to it during the mediation process.

- 7.4 The mediator may, with the consent of the parties, seek information or advice from an Environment Judge and shall disclose the results of such enquiry to all parties in an even-handed way.
- 7.5 The mediator may work with the parties actively to stimulate communication and settlement, or may take a more passive role as he or she thinks appropriate.
- 7.6 Information will not be given under oath during the course of the mediation, and the Court gives no guarantee as to the accuracy of any information. It should be noted, however, that there is general case law precedent whereby Courts have assisted parties who have refused to be bound by mediated agreements reached on the basis of an exchange of misleading information.
- 7.7 Participation in mediation shall not prejudice the existing legal rights of the parties, but parties should understand that a settlement or agreement reached through the process may change their legal rights and may be legally enforceable.
- 7.8 The mediator may assist the parties to record their agreements in writing, whether by way of heads of agreement, a detailed agreement, or a draft consent order and memorandum for a Judge. In the alternative, details of a draft consent order and memorandum for a Judge may be left to be reduced to writing immediately after the mediation, or otherwise within an agreed timeframe, but mediators will generally encourage the parties to record as much as possible of their agreement in writing before conclusion of the mediation session.

7.9 The mediator will advise the parties (if all or any of them are unaware) that the Judge considering any draft consent order has a discretion as to whether or not to make it, or to recommend modifications of it to the parties, or to decline to make it. For example, the Judge may in the course of exercising his or her discretion, have regard to matters of wider public interest than were addressed by the parties, and also the purpose and principles of the relevant legislation.

8. Confidentiality

8.1 Mediation is a private procedure. The parties and the mediator (subject to rights of the parties to take legal advice during the process) shall maintain the confidentiality of the process, and not discuss what occurred in the mediation with others who were not involved with the process.

8.2 The mediator may meet separately with any party or parties and may be offered information which is to be kept confidential from other parties. Subject only to any overriding duty to the contrary imposed by law (eg the Crimes Act 1961), the mediator shall keep that information confidential and not disclose it to anyone else without the consent of the party who provided it. The parties should have careful regard as to whether settlement will be assisted by such conduct, however.

8.3 The mediation shall be without prejudice to the dispute and shall not be referred to or relied upon in any other proceedings in the Court. The parties shall not, without the written consent of all other parties, introduce as evidence in any such proceedings:

- Documents prepared expressly for the mediation;
- Admissions made by a party in the course of the mediation;
- Views expressed or suggestions made by any party concerning a possible settlement of the dispute;
- Proposals made or views expressed by the mediator;
- The fact that a party had or had not indicated willingness to consider a proposal for settlement.

8.4 Nothing in this Section 8 bearing on confidentiality shall prevent discovery, or affect the admissibility, of any evidence (being evidence that is otherwise discoverable or admissible that existed independently of the mediation process), merely because the evidence was presented in the course of the mediation.

8.5 Unless directed by the Court, the mediator shall not divulge any aspect of the mediation in any proceeding in the Court. The parties may collectively waive confidentiality, but unless that occurs, or a direction is specifically made by a Judge, he or she shall not divulge any matters disclosed in the mediation.

8.6 The mediator may only sit as a member of the Court to hear a proceeding on the subject matter of the dispute mediated, if the parties, the member concerned, and the Court are satisfied that it is appropriate.

9. Costs

9.1 The mediation, if conducted by an Environment Commissioner, will be without fee payable to the Court unless directed or authorised by any relevant legislation.

- 9.2 The parties shall meet their own costs of the mediation unless they agree otherwise between themselves.
- 9.3 The mediator has no power to make any order for costs as between parties or in favour of the Court.

10. Termination

- 10.1 Any party may withdraw from a mediation at any time, but is encouraged not to do so and instead to participate in the full spirit of endeavouring to settle the dispute or at least elements of it.
- 10.2 The mediation may be terminated at any time by agreement between the parties, or by direction of the mediator.
- 10.3 The mediator may terminate the mediation if he or she considers that a party's safety, or his or her own safety, is at risk.
- 10.4 Subject to any further input sought by a Judge from the parties, the mediation shall be concluded upon execution of a final agreement, or alternatively upon finalisation of detailed documentation left to be completed after the mediation.

11. Variation

- 11.1 The parties may vary this protocol by an agreement and under the guidance of the mediator, but are encouraged to utilise as much of it as possible as a procedure for settlement of planning and environmental disputes.

2. EXPERT WITNESSES

Expert witnesses to comply with Code of Conduct

- [1] A party to a proceeding who engages an expert witness must either give the expert witness a copy of the Code of Conduct contained in this Practice Note, or be satisfied that the expert witness has seen the Code of Conduct and is familiar with it.
- [2] An expert witness must comply with the Code of Conduct in preparing any affidavit for filing with the Court, or in the preparation of a proposed brief of evidence, or in giving any oral evidence in any proceeding in the Court.
- [3] The evidence of any expert witness who has not read, or does not agree to comply with, the Code of Conduct may only be adduced with leave of the Court.

Code of Conduct for Expert Witnesses

Duty to the Court

1. An expert witness has an overriding duty to assist the Court impartially on relevant matters within the expert's area of expertise.
2. An expert witness is not an advocate for the party who engages the witness.

Evidence of expert witness

3. In any evidence given by an expert witness, that person must, in the body of the witness's statement or affidavit (if the evidence is in writing) or orally (if the evidence is being given orally):
 - (a) acknowledge that the expert witness has read this Code of Conduct and agrees to comply with it;

- (b) state the expert witness's qualifications as an expert;
 - (c) describe the ambit of the evidence given and state either that the evidence is within the expert's area of expertise or that the witness is relying on some other (identified) evidence;
 - (d) identify the data, information, facts, and assumptions considered in forming the witness's opinions;
 - (e) state the reasons for the opinions expressed;
 - (f) state that the expert witness has not omitted to consider material facts known to the witness that might alter or detract from the opinions expressed;
 - (g) specify any literature or other material used or relied upon in support of the opinions expressed;
 - (h) describe any examinations, tests, or other investigations on which the expert witness has relied, and identify, and give details of, the qualifications of any person who carried them out;
 - (i) if quoting from statutory instruments (including policy statements and plans), do so sparingly. (A schedule of relevant quotations may be attached to the statement of evidence or a folder produced containing relevant excerpts).
4. If any expert witness believes that his or her evidence, or any part of it, may be incomplete or inaccurate without some qualification, that qualification must be stated in the evidence.
5. If an expert witness believes that his or her opinions are not firm or concluded because of insufficient research or data, or for any other reason, that must be stated in the evidence.

6. If after the exchange of a brief of evidence has occurred, an expert witness changes any of his or her opinions, that must be communicated without delay to the party or parties wishing to call the witness.

Directions to Confer

7. The Court may (usually after the exchange of primary statements of evidence) on its own initiative, or on the application of any party, direct that groups of expert witnesses confer to attempt to agree on matters in their respective fields and narrow issues between them.
8. An expert witness must comply with any such direction of the Court to:
 - (a) confer with another expert witness.
 - (b) seek to reach agreement with the other expert witness on matters within the field of expertise of the expert witnesses.
 - (c) prepare and sign a joint witness statement stating the matters on which the expert witnesses agree and matters on which they do not agree, including the reasons for their disagreement.
9. In conferring with another expert witness, and in preparing a joint witness statement, the expert witness must exercise independent and professional judgment and must not act on the instructions or directions of any person to withhold data or information, or to withhold or avoid agreement, or as to the contents of the joint witness statement.

3. AMENDMENT TO PRACTICE NOTE ISSUED IN 2004 ON CASE MANAGEMENT

[1] Experience has shown that:

- (1) in some standard track cases the period of 50 working days for a report to be furnished to the Court warrants variation;
- (2) generalised types of appeal are commonly lodged without providing adequate information as to the issues giving rise to the appeal;
- (3) some parties or their representatives seek the Court's assistance, often by way of conference, on procedural matters in circumstances where they should be able to agree on the procedural matters amongst themselves;
- (4) in some cases large volumes of material of marginal relevance, or not focussed upon essential issues, are presented to the Court;
- (5) some parties, counsel, and representatives have shown a tendency to make excessive use of the ever-growing numbers of Court decisions available (reported and unreported) on any given point in their case, thereby prolonging hearings and adding to cost.

[2] The Court's Practice Note on Case Management [2004] NZRMA 237 is thus amended as indicated in paragraphs [3], [4], [5], [6] and [7] below. In all other respects, the 2004 Practice Note is confirmed.

[3] Standard Track – Report to the Court: The fourth bullet point to paragraph [15] of the 2004 Practice Note is amended to read:

- a standard direction that a party to the proceedings (normally the respondent) is to lodge with the Court and serve a report (to include a programme for the proceedings), consequent upon consultation with other parties, within 50 working days, or such other (generally shorter) period that the managing Judge may specify.

[4] Particulars of Appeal: In lodging appeals, appellants must give full and clear particulars of their grounds for appeal, and, following lodgment, confer meaningfully with the respondent and other parties in seeking to agree on, or otherwise narrow, relevant issues.

[5] Conferences: The Court expects the parties, particularly their professional representatives, to take a proactive role in contacting, negotiating and settling with other parties before seeking the Court's assistance to determine procedural issues.

[6] Evidence: In preparing for hearing, parties are expected to co-operate in ensuring that the proceedings are dealt with in a focussed way on all sides. With that in mind, parties are encouraged to provide a statement of agreed facts and issues, and an agreed dossier or folder containing copies of relevant provisions of statutory planning instruments, at or shortly before the hearing. Succinctness and the avoidance of needless repetition, aided by efficient cross-referencing, tabulation and indexing, are looked to by the Court.

[7] Citation of Court decisions: A considered and discerning approach to the citation of cases needs to be adopted, with particular emphasis on:

- (a) Citation of the most recent or most authoritative statement on a point rather than a plethora of cases (remembering however that some points are not capable of simple or straightforward answers);
- (b) Identification of relevant passages by paragraph and/or page number;
- (c) Identification of official report citations of decisions where such exist;

(d) Succinctness and avoidance of needless repetition.

4. TIMING OF INTRODUCTION

[1] This Practice Note takes effect from 31 March 2005.

R J Bollard
Principal Environment Judge