

Instructing an Expert

GBRW Expert Witness provides expert witnesses in disputes involving banking, investment or insurance.

This briefing paper comments on a number of issues to be considered when selecting and instructing an expert. While it makes reference to practice in the English Courts, most of the comments will also apply to experts working in other jurisdictions.

Expert Witness or Expert Adviser?

While practices on expert evidence vary between jurisdictions, the English Courts distinguish between an Expert Adviser and an Expert Witness. The two roles have important differences:

- An Expert Adviser provides advice to his or her instructing party on the strengths and weaknesses of their case. Since this normally occurs in the early stages of a claim, the advice will often be delivered in a more informal manner and may include discussion of tactics and of the perspectives of the opposing parties. It is important to ensure that the instruction to provide expert advice establishes that all advice given is legally privileged and therefore protected from disclosure to the other side.
- An Expert Witness produces a report which forms part of a claimant's evidence and is normally based on a letter of instruction which is also disclosed. The Civil Procedure Rules which govern expert evidence in the English courts state that "*It is the duty of an expert to help the court on the matters within his expertise*" and that "*This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid*". In other words, the expert has a direct responsibility to the court and can expect severe criticism if he is perceived as acting as a "cheerleader" for his instructing party.

The same individual can play both roles, providing privileged advice initially and a formal report later in the process, as long as legal advisers are satisfied that the first role does not risk undermining the effectiveness of the second.

In some cases, both parties may agree to appoint a Single Joint Expert; however, this practice is less common for larger claims.

How to instruct an expert

The short answer is "*Through your legal adviser*". Expert advice is only one aspect of making or defending against a claim and an expert cannot substitute for a lawyer who is qualified to identify and advise on the relevant issues in the applicable jurisdiction(s). Few cases are absolutely clear cut and legal advice is essential to evaluate the impact of the expert's comments, some of which may be supportive and some unsupportive to the case being put forward.

Lawyers should generally be able to identify one or more experts whose experience is well matched to their requirements through word of mouth recommendations, references from prior clients and suggestions from practices such as our own.

An experienced expert will have a thorough understanding of what is required from him or her and be able to produce reports and advice which are easily understandable by

non-specialists. He or she should also have current or recent professional experience which is relevant to the issues involved in the claim.

Although the majority of cases settle before they get to court, prior experience of giving evidence is a definite plus (always assuming that the judgement did not reflect adversely on the evidence given).

What will it cost?

Experts generally charge on an hourly basis (daily in some situations) and should be expected to produce detailed time records to substantiate invoices where required.

The new Civil Procedure Rules incorporating the reforms recommended by Lord Justice Jackson place significant new requirements on law firms. We are happy to engage with these and to assist with the production of a Costs Budget where needed.

Our experts are prepared to have an initial meeting or phone discussion on a non-billable basis to discuss the areas where expert evidence is required and to enable both the instructing law firm and expert to assess whether their evidence is likely to be supportive.

We can normally provide an estimate for the time required to produce a detailed draft report once we have an idea of the volume of documentation to be reviewed and the issues to be addressed.

Contingency fees

In many jurisdictions, lawyers are able to act on a no-win, no-fee contingency basis. However, the Civil Procedure Rules applicable in England and Wales explicitly prohibit experts acting on this basis and the declaration at the end of an expert report states “*I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.*”

The reason is an obvious one, since any expert will struggle in court to maintain that his advice is completely independent when all parties know that he will not be paid if his client loses. However, there is nothing to prevent the instructing lawyer meeting the expert’s fees under a contingency agreement and this is a situation we come across increasingly.

For further information

If you would like to discuss a requirement for expert evidence, please contact:

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