

Solicitors Looking for a Suitable Expert Witness or Adviser

Guidelines to Experts

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Introduction

Enquiries from solicitors may come by letter, by fax, by e-mail or by telephone. Most enquiries come by telephone in the first instance. It is essential, therefore, that the expert looking for new work is well prepared, especially when the initial contact is by telephone. There are many matters which need discussing thoroughly to avoid problems later.

The size and quality of the solicitors' firms who may approach you will vary from the relatively small firm away from the big cities to the very large firms in London who operate internationally. Large firms of solicitors in the City have their own litigation departments with very experienced lawyers engaging in litigation regularly. Many smaller firms in the provinces will only occasionally be handling a dispute where your expertise is required.

The approach of solicitors to appointing an expert varies. Sometimes the initial enquiry about your services will come from the partner involved; sometimes from his or her colleague assistant; and sometimes from a trainee solicitor whose lack of experience will sometimes be quite evident.

Solicitors are not always clear on the precise expertise they need. This needs to be established early and guidance provided. There are hundreds of different types of expert: the Sweet & Maxwell Directory, which at one time was endorsed by the Law Society, lists about 1,500 different expert classifications. Other matters where some solicitors lack experience include the appointment and management of Single Joint Experts (SJE). The expert should be ready to provide guidance on this and other issues in a constructive and tactful manner.

Ideally, solicitors should consider the appointment of an expert at the very outset of a dispute so that they get the pleadings right. Also, experts can guide them on whom to sue because in certain disciplines several parties could be involved.

It is essential to demonstrate an air of confidence when contacted by a solicitor. He may not know you but your contribution to the success of his case could be substantial. Of course, the more cases you do the greater will be your self-assurance. However, your state of well-preparedness when he telephones you is a start. You should fully understand the difference between acting as an adviser and providing a Civil Procedure Rules (CPR) compliant report to the court; be familiar with the Civil Procedure Rules, especially Part 35; the Codes of Conduct put out by the Expert Witness Institute and the Academy of Experts; and the potential minefield of problems if you are instructed as a Single Joint Expert. In particular, some experts need to be mindful of pre-action protocols.

The Civil Procedure Rules apply only in England and Wales at present. Experts need to be aware of the different legal systems that apply in Scotland, Northern Ireland, the Isle of Man and the Channel Islands. Similarly, experts are often required in the Republic of Ireland where the system is based on English Law but practice differs from England.

Questions to ask, discuss and reach agreement in principle

1. Name and Status of Solicitor(s)

In many cases you will deal with one partner from start to finish of a case. In the larger firms you may be contacted initially by a trainee solicitor, an assistant solicitor or a Legal Executive before being involved with the partner running the case. Additionally, you may find that another more senior partner is carrying out a watching brief on the case who may occasionally wish to speak to you directly.

Throughout this document:

- (a) *Words importing the singular include the plural and vice-versa where the context so requires*
- (b) *Words importing the masculine also include the feminine where the context so requires*

2. Claimant or Defendant?

Which side is your instructing solicitor on?

3. Legally Aided Case?

4. Precise nature of the dispute

This needs careful probing to ensure that the subject-matter of the dispute is within your expertise.

5. Who are the claimants?

Any conflict of interest?

6. Who are the defendants?

Any conflict of interest?

7. What is required?

Full report to the court or a letter of advice? A full report to the court, CPR compliant, will take as long as you decide is necessary to do justice to the issues and not compromise your own professional reputation. On the other hand, care needs to be exercised on a request for a letter of advice. Some solicitors will talk about "advice" or a "preliminary view". Generally, solicitors want this to be thorough because, on the strength of your advice, may depend subsequent steps on the road to litigation. But make sure that your solicitor has no grounds for complaining about your charges for initial advice.

The solicitor may indicate that he wants advice first with the possibility of a report later. There are some who believe that experts should accept an assignment to do a letter of advice or a full report but not both. Individual experts will need to decide this for themselves. The problem is that even after doing a full report in the first instance solicitors sometimes later will want an expert to give some advice on a particular point wide of the full report.

Other points to discuss and gain agreement on include:

- a) Is a site visit necessary? Are the costs (professional and travelling time) fully appreciated?
- b) Scientific experiments necessary?
- c) An audit required?
- d) Research necessary?
- e) Are pre-action protocols involved?

8. Has the brief been established?

If you get the assignment, remind him - especially if they are provincial solicitors - that you will be expecting a clear brief in writing as to the precise areas of focus for your letter/advice. (You will get this as a matter of standard practice with leading nation-wide solicitors or those in the City).

Unfortunately, there are still some solicitors who attempt to instruct you by sending a range of documents with the simple injunction "we look forward to your report". A solicitor can reasonably invite you to provide a wide-ranging appraisal of all the issues in a case but clarity in what an expert is expected to do is vital. Try and secure a brief which asks one or more specific questions.

9. What are the deadlines?

For a full report to the court obtain copy of Court Order

With tighter case management by the courts since CPR were introduced various deadlines will be set in the Court Order. Ascertain those deadlines. You are entitled to see a copy. Do not be surprised if it was made weeks before you are instructed even though the court authorised the appointment of experts.

The Order will encompass:

- a) Deadline for delivery of full report
- b) Trial Date
- c) Meetings of Experts

For a letter of advice

The deadline for this is entirely a matter to be agreed between the expert and the solicitor

10. Party-appointed expert or Single Joint Expert (SJE)?

Many solicitors do not fully appreciate all the implications of the appointment of a SJE because they have had little or no experience of having to use one. Apart from your over-riding duty to the court you have duties to two firms of solicitors. You must do the following:

- Ensure that you have a clear brief, agreed in writing by both firms of solicitors.
- Get both firms, separately, to confirm, in writing, that they accept your Terms of Appointment for acting as a SJE, your fee scale AND that they will be jointly and severally liable for your fees. Although this is expressly provided for in the CPR experience has shown that this is an essential precautionary reminder.
- Confirm to both firms that everything you do will be copied to both firms and that the substance of any telephone calls with one will be conveyed to the other.

11. How many inches thick is the file(s) of papers?

Important when considering "reading time"

Documents sometimes arrive not in chronological order and with illegible photo-copies. It is worth, diplomatically, enquiring about both quantity and quality of the documentation.

12. (If necessary) Provide guidance on what documents you would expect to see.

Follow this up in writing.

13. Obtain clear understanding of your terms of appointment and your fees.

You will be confirming in writing, of course, if the solicitor wants to appoint you but make it clear that you will be asking him to confirm in writing that he will be responsible for your fees and that they will be paid on presentation of your invoice (usually on completion of the report/letter as a first stage).

Although by the terms of the Law Society Guide to the Professional Code of Conduct of Solicitors (Principle 20.01) they are required to pay experts even before they get paid by their client some flexibility is necessary especially in large cases where you are acting for very large organisations, e.g. insurers, who are frequently in the courts as defendants. These organisations tend to have monthly or quarterly accounting arrangements with the solicitors they instruct.

Apart from having your CV on computer to send quickly to interested solicitors it is also useful to have your fee scales available on computer for attaching to an e-mail. Some experts charge the same hourly rate for all their work. Some have different scales for different types of work. The scale should encompass, hourly rates, daily rates for court attendance, travelling time rates and cancellation charges.

Very occasionally, one or two solicitors - mainly in the City - will attempt to fix the basis of your appointment on their terms. Experts should decline to work on this basis. Professional expert bodies like the Expert Witness Institute have comprehensive, well developed and tested Model Terms which all experts are strongly recommended to use on all occasions (both for full reports and letters of advice).

It has been known for solicitors to refuse to accept responsibility for the expert's fees. This is a wholly unacceptable basis on which to work for a solicitor and is contrary to the Law Society Code.

14. Ask for the solicitor's e-mail address.

Letters continue to form a large part of the communication process of lawyers but much of the day-to-day contact with them may be done by e-mail. He may want your CV and fee scale immediately.

15. Obtain the solicitor's direct line phone number. His mobile no. could be useful too.

16. Try and avoid fixed-fee cases

It always takes longer than you think. This tends to arise more with letters of advice. At the outset of a case when a solicitor is not sure whether there is viable case at all there will be understandable concerns by him and his client about costs. It is not unreasonable for the solicitor to want to know what sort of ballpark your bill will be in. It is vital to talk this through fully. In your own interest, reserve the right to go back to him if after closer examination of the documents in the case it is clear that there is much more work than you were led to believe initially.

17. Introductory Source?

Some experts derive much work from the same solicitors; others get sporadic work from a wide range of sources. To reduce the risk of "feast and famine" experts should monitor their sources of work by asking solicitors how they got to know about you. This enables you to monitor your advertisements, improve your website and generally keep under review your most effective exposure thus enabling you to maintain a pro-active marketing role. No one owes you a living.

18. The Expert's Office Management

Most experts use a computer these days for word processing and spreadsheet records of fees, business expenses and other data to run their practise. However, some experts, in addition, find it helpful to use an operational summary sheet on the top of their general correspondence file with the solicitor which pulls together all the essential information about a case - names of the parties, solicitor's details, names of Counsel, trial dates and other deadlines like experts' meetings. All this information can be useful to have to hand in one place.

Experts must create and keep up-to-date a Time Sheet which records briefly the type of work they carry out on a case on a daily basis with associated timings.