



INSTRUCTION MANUAL

JON ANDREWS OFFERS TIPS ON BECOMING AN EXPERT IN INSTRUCTING EXPERTS

It is hard to overstate the importance of expert witnesses in the litigation process, particularly in the field of personal injury. A good expert can win a claim, a bad expert can lose one, and either can drastically affect the value of a claim.

This article sets out some practical guidance and reminds even experienced readers of the relevant provisions in the Civil Procedure Rules, and what is expected of us by the Court. It also shares some personal experience from over 30 years at the coal face of personal injury litigation.

Back to basics

It is always important to bear in mind the basis on which we all instruct expert witnesses, whether in the most routine case, or the most complex. We start with Part 35 of the Civil Procedure Rules, which sets out the expert's overriding duty to the Court; and then in the attendant practice direction offers helpful guidance as to the nature of that duty.

Readers will be aware of the Civil Justice Council's role in the instruction of experts. A protocol was published nearly 20 years ago, back in 2005, by the CJC. That was replaced by guidance in 2014, which remains important.

Although much of it will be self-evident and familiar, I recommend all readers occasionally refresh their minds as to the contents of paragraph 20 of the 2014 guidance. While I will not repeat it here, the Courts will expect the CJC guidance to have been complied with. Finding that guidance and making sure it is complied with is frankly not particularly difficult. But over the years, I have from time to time been involved with transfers of files between law firms, which gives a useful insight into common practice. Unfortunately, the CJC guidance is quite frequently and surprisingly overlooked. Needless to say, ignoring those basic guidelines can cause just as many problems as some of the other issues I will address.

Rule 35.1 of the Civil Procedure Rules clearly states that expert evidence will be restricted to that which is reasonably required to resolve the proceedings. Always remember that permission is needed before a party can be called on to give expert evidence. Consider whether that evidence will be in writing or oral.

I will not address here the particular issues relating to low-value road traffic collision claims, and much of what I have to say is really relevant to cases in the multi-track, where there will probably be opposing experts, and potentially experts from several disciplines.

Touching briefly on single joint experts, they are of course defined at CPR Rule 35.2 (2). I would also recommend reading paragraphs 34 onward of the CJC guidance which relates to single joint experts, joint instructions and such. Again, the Courts will expect litigators to be familiar with these provisions, and will expect them to be complied with. Failure to do so will cause real difficulty.

Having reminded readers of the basic outline of the rules applying to the instruction of experts and considered the importance of Part 35 and the CJC Guidance, I now turn to some more personal views.

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When to start thinking about experts

At the start any claim, whether acting for a claimant or defendant, there are lots of important considerations. Obviously, one part will be to explore and capture lay witness evidence as soon as possible. There are also protocols to be complied with, retainers to be concluded and potentially eye witnesses to be identified.

This is all important stuff, but I would suggest consideration of expert evidence should be added to the list.

The reason for this is that - particularly in the more complex and / or high-value claims - the best experts are unsurprisingly the most in demand. There are often significant waiting lists to obtain appointments and reports. Early identification of the type of expert that might be required, and then the individual who might be instructed, is key to avoiding later delay and potential difficulties with court timetables. It really is never too early to start thinking about expert witnesses in those types of cases.

I am aware of one particularly well-regarded liability expert in the personal injury field, who would not generally be able to produce a report until around 12 to 18 months after initial instruction. This is no criticism of them - in fact it reflects their ability - but if they are

only instructed for the first time shortly before directions are given, it may be very difficult to accommodate the time it will take them to produce a report.

Searching for the correct expert

When you have decided what type of expert you require, you need to start thinking about the individuals you might instruct. Reputable agencies can play an invaluable role both in locating and funding experts, but should always provide detailed curriculum vitae, which should be carefully considered. You may of course have your own experiences of various experts, and it always makes sense to speak to colleagues and counsel.

Bear in mind that sometimes experts from different professional backgrounds might validly comment on the same issue. For example, either a consulting engineer or an occupational hygienist could give good evidence on an asbestos claim.

Always look for relevant experience. In particular, it will not take long to look at some of the recent leading cases in the particular field you are seeking to instruct an expert in. See who was instructed. Read judgments and consider what comments might have been made about particular experts by the judiciary. It can be quite clear from the politely worded judgments one reads, which experts were favoured and which experts the Court attached little credibility to - even though it might not be put that bluntly.

Court experience v academic experience

It is not necessarily the case that the leading academic in a particular field will make the best expert witness. I have seen cases where a very promising initial report, supported by impressive academic argument on causation, largely disintegrated in the practical testing ground of a joint statement being prepared.

So, while you are looking for someone with suitable qualifications and experience in their field, ideally that must come alongside experience of the litigation process. In the example above, it was not that the expert witness was in any way unfamiliar with their field, nor lacked any academic understanding of the issues. But they were not used to the forum of preparing joint statements, and seemed unaware that it is quite possible to say in a joint statement that you do not agree with the other expert.

Of course, everyone has to start somewhere, and a recurring theme with very high-level expert witnesses can be the retirement of those with great experience and the question of who might come forward to take their place. Common sense dictates what levels of case a slightly less experienced expert might be brought to bear on, possibly with a view to instructing them on a more complex matters as their experience grows.

Build relationships with experts

It is perfectly reasonable, however, to build a good professional relationship with a number of experts. There are numerous advantages to this. You will have a quicker understanding of whom you might instruct. When it is appropriate, you can seek soundings from them before you incur the expense of a formal report. In the context of such a relationship, they are far more likely to be frank when it comes to deciding if they really have the expertise for a particular case or not. If it is not for them, then they will frequently be able to identify someone who can help.

Will the evidence be allowed in?

I have indicated that it is important to give early consideration to the appointment of experts. But you will not want to incur substantial fees until you know the report will be allowed in. It is quite possible to line up an expert and keep an eye on the timescales they have for reporting, before you send formal instructions. Of course, there are some cases when it is inevitable that particular evidence will be allowed in, and early instructions can be sent.

In conclusion

At some point during one of the various Covid lockdowns, I was talking to an opposing solicitor. We had settled a case and we briefly engaged in comparing notes about our lockdown experiences. I happened to mention that a neighbour of ours was a consultant in a particular medical field. After a brief pause, the lawyer I was talking to, said 'I don't suppose they do medico legal, do they?' My reply was that the neighbour did in fact undertake medico legal work, but perhaps thankfully not in a field that I would have reason to instruct them in. After another slight pause, I was asked if I could provide some contact details which subsequently, having obtained permission, I did.

A few weeks later, my neighbour thanked me for the introduction, as it would appear they had received several instructions. Now as it happens my neighbour is very good at what they do, and I am sure produced helpful reports. But I do not think that there is any dispute that being in the right place at the right time, and being available, was the key to them being instructed - rather than any careful consideration as to whether they were the correct expert. The moral of the story is that it is important to rely on judgment rather than luck when instructing experts.

Never forget that experts can win or lose cases, can have a huge impact on the value of claims, and sometimes, by virtue of a persuasive but informal early opinion, might enable you to avoid a world of pain and expense by saving you from pursuing an unwinnable case, or encouraging settlement of an indefensible claim.

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