

# EXPERT WITNESS INSTITUTE MEMBERSHIP KNOWLEDGE HUB

## WHAT TO EXPECT FROM INSTRUCTIONS BY SOLICITORS/LAWYERS

### The Instructions

Once you have agreed to act for the Instructing Party, they will provide you with Instructions.

The Instructions you receive should be:

1. In writing
2. Clear and concise
3. Specify exactly what the Instructing Party wants you to do – consultant/advisor or court Expert Witness?
4. Specify exactly what will be available to you in terms of evidence
5. Specify exactly the questions the Instructing Party wants you to answer
6. Identify any relevant standard of proof to which you must work or any relevant governing case law

### The instruction letter

If the instruction letter is well written, it should:

- Set out the factual matrix
- Individually list what documents the Instructing Party is providing, ideally in a paginated and indexed bundle, especially if there is a large volume of material.
- Identify the key legal aspects of the case from the client's perspective.
- Identify issues that need to be addressed in your report/advice.
- Put the duty on you to inform the Instructing whether they feel you are the right person for the task or not
- List the duties of an Expert Witness – with emphasis on not being an advocate.
- Identify a list of issues to be addressed in your report
- Timetable – lay out key dates and framework with court submissions date for report so you can manage your time.
- Confirm payment terms.

**Don't be afraid to push back and ask for clarification if the letter of instruction is unclear or there is not a clear identification of the issues that need to be addressed in your report/advice.**

# Further letters of instruction

You may receive additional letters of instruction as the case develops relating to:

- Experts' Meeting and Joint Statement
- Supplemental reports
- Additional evidence to consider
- Consultation with Counsel
- Details about the trial, including date and how long it is expected to last
- Whether the Expert Witness will be required to give concurrent evidence (Hot-Tubbing)
- Explain that the Expert Witness has the right to ask for directions from court in civil matters
- Questions on Expert Witness's reports in civil matters

# Reviewing Instructions

- It is important to review the Instructions carefully to make sure that you fully understand them and that they will enable you to provide impartial expert evidence and meet your duty to the court.
- You should seek clarification from the Instructing Party if you are unsure of anything, for example if anything is unclear, inadequate, or conflicting.
- You should also check to ensure that all the questions and subject matter in the Instructions are within your area of expertise.
- If there are questions or other matters that are outside your area of expertise, you should inform the Instructing Party as soon as possible, as they may wish to retain another Expert Witness to address those issues.
- Remember that the Instructing Party will not be an expert in your field and may not understand important distinctions in expertise across your field's professional occupations.
- You should also consider whether there is sufficient evidence you for to provide a definite opinion on all of the questions or matters in the Instructions.
- Let your Instructing Party know as soon as possible if this isn't the case, as they may wish to revise the Instructions accordingly.

## Single Joint Expert

In some cases the court may mandate that a **Single Joint Expert** is instructed or the parties may agree to the appointment of a Single Joint Expert. If a Single Joint Expert is appointed then the parties must agree and/or exchange instructions to the Expert Witness. There are some limitations on contact with a Single Joint Expert, but essentially the same approach applies to the selection and appointment process.

From a solicitor's point of view, a benefit of instructing a Single Joint Expert is that once you get their opinion, everyone knows where they stand and can rely on that opinion. There are also no adversarial views between Expert Witnesses.

The main disadvantage is that a Single Joint Expert is no one side's Expert Witness. Solicitors can't have private conversations with the Expert Witness and all communication, verbal and written, must be sent simultaneously to both parties. If the parties disagree on facts or the terms of an instruction, separate instructions must be delivered and the Single Joint Expert has to navigate this and consider both sides when reaching their opinion.

Alternatively, parties may have separate Expert Witnesses in the same discipline. If you do, it's important for both Expert Witnesses to have access to the same documents and can avoid embarrassment in the witness box later.

## **TYPES OF INSTRUCTIONS:**

Under the Civil Procedure Rules ('CPR'), Single Joint Expert "means an expert instructed to prepare a report for the court on behalf of two or more of the parties (including the claimant) to the proceedings" (CPR 35.2(2)). SJE's are Part 35 experts. They owe an overriding duty to the court and an equal duty to all parties. They should maintain independence, impartiality and transparency at all times.

The most important rules and guidance for SJE's are set out at CPR 35.7-8, Practice Direction 35 paragraphs 7 and 8, The guidance for the instruction of experts in civil claims paragraphs 34 to 60 including:

Single joint experts (34 to 38),

Joint Instructions (38 to 41)

Conduct of the single joint expert (42 to 46) and

Cross-examination of the single joint expert (47).

It is very important to be familiar with these rules and guidance before accepting instruction as an SJE.

## **Appointment of an SJE**

Under CPR 35.7, where two or more parties wish to submit expert evidence on a particular issue, the court has the power to direct that evidence be given by an SJE. The guidance (34) makes it clear that the CPR encourage the use of joint experts, whenever possible a joint report should be obtained, and that SJE's are the norm in cases allocated to the small claims track and fast track.

If the parties cannot agree on who should be the SJE, the court can select the expert from a list prepared by the parties or direct that the expert be selected in some other way. Paragraph 7 of the Practice Directions sets the circumstances the court will take into account when considering whether to permit expert evidence and whether that expert evidence should be from an SJE.

## **Instruction of an SJE**

In the early stages of a dispute (Guidance, 35), consideration should be given to the instruction of an SJE, especially where the matters are not expected to be contentious. An expert who has previously advised a party (whether in the same case or otherwise) should only be proposed as an SJE if the other parties are given all relevant information about the previous involvement.

Under CPR paragraph 35.8, any relevant party may give instructions to the SJE, copying in the other relevant parties. The parties should try to agree joint instructions to SJE's, particularly what documents should be included with instructions and what assumptions that SJE should make. If the parties fail to agree joint instructions, they should try to agree,

and set out in their instructions, where the areas of disagreement lie (Guidance, 38 and 39).

### **Conduct of an SJE**

SJEs owe an overriding duty to the court and an equal duty to all parties. They should maintain independence, impartiality and transparency at all times, and must keep all instructing parties informed of any material steps they are taking. SJEs should not attend a meeting or a conference that is not a joint one, unless all parties have agreed in writing. SJEs may request directions from the court (Guidance, 42-45).

### **SJE's report**

SJEs should provide a single report even if they have received instructions that contain conflicts. They should serve their reports simultaneously on all instructing parties. If conflicting instructions lead to different opinions (e.g. because of different assumptions of facts), reports may need to contain more than one set out opinions (Guidance, 46)

### **Getting paid**

Unless the court directs otherwise, the parties are jointly and severally liable for the payment of the SJE's fees and expenses (CPR 35.8 and Guidance 40). The court may also give directions about how the SJE undertakes their work.

### **Acting as a shadow expert in proceedings with an SJE**

The appointment of an SJE does not prevent the parties from instructing their own experts, but the cost will not be recoverable from another party (Guidance, 37).

**\*Templates available for Joint Statements where Insurers or Solicitors from both sides are requesting Expert Witness services or INA services.\***