

WORKING WITH INSTRUCTING PARTIES

The pitch

A pitch or preliminary meeting may take place in a higher value/more complex case, although it would be rare in most routine matters in which you will either simply receive a letter of instruction or a “willing to act” letter followed by instructions.

What to look out for

A pitch meeting will generally be to set up the relationship between you and the prospective instructing party. They will likely explain the case, the expertise they are looking for, and the types of issues that you would need to address. They may attempt to use this opportunity to establish if they have a case. Explain how you can provide what they are looking for, but don’t give away too much for free.

This meeting is your chance to determine whether you have the right expertise and if this is a case you want to take on. You may not be the only expert in your field that they plan to approach, so it’s also the opportunity to set out your expertise and experience, both in your profession and as an Expert Witness, and present yourself as a credible and reliable expert.

Preparation

As far in advance of the meeting as possible, you should review as much background information and documents relating to the case as you need to understand the issues. At the same time be aware that you are unlikely to be paid for this meeting, so you need to consider the value of the time spent. You can ask the party or their solicitors to clarify the overall purpose of the meeting and to prepare a list of questions for which they need answers. Make sure your CV clearly sets out all the expertise and experience you have that is relevant to the case. You may need a different CV for each case.

What you need to get from the meeting

You should leave the meeting with a clear understanding of four main points:

1. What is the ‘nub’ of the dispute?
2. Is this within your area of expertise?
You must always remain within your specialism, but you can recommend other specialists if required.
3. Will there be enough time for you to be able to accept and then complete the instructions?
4. Do you have all the information you need to provide a quote?

The “Willing to act” letter

Before or after the meeting, you may be asked to sign a “willing to act” letter which confirms that the case falls within your scope of expertise, that you have no conflicts of interest, and that you would be willing to act.

Checklist of practical steps

You can follow these practical steps to ensure you are fully prepared:

- Find out the name of the prospective client and do Internet and Companies House research on the specific entity.
- Check the jurisdiction and seat of the dispute and review the specific rules and regulations concerning expert evidence. You can find links to the rules and regulations of a wide range of jurisdictions here.
- Ask for an outline of the assignment on which you might be instructed.
- Clarify what sort of expert they are looking for to ensure you are the right person to instruct.
- Identify where the case is currently (that is, how far it has progressed, is it listed for court yet).
- Ensure that the instructing party is planning on providing you with the documents you are likely to need. It is important that they understand that you would be unable to complete your report without these, as this will impact timeframes.
- Be prepared to disclose when you don't know something. Alternatively, do not attempt to embellish your expertise or knowledge. Also, be prepared to ask questions if you don't understand any issue or legal argument.
- Ensure the solicitor understands the sort of questions you would be able to answer and which ones would be outside your area of expertise.
- Establish timeframes - ensure they understand your availability and report turnaround times.
- Set a short time limit on the meeting, and don't give too much away!
- Have a supply of business cards (or a digital equivalent).
- Record the names and firms of anyone you talk to.
- Carefully consider whether you have any potential conflicts of interest and make sure you communicate them clearly to the solicitor.

Make sure that...

- Before accepting any instruction, you have received written acceptance of your Terms and Conditions of Engagement.
- It is not uncommon for paralegal staff to overlook your terms, and simply push for a date. Always make sure that the terms of payment are clear! You can use EWI's standard Expert Terms and Conditions of Engagement as a template which can be amended as required for your circumstances and those of the case and the client.
- You have understood whether they are asking you to act as an Expert Witness in the case or as a consultant or shadow expert.
- In the latter case, your advice is not subject to the requirements of the court rules and is not disclosed. However, you need to be careful if you are subsequently placed in the tricky situation where the instructing party wants you to provide evidence for their case. At that point the court rules do apply and your primary duty is to the court, not to the party instructing you.

Discussion of the pre-action advisory report

- After contracting for your services, but before providing formal instructions, the instructing party may ask you to provide a pre-action advisory report. Although in many cases no pre-action advisory report will be written, and you will be instructed to go directly to the full Expert Witness report.
- Whenever providing an opinion, you should caveat that you have reached your opinion with the evidence that you have reviewed. Your opinion may change once you have reviewed all of the evidence. An expert's predicted opinion at the start of a case often changes by the time they come to write the report. You should try to avoid giving an opinion too early.
- The purpose of the report will be to establish the strength of their case. In drafting this report, you should set out the evidence required to establish the strength of the case but ensure that if the report is at this stage a pre-action advisory report then it is clearly marked and identified as such so that it cannot be used as the Expert Witness report itself.
- They may wish to meet with you to discuss the advisory report. In preparing for this meeting, you should follow the checklist of practical steps set out for the 'kick-off meeting'. The client may work in the same field as you are acting in as the expert.
- When the client is at the meetings, with the lawyer, they may be too emotionally involved and believe that their case is very strong, which can make the expert's view difficult. Be careful to resist pressure from either the lawyer or, more often, the client to provide them with the opinion that they want.

Kick-off meeting or initial conference

What to look out for

- The purpose of the kick-off meeting is to consider the draft instructions and ensure that you understand what is required. The instructing party will want to determine what your opinions are likely to be on the actual questions set out in the draft instructions.
- The meeting will usually be structured, but if it is not, or you are asked very broad questions, you should consider how they would like you to reply. They may prefer a summary or detailed view of each opinion.
- If you are not sure, you could always provide a simple summary noting 'that is a summary of my opinion and reasons for it, are there any areas you would like me to expand upon?"
- This is really important when you are just starting out as the nerves of the situation will intensify any personal or professional vulnerabilities you have – so prepare for that and all will be well! Don't be afraid to suggest what the questions should be.

A couple of key things to remember are:

- Don't be afraid to be yourself – people like people not robots. Don't 'fake it'. The party may decide to take the case to court based on your confidence. If you believe there is an alternative view or possible challenge to the view, say so (if appropriate to).
- Say if you don't understand something - ask for clarification and don't feel pressure to flap about trying to answer an ambiguous question. If you are unsure, explain your understanding of the question so they can correct you before you head off on a monologue!
- Be honest in your opinions, even if you are potentially giving opinions you think the client may not want to hear. You must be an honest and impartial advisor.

What you need to get from the meeting

The kick-off meeting is your chance to ensure that you have all you need to write your report. You should:

- Make sure you understand your instructions and that they are clear – what are you providing your opinion on? Do you fully understand the questions you need to answer?
- Remind the solicitor not to send you documents that they do not wish you to refer to in your report – once you have seen them, they are likely to influence your opinion, and you are bound by your duty to the court to refer to them in your report.

Checklist of practical steps

You can follow these practical steps to ensure you are fully prepared for the kick off meeting.

Prepare exactly as you would if going to court:

- Check time, date and place and make allowances for traffic or transport difficulties.
- Be professional in appearance and demeanour,
- Be completely familiar with the case - make sure you have prepared both your understanding of the issues and the main facts in the case.
- Have your file properly organised and complete: have all documents in possession (if hard copies organised and appropriately tagged - if electronic, accessible, and able to locate key documents).
- Before agreeing to a date for the meeting, make sure that you are happy with the level of documentation that has been provided. You should make it clear that you may/will have to charge for your time preparing for the meeting.
- Draw a timeline of events for your own use (for example date of the index event, first assessment date, report date, dates of other assessments/ reports done for the client - anything which may be relevant to the conversations). This produces a more professional and seamless approach and you appear very 'together' rather than rifling through papers to find things.
- From this timeline, note where the gaps in your information are, or where you need more information, or clarification of the information you have.
- Research and remind yourself of any relevant legal tests for the type of case (nothing is more embarrassing that forgetting which principle or test is which or getting them mixed up in your head under stress).
- Be aware of your tendencies or areas of vulnerability and try to proactively manage them with techniques which will help you. For example, if left unstructured, some people may have a tendency to talk for too long because they get overly enthusiastic about certain concepts.
- Consider whether you have a connection to any party involved in the action and disclose it to the solicitor. This could include, for example, a family or business relationship, or a current or former colleague.
- If you are meeting with a Litigant in person, you may need to explain your opinion in extremely simple language, simpler than in the report.

Discussion on your report

What to look out for

- After you have submitted your draft report, the instructing party may want to meet with you to ensure they fully understand your opinion and the reasoning behind it. They may ask you to add more detail or further explanation in certain areas or to provide more illustrative examples.
- As with any client, you should be open to amendments which do not change or obscure your opinion or the reasoning for it. For example, it is legitimate for the instructing party to ask you to correct factual errors, to add more detail or to clarify your opinion but not to attempt to influence your opinion.
- Don't take suggestions for making changes to the report personally. It happens to everyone. This can be difficult for a new expert, especially when very experienced in their field and used to not being questioned!
- They may also ask you to make amendments which bolster their case, or redactions to material that weaken it – you should always remember that your overriding duty is to the court, not to the party instructing you. The report sets out your expert opinion and you will need to be able to defend the opinions and reasoning in it, if the case goes to trial.

Preparation

- In preparing for the meeting, you should follow the checklist of practical steps for the 'kick-off meeting'.
- You should also re-read your report – you should know your report backward and be able to easily find references to material in it.
- Make a note of your main findings/opinion in short form and list for yourself any glaring holes or challenges that could be made in the opinion. You should spend some time thinking about your view of those challenges.

Conference with counsel after exchange of reports

- There is likely to be a further meeting after the exchange of reports with the other side, but before the discussion between experts. This may take the form of a conference with counsel which would also be attended by any other expert witnesses instructed by the same party.
- This conference is likely to focus on a discussion that anticipates the Discussion between experts stage and which looks at the strengths and any weaknesses of your report and also the report of your "opposite number" - the expert witness in the same discipline on the other side.
- The lawyers are likely to use this meeting as an opportunity to draft an Agenda for use at the Discussion between experts' stage and will need your input to fine tuning the questions.
- Be prepared for Counsel to vigorously test your report. Again, don't take it personally. It is better that they find the potential weaknesses, prior to when you are standing in the witness box.

Discussion between experts

At any point during the case, you might be asked to attend a discussion with the expert or experts for the other parties. This meeting is focussed on the experts rather than the party or their solicitors. Both parties need to agree the questions. It is better if both Experts have the same instructions! If the instructions don't match, it can be difficult for the experts to discuss the points they don't agree on.

Expert Discussions and Joint Statements

Rules and guidance on discussions between experts and joint statements have introduced a significant role for experts to support the court by determining where the actual areas of dispute are in the expert evidence. It is important to understand the relevant procedure rules and guidance that apply and what is expected of you, before engaging in an expert discussion.

Tips for attending an expert discussion

Some tips for attending an expert discussion are:

- Make sure you understand what issues (if any) the court has specified for the discussion and whether the court has directed that a joint statement be prepared.
- Seek to provide input into the agenda and consider it carefully.
- Read and re-read the reports of you and the other expert(s) before the discussion.
- Think about where you agree and disagree, and ways of resolving any disagreement.
- Make notes of your discussion and, if online and the other expert(s) agree, record the discussion.
- At the end of the discussion agree how the joint statement will be drafted. Be aware of deadlines in the relevant procedural rules!
- If you didn't write it, carefully review the joint statement to make sure that it accurately represents your discussion.

Guidance and Templates

We have developed the following specific guidance and templates for members.

Pre-trial conference

If the case goes to court, there will be a pre-trial conference. In addition to the client and their solicitors, the pre-trial conference will also include the barrister for the trial and the other experts for your side (where appropriate).

The lawyers will probably also want you to discuss the contents of the Joint Report prepared after any Discussion between experts meeting. The lawyers will not only want to "test your opinion" but will also want your help in preparing to test, in cross examination at the trial, the opinion of the expert on the other side.

Your overriding duty remains to the court, but it is legitimate for your instructing lawyers to ask you to explain in detail why the opinion you have expressed should be preferred to that of the expert on the other side. You should take care to ensure that this does not stray into coaching.

What you need to establish at the meeting

At the pre-trial conference, you should:

- Find out the questions you will be asked to address
- Ask how you will be expected to give your evidence, where you should sit, and whether you will have to hear other evidence
- Clarify the time in the proceedings at which you are expected to attend. If you are going to have to base your opinion on facts proved by the evidence of other witnesses, it is usual to be allowed to be present for their evidence but for this the judge will have to give permission
- Practice your recital of the reasons for disagreeing with the other side's expert. Be ready to learn from the way the barrister tests your opinion. It's their job to challenge your opinion. They will want to know what you are going to say when cross-examined and your opinion is put under attack. It is in their interests to explore any potential area of uncertainty or weakness. See it as a 'dummy run'.

Preparation

In preparing for the pre-trial conference, it is particularly important to make sure you are very familiar with your report and the opinions and reasoning set out in it. It may have been some time (perhaps a year or more) since you wrote it and you will have engaged in a lot of other professional activity in the meantime. As you re-read it, take care to check that you still hold the opinions set out and that the reasoning you have relied upon is still correct.

You may wish to consider training to bolster your confidence before your appearance in court. EWI's Confidence in the Courtroom training provides you with a solid understanding of the latest updates to court procedures as they apply to giving evidence, as well as advice on pre-trial preparation, the art of cross-examination, and how to conduct yourself effectively in court. It can also help get you in the 'zone' for court.

Post-case wash-up

Do not expect to be invited to a post-case wash-up meeting or even notified as to the outcome of the case. You probably won't receive feedback from the solicitors on how effective your expert evidence was unless you specifically request it. Don't take this personally. If they hire you again, you know it went well.

