

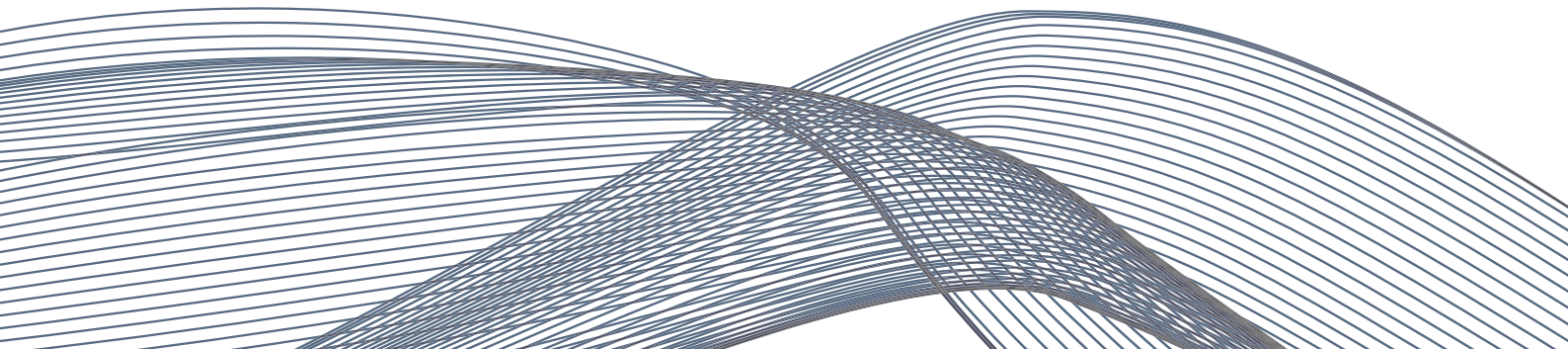
Expert witnesses at a conference with counsel - a practical guide

This guide is intended to help expert witnesses understand the purpose of a conference with counsel.

The starting point is the Guidance for the instruction of experts in civil claims by the Civil Justice Council: www.judiciary.uk/wp-content/uploads/2014/08/experts-guidance-cjc-aug-2014-amended-dec-8.pdf The purpose of this Guidance is to assist litigants, those instructing experts and experts to understand best practice in complying with Part 35 of the Civil Procedure Rules (CPR) and court orders. Counsel will use this to ensure the conference complies with the CPRs and experts should read and follow the Guidance. So let's look at the basics.

What is a conference with counsel?

A conference simply means a meeting with the barrister who has been instructed by a solicitor to advise on or be the advocate in a case. There may be two barristers if the case warrants this, a QC who will advocate at the hearing and a Junior Counsel or just a Junior Counsel. The solicitor conducting the case will be there and sometimes assistants and trainees. The meeting is sometimes called a "Con." Sometimes a conference will be by phone or conducted remotely by one of the many links available now.



Why do barristers need conferences?

There are several purposes for holding a conference. The first question counsel will consider is *"Do we need an expert?"* Those intending to instruct experts to give or prepare evidence for the purpose of civil proceedings should consider whether expert evidence "...is required to resolve the proceedings" (CPR 35.1). Almost by definition, an expert will be required if there are issues that need someone who knows the area to explain the issues clearly and proffer an opinion so that the court can make an informed judgment.

Although the court's permission is not generally required to instruct an expert, the court's permission is required before an expert's report can be relied upon or an expert can be called to give oral evidence (CPR 35.4). So initially counsel will need to see the expert to decide if one is actually needed and if required to produce a report and potentially give oral evidence.

The second question is: *"Is this the right expert for the particular issues in the current case?"* The instructing solicitor will have done much work prior to the conference to make sure that the expert is needed and the right one for the issues in question. However, counsel will want to satisfy himself that there has been proper due diligence in the selection of the expert. Remember an expert is issue specific and needs to have the right qualifications and experience for the issue in dispute.

There have been several cases in recent years where the expert is not properly qualified or suitable. There are two sets of skill that counsel will look for, first the qualifications and experience as an expert in the right field and secondly the skills of being an expert witness: how to write a court compliant report, how to give oral evidence and deal with cross examination and lastly a good working knowledge of the relevant law and procedure.

Expert witness training can give comfort to the lawyers as the expert will know how to construct a court compliant report without hand holding by the lawyers and the consequent possible suggestion of interference and also be practiced during training in the skills of dealing with the rigours of cross examination. Many cases settle before trial, so an expert may have written many reports, but not actually been to a courtroom and stood in a witness box. Training will have given the expert at least a good flavour of what to expect. The way the expert handles questions at the conference will also help form a view of his performance at trial.

Counsel should make sure the expert is up-to-date in the practice in their field and be wary of retired experts or those with limited experience.

If the case does require an expert and this is the right expert, then the third question is: *"Does counsel really, really, really understand the expert evidence?"* Counsel should use the conference almost as a lesson in understanding the technical issues. If counsel does understand then it is likely the judge will. Counsel should not end the conference until he really understands the expert's evidence. This will also assist in preparing cross examination of the other side's expert. It will also give the lawyers a better insight into whether the matter should settle.

When does a conference take place?

There are several phases during the litigation process where there may be a conference with counsel. Each use of a conference has to pass the tests of being reasonable and proportionate and be justifiable in budgeting. Here are some possible points:

- Pre-action: Looking at the merits of the claim and advising the client and in settlement discussions.
- Issue and statement of the case: Preparation of particulars.
- Disclosure
- Expert report: Identifying and engaging suitable expert(s). Reviewing draft and approving report(s). Dealing with follow-up questions of experts. Considering opposing experts' reports. Meetings of experts and preparing agenda.
- Trial preparation
- Trial
- ADR and settlement

Preparing for the conference

Preparation for the conference is obviously important and what is to be covered will depend in which phase of the litigation process it takes place. There should be a clear purpose. The attendees should set an agenda and schedule for the meeting depending on the number of attendees. Practical arrangements will normally be coordinated by the solicitor including organising a convenient time and place for a physical meeting and call in details for remote conferences. Again with remote conferences, all should make sure the connection system and devices work to avoid wasting valuable meeting time dealing with technical details. All relevant materials should be made ready and if necessary the right number of copies of documents printed. A reminder e mail is useful and aim to start the meeting promptly at the given time. It goes without saying that all attendees should have read the appropriate material thoroughly and have prepared questions and matters to be raised.

Do both the expert and the lawyers understand the duties and obligations of experts?

Experts always owe a duty to exercise reasonable skill and care to those instructing them, and to comply with any relevant professional code. However when they are instructed to give or prepare evidence for civil proceedings they have an overriding duty to help the court on matters within their expertise (CPR 35.3). This duty overrides any obligation to the person instructing or paying them.

The Guidance says: *“Experts must not serve the exclusive interest of those who retain them and must provide opinions that are independent, regardless of the pressures of litigation. A useful test of ‘independence’ is that the expert would express the same opinion if given the same instructions by another party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates or mediators.”*

Although counsel is entitled to probe and question what the expert says at the conference, he may not seek to change the evidence of the expert. However, the last thing counsel wants is for the expert to change the opinion in the courtroom, so counsel will want to make sure the expert is clear on the evidence and knows where there are grey areas in the opinion. The expert has to indicate if there is a range of opinion anyway.

So in essence counsel will want to test the experts qualifications and experience to be an expert on the issues and then to test the opinions expressed. Counsel should explain to the expert that these same areas will be tested in court by cross examination.

Getting to the issues

Counsel will want to answer two questions:

- What are the matters which are material to the disputes that require expert opinion?
- Do these matters lie within the expert’s area of expertise?

Much of the conference will focus on these questions and the expert should expect some quite difficult questioning. They should not take this personally but do all they can to satisfy counsel. Experts should indicate immediately where particular questions or issues fall outside their expertise. There have been several cases where an expert has moved outside their field with unpleasant consequences for example the cases involving Sir Roy Meadow. Counsel should be careful to avoid mock cross examination on the issues as this could verge on coaching which of course is forbidden.

The whole thrust of the CPRs is to narrow issues and the options of discussions between experts and putting questions to the other sides expert should be discussed in detail.

The CPRs (35.4) require that when parties apply for permission to instruct an expert, they must provide an estimate of the costs of the proposed expert evidence and identify the field in which expert evidence is required and the issues which the expert evidence will address. Permission if granted shall be in relation only to the expert named or the field identified and The court may specify the issues which the expert evidence should address and may limit the amount of a party's expert's fees and expenses that may be recovered from any other party. It is clearly important that the issues are identified from a costs point of view but also to help narrow the issues for the purposes of experts discussions, on how the case is pleaded and in the preparation for cross examination.

Has the expert seen all the relevant evidence?

Counsel should make sure that the expert has been provided with all the appropriate evidence. As the Guidance says: *"Experts should take into account all material facts before them. Their reports should set out those facts and any literature or material on which they have relied in forming their opinions. They should indicate if an opinion is provisional, or qualified, or where they consider that further information is required or if, for any other reason, they are not satisfied that an opinion can be expressed finally and without qualification."* Counsel should remind the expert that he should inform those instructing them without delay of any change in their opinions on any material matter and the reasons for this.

Counsel should advise on whether the expert should be formally instructed if he has not been prior to the conference.

The Guidance provides:

"Before experts are instructed or the court's permission to appoint named experts is sought, it should be established whether the experts:

- a. have the appropriate expertise and experience for the particular instruction;
- b. are familiar with the general duties of an expert;
- c. can produce a report, deal with questions and have discussions with other experts within a reasonable time, and at a cost proportionate to the matters in issue;
- d. are available to attend the trial, if attendance is required; and
- e. have no potential conflict of interest."

No doubt the instructing solicitor will have established these matters, but counsel should confirm that the expert is actually fully aware of them. The solicitor normally will have agreed the terms of appointment including timing of reports, charges, cancellation fees etc. So these matters should not concern counsel.

Going through the expert's report

The expert's report forms the backbone of the expert's evidence. It should not be served until counsel has advised. The Guidance provides helpful information about the form of the report and this should be read carefully. The lawyers should make sure that the report complies with all the requirements and it is in order to point out discrepancies to the expert provided this does not affect the opinion.

Expert reports must contain statements that the expert understands the duty to the court and has complied with the CPRs. Most importantly, the expert must sign the statement of truth. In the recent case of Zafir, www.judiciary.uk/wp-content/uploads/2020/04/CO23962019-ZAFAR-Final.pdf the expert lied and was given a suspended prison sentence and struck off his professional register.

Does the report set out all material instructions?

The report should also set out all material instructions sent by the solicitor. Counsel should check this is accurate as the Guidance states: "The mandatory statement of the substance of all material instructions should not be incomplete or otherwise tend to mislead. The imperative is transparency. The term "instructions" includes all material that solicitors send to experts. These should be listed, with dates, in the report or an appendix. The omission from the statement of 'off-the-record' oral instructions is not permitted. Courts may allow cross-examination about the instructions if there are reasonable grounds to consider that the statement may be inaccurate or incomplete."

Also prior to filing and serving an expert's report solicitors must check that any witness statements and other experts' reports relied upon by the expert are the final served versions. Counsel should make sure this happens as the opinion may change in the light of later evidence.

The Guidance further states: "Experts should be aware that any failure to comply with the rules or court orders, or any excessive delay for which they are responsible, may result in the parties who instructed them being penalised in costs, or debarred from relying upon the expert evidence." Counsel should remind the expert of these unpleasant possibilities.

Getting paid for the conference

A conference with counsel may well be a fully justifiable cost but judges are becoming increasingly strict when it comes to costs and budgeting. The impact of the reasonable and proportionate rule can be seen for example in *BNM v MGN Limited* [2016] EWHC B13 (Costs). The successful party claimed costs of £241,817. Following a line by line assessment of what were reasonable costs needed to be incurred in order to bring the case, this sum was reduced to £167,389. However it was concluded that even this was twice the sum which would be proportionate and the costs were reduced further to £84,855.80.

When asked for an estimate of fees for the purposes of costs budgeting that includes a conference with counsel, ensure that it is accurate, detailed and transparent and gives good reasons for the need for a conference. In any such estimate, include likely contingencies for example further work such as clarification and amendment of reports, further reports, examinations and tests which may become necessary as a result of the other side's expert evidence or what transpires from the conference. Getting the estimate right is important although where the original budget is likely to be exceeded, an application to review the budget can be made. The court can make a costs management order (CPR. 3.15) to control recoverable costs.

Record keeping

As is good practice in any professional meeting, careful notes should be kept of the conference including the date, start and finish times, who was present and what was said. It is also good practice at the end of the conference to run through any action steps agreed noting who is responsible and when the actions are to be completed.

Conclusion

A conference between the expert and counsel is an important stage in the litigation process. Both lawyers and experts should prepare carefully to ensure conferences are as effective as possible. Many problems ranging from embarrassment to criminal proceedings can be avoided if a conference is conducted properly.

Mark Solon

Solicitor and founder of Bond Solon
info@bondsolon.com
www.bondsolon.com