Your Witness

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Terms of engagement

This issue of *Your Witness* is turned over almost entirely to an expert witness's terms of engagement. The recent changes wrought by *Kaney*, together with moves on fees at the Ministry of Justice and Legal Services Commission, have made the need for an expert witness to have in place a proper contract more important than ever. Starting on page 2, we present our revised template terms for your consideration. These offer you a starting point from which to develop your own set of terms.

A good set of terms won't stop problems arising, but it will make clear what each party expects of the other and the contractual obligations. As a result, dealing with any problems that do arise will be much easier.

Ministry of Justice litigation reforms

In February 2012, the Government published its responses to the consultation it ran in the middle of 2011 entitled 'Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: A consultation on reforming civil justice in England and Wales'. The Government set the backdrop to the consultation in the following way:

> *'Despite many strengths, our system is not working as well as it should. Whether it's the individual that has a debt, or the business that is trying to get back what it believes it is owed, or the homeowner that might be facing repossession, too often disputes get bogged down in the legal system that could have been resolved outside it. Once in the system, cases are resolved too late, too expensively, with complex procedures and an adversarial climate imposing costs that sometimes dwarf the value of the contested claim.'*

The Government's aim is to deliver a system:

- that prevents the unnecessary escalation of disputes before cases reach the courtroom
- where courts offer quicker and more efficient services where needed
- where judgments can be enforced fairly, and
- where costs are borne in a fair way.

To achieve this, the Government proposes to:

- **expand mediation** by building on the mediation service (which has received very high levels of customer satisfaction and has been used to resolve almost 15,000 disputes over the past 2 years, and all without people ever having to travel to court). The plan is to introduce automatic referral to the small claims mediation service so that all 80,000 disputes currently allocated to the small claims track annually are offered mediation.
- **double the small claims ceiling** to cover claims with a value of up to £10,000. This is seen merely as playing catch-up with inflation because many of the cases that fell into the small claims track back in 1999 are now treated routinely as fast-track cases with associated costs.
- **introduce a fixed-cost simplified claims procedure for more types of personal injury claim**, similar to that introduced in 2010 for road traffic accidents under £10,000.

The Government reports widespread endorsement of all its proposed structural reforms – creating a better balance of work and resources between the county and high courts, as well as introducing a single county court jurisdiction for England and Wales.

Taken together with the reforms already announced, it is hoped that these changes will bring benefits to both individuals and businesses, creating further opportunities for disputes to be resolved at less cost and, in many more cases, earlier, without the stress often associated with a court hearing. Here's hoping!

Psychologists under attack

In the last issue, I shared a little humour at the expense of psychologists. Many readers will think that requiring a psychologist to go into the witness box in a pointy hat and beard goes a little too far. But the report '*Evaluating Expert Witness Psychological Reports: Exploring Quality*' by Professor Ireland from the University of Central Lancashire may give pause for thought.

A good deal of confusion has been thrown up by this report. Despite acknowledging that its qualitative methodology was one that precluded the possibility of knowing if its findings were representative, the report attracted much media attention. This was perhaps not surprising when its main conclusions included:

- 1 in 5 psychologists were found, on the basis of their CV, to be 'inadequately qualified'
- 90% of the psychologists reporting had no clinical practice, and
- two-thirds of the expert reports reviewed were rated as below the required standard.

The Ministry of Justice Analytical Services team has begun looking at what type of short- and long-term research would be valuable on expert witnesses in the family court. Hopefully, that forum will help to ensure that future attempts at research adopt a refined methodology that produces more light than heat.

Chris Pamplin

Inside

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June 2012

Terms of engagement

With over 50% of experts still not using written terms...

It is a sad fact that most of the problems that arise between experts and the solicitors who instruct them stem from misunderstandings as to what one party can expect from the other. All too often the root cause of this is that the expert has failed to secure the solicitor's written agreement to his terms of engagement (or terms of business) before accepting the solicitor's instructions. According to our series of expert witness surveys, the number of experts who use a written form of contract when accepting instructions from a solicitor has always fallen short of the 50% mark. That leaves over half of all experts claiming not to use any form of written contract.

As every lawyer knows, setting out clear terms for any contract, at the outset, is essential if subsequent problems are to be avoided. The contract between expert and instructing lawyer should be no different. Indeed, the need for expert witnesses to be up-front about their terms of engagement is a requirement of the Civil Procedure Rules.

Terms of engagement are as individual as the experts to whom they relate, and for no two experts are they likely to be the same. They may also vary from job to job. Against this background, there is little point in attempting to draft a set for use by all experts in all circumstances. So, long ago we published the *UK Register of Expert Witnesses Terms of Engagement Framework*. This is intended to provide a base from which experts can build their own sets of terms.

Over the last few months we have been revisiting the framework to see if we can improve it by including new clauses to deal with events such as the removal of expert witness immunity. This has led us to expand the framework by including clauses dealing with insurance, liability period, limitation of liability, termination, entire agreement and governing law and jurisdiction. But, before commenting on some of these issues, it is worth being clear with whom an expert should contract.

Parties to the agreement

... the time is ripe to show how easy it can be to understand the basics

Experts, when instructed or when negotiating terms, will, of course, deal mostly with an individual solicitor. That solicitor may be a sole practitioner, but he is more likely to be a partner or associate with a firm of solicitors. Individual solicitors will normally be contracting on behalf of their firm and not on a personal level, so are unlikely to accept exclusive personal liability.

The legal contractual capacity of a partnership (whether or not a limited liability partnership) is that a firm can sue or be sued in the name of the firm or in the name of individual partners in that firm. The partners are jointly and severally liable. An individual partner, or someone holding themselves out as such, acting within their normal capacity will bind the firm for which they act. It makes sense, therefore, for agreements to be made in the name of a firm and not the individual solicitor. This will also save potential difficulty if the matter is taken over by another solicitor within the same firm.

Limiting liability through contract

In the Supreme Court decision in *Jones -v- Kaney*, which removed expert witness immunity, Lord Collins says '*There is no basis for suggesting that experts will be discouraged from testifying if immunity were removed – most are professional people who are insured or can obtain insurance readily, and those who are not insured can limit their liability by contract.*'

The notion that an expert witness could successfully limit his liability through his contract is an odd one for a Supreme Court judge to make. The court reports are littered with examples of failed attempts to achieve such limitation. To be effective, any attempt to use the contract to limit exposure to claims in negligence will need to comply with the relevant legislation on contractual fairness – and the overwhelming impression given by how courts have dealt with such clauses is that if they greatly disadvantage one party, or the parties start out on an unequal footing, they will be deemed unfair.

While it may be that where there is a shortage of experts – for example, in family work – limitation of liability clauses may be more likely to be accepted by a party struggling to find an expert to instruct and to be upheld by the courts, this is certainly not the panacea suggested by Lord Collins.

Where the courts have upheld limitation clauses, they have tended to do so where the limit is set in relation to an insurance policy cover level or a specific assessment of the likely value of any claim, and where the client is fully aware of the proposed clause and its impact and had the opportunity to negotiate over the wording of the clause.

There is a growing tendency for experts to require indemnities against liability for any potential claims against them, or the inclusion of clauses in their terms of engagement that exclude or limit their liability for such claims. Solicitors who are asked to give an indemnity are unlikely to do so, because they might have every cause to consider that it would not be in their client's interest to do so. However, there is a detectable lessening of opposition to some form of limitation of liability following the decision of the court in *Kaney*. Since most experts will now carry a level of professional indemnity and public liability insurance, and in the light of a growing expectation by the courts and professional bodies that they will do so, we have appended optional insurance and limitation clauses to the framework.

Entire agreement clause

Another optional clause we've added that might assist in limiting liability is the 'entire agreement

clause'. It is intended to prevent the parties to a written agreement from raising claims that pre-contractual statements (i.e. statements or representations that were made during the contract negotiations but were not included in the final version of the agreement) constitute additional terms of the agreement, or a collateral warranty or some other side agreement. Most entire agreement clauses also include wording intended to restrict claims based on misrepresentation.

Governing law and jurisdiction

We have redrafted the original jurisdiction clause to firm up its terms. Where the parties have agreed (in accordance with the jurisdiction clause) to submit disputes to the English courts, it is possible for the parties to choose a foreign law as the governing law of the contract.

English courts are experienced in applying foreign laws when determining disputes before them, but the foreign law must be pleaded and proved as a fact, usually by witness evidence from a qualified lawyer in the relevant jurisdiction. The court's application of a foreign governing law may give rise to problems, such as conflicting expert evidence on the foreign law or its interpretation. Furthermore, the process of instructing foreign lawyers to give evidence can add significantly to the time and costs of the litigation. However, where the nature of the obligations in the contract or the bargaining power of the parties necessitates a choice of foreign law, English courts have no objection in principle to deciding a dispute on this basis. This may, of course, have some application to English and Scottish experts who work in jurisdictions other than their own.

Where the parties have agreed to refer their disputes to arbitration, it is equally important to specify the governing law of the contract.

Caution

In using the *UK Register of Expert Witnesses Terms of Engagement Framework* you will understand that it is provided as a convenience only. Whilst we have taken care to ensure the framework is accurate, appropriate and up to date, it is supplied for general information purposes only and does not constitute professional advice. In using the framework you agree that you do not hold either J S Publications or the authors liable for any loss that may arise from reliance on information contained therein. It is for you to ensure that your Terms of Engagement are appropriate to your own situation and that you comply with the rules of court, practice directions, protocols and any codes of practice currently in effect.

Terminator is a small application that enables you to create personalised sets of terms based on the framework and output them as either a pdf file or html text. Visit *www.jspubs.com* and follow the link to *Terminator* to try it out.

Terms of Engagement Framework

Appointment of [*expert's name*] as an Expert in the matter of [*case*]

Agreement made this ..... day of ..... 20.... between [*name of solicitor's firm*] (hereinafter called the Appointor) of [*firm's name and address*] and [*expert's name*] (hereinafter called the Expert) of [*expert's address*].

As witness the hands of the parties

I am duly authorised to sign this contract for and on behalf of [*firm's name*]

Signature of the Appointor .....

Signature of the Expert .....

This agreement has [*x*] pages.

Terms of Engagement of [*expert's name*] as an Expert in the matter of [*case*]

1. Recital of Appointment

Messrs [*firm's name*] has appointed [*expert's name*] to render advice and services in accordance with these Terms of Engagement.

2. Definitions

Unless the context requires otherwise:

(a) 'Appointor' means the solicitor instructing the Expert.

(b) 'Expert' means the person appointed to provide advice and services, which may include the giving of expert evidence.

(c) 'Client' means the person(s), firm, company or public body on whose behalf the Expert is being instructed.

(d) 'Assignment' means the matter(s) referred to the Expert for advice to which these Terms of Engagement apply.

(e) 'Fees' means (in the absence of a written agreement to the contrary) the reasonable charges of the Expert based on his or her normal hourly/daily rate for work of the type instructed and including VAT where applicable.

(f) 'Disbursements' means all reasonable and appropriate costs and out-of-pocket expenses incurred by the Expert in carrying out the Assignment, including travel, refreshments and, should an overnight stay become necessary, hotel accommodation. VAT will be charged where applicable.

3. The Instructions

The Appointor will:

(a) provide the Expert with full and timely written instructions which clearly state:
(i) whether the Expert is being instructed on the Appointor's own behalf or that of one of the parties to the dispute or as a Single Joint Expert
(ii) the purpose for which the Expert's advice and services are needed, including a description of the matter on which they are being sought
(iii) which factual aspects of the matter may be in dispute
(iv) whether the advice and services are to be provided in accordance solely with information supplied or will require independent investigation by the Expert
(v) the precise kind of expertise called for
(vi) the particular questions that are to be addressed
(vii) whether the Expert will be expected to confer with experts instructed on behalf of other parties with a view to reaching agreement on the issues or narrowing those in dispute
(viii) whether the Expert is to prepare a report for the advice of the Appointor and/or his Client or for use in court, and, if the latter, whether a draft

New clause to limit liability to level of insurance cover

It is for you to ensure your terms meet your specific needs

Terms need to set out clearly the solicitor's obligations to you...

... and your obligations to the solicitor

version needs to be submitted first of all
(ix) any time constraints for the provision of the advice, the production of the report, etc.

(b) provide the Expert with such basic additional information as names, addresses, telephone numbers and dates of incidents.

(c) supply the Expert with good-quality copies of all relevant documents.

(d) in the case of medical records, specify their location and identifying numbers and state whether consents for their disclosure have been given or are being obtained.

4. Obligations of the Appointor

The Appointor will:

(a) inform the Expert by whom his or her fees are to be paid and whether the Appointor needs to obtain authority to incur the estimated fees and disbursements before confirming the Expert's instructions.

(b) in legal aid cases:
(i) notify the Expert that a funding certificate or legal aid order has been applied for, granted or amended
(ii) apply to the Legal Services Commission for prior authority to incur the Expert's anticipated fees and disbursements and immediately advise the Expert should this authority be refused
(iii) apply to the Legal Services Commission for interim payments on account to settle the Expert's invoices within the agreed time scale
(iv) determine, as part of the preliminary or protocol enquiries, whether Legal Services Commission criteria for exceeding the benchmark rates for fees apply. The benchmark rates will only apply in the event that the Expert's evidence is not key to the Client's case and where the instructions and material to consider are neither complex nor specialist in nature
(v) for attendance at court in criminal proceedings, aid the Determining Officer in the exercise of his or her discretion on payment of fees by advising of the nature and complexity of the case, any factors limiting the availability of experts, the status of the Expert and the Expert's charging rates for preparation, attendance and cancellation and will notify the Expert of the court address and details for the purpose of invoicing.

(c) in privately funded cases ensure that the Expert's fees and disbursements are paid within the agreed time scale, whether or not the Appointor has been placed in funds by the Client.

(d) respond promptly to any reasonable request from the Expert for, *i.a.*:
(i) clarification of instructions already given
(ii) further information or documents
(iii) permission to incur expense additional to that initially estimated
(iv) authority to engage others to undertake part of the assignment.

(e) not alter, or allow others to alter, the text of the Expert's report(s) in any way without the Expert's permission.

(f) give prompt written warning of every meeting or hearing that the Expert is, or may be, required to attend and immediate notification should they be cancelled.

(g) keep the Expert informed as to the progress of the case and its outcome.

(h) not use, or allow others to use, the Expert's report(s) for any purpose other than litigation in the matter on which the Appointor has sought the Expert's advice and services. The Appointor's instructions are accepted by the Expert only upon the basis that the Appointor gives to the Expert full, timely and proper instructions, authority and information which will enable the Expert to lawfully and properly carry out the assignment and comply with the Expert's duty to the court, and that the Appointor will indemnify the Expert accordingly.

5. Obligations of the Expert

If the Expert is required to provide expert evidence, he or she becomes subject to the provisions of the court's Procedure Rules that relate to experts. In such circumstances the Expert's primary duty would be to the Court and his or her evidence must be seen to be independent, objective and having no bias towards the party responsible for paying his or her fees. Subject to these overriding considerations, the Expert will:

(a) at all times, both during and after completion of the Assignment, adhere to professional boundaries of confidentiality, and raise with the Appointor any conflict between professional boundaries and Appointor instructions, if it becomes apparent.

(b) perform only those tasks for which he or she has the requisite qualifications and experience to undertake, and the resources needed to adequately fulfil them within the allotted time span.

(c) keep detailed time-sheets and records of tasks undertaken.

(d) promptly notify the Appointor of:
(i) any conflict of interest that would disqualify the Expert or render it undesirable for the Expert to have continued involvement with the case
(ii) any requirement the Expert perceives for the Appointor to employ additional expertise.

(e) endeavour to make him or herself available for all hearings, meetings or other necessary engagements for which he or she has received adequate notice.

(f) not negotiate with the opposing party or their advisers unless specifically authorised to do so by the Appointor or instructed to do so by order of the Court.

(g) if requested by the Appointor, provide before the hearing full and complete details of his or her costs to trial.

(h) not without good cause, discharge himself or herself from the appointment as Expert.

(i) at all times, both during and after completion of the Assignment, treat all aspects of it as confidential unless authorised by the Appointor to the contrary.

6. Intellectual Property Rights

(a) Unless otherwise agreed in writing, all legal and beneficial interest in intellectual property rights and rights of ownership in written reports, photographs, recordings, models and other original work created by the Expert relating to or developed by him or her in connection with the assignment given by the Appointor shall belong to the Expert.

(b) The Expert grants to the Appointor a non-exclusive, non-transferable licence to use the said intellectual property solely in connection with the assignment to which the instructions relate and for the duration of these terms of engagement but subject to clause 7(f) below.

(c) The Expert shall not be liable for use of the Material for any purpose other than that for which it was prepared and/or provided.

7. Fees and Disbursements

In the absence of any written agreement to the contrary:

(a) the Appointor who instructs the Expert does so as principal and shall be personally responsible for payment of the Expert's fees and disbursements, whether or not the Appointor has been placed in funds by the client (or, in legal aid cases, by the Legal Services Commission), and the Appointor shall pay them in full, notwithstanding any provisions of the court's Procedure Rules with regard to their amount, recoverability or otherwise, and whether or not the full amount has been allowed in any assessment of the costs of the case.

(b) Fees will be charged on a time costed basis at the Expert's hourly rate from time to time applicable

and notified in writing by the Expert to the Appointor unless a fixed fee or some other basis of charging is agreed in advance and in writing between the Expert and the Appointor.

(c) The Expert may present interim invoices at such intervals as he or she considers fit and payment of each invoice will be due within [period] of its presentation, subject to any written waiver granted by the Expert in legal aid cases.

(d) The Expert reserves the right to charge to the Appointor the costs and expenses (including legal costs) of recovering late payments and to charge interest at the rate then in force pursuant to the *Late Payment of Commercial Debts (Interest) Act 1998*.

(e) If the Appointor does not make payment when due the Expert may, in addition, modify the payment terms so as to make all fees and disbursements payable in advance or require the Appointor to give such assurance, guarantee or undertaking as the Expert may reasonably require to secure the Appointor's payment obligations.

(f) Until payment in full has been made by the Appointor, the Expert shall be entitled to retain all books, papers, reports, documents and other materials, whether or not these are the property of the Appointor and whether or not they relate to the assignment in respect of which the Expert has been instructed.

8. Cancellation Fees

The Expert shall be entitled to charge fees whenever:

(a) the Expert's time has been reserved for a specific hearing, meeting or other engagement, or

(b) specific instructions have been given to the Expert for an investigation and report and due to settlement of the matter, or for any other reason not the fault of the Expert, the reservation of time has been cancelled or the instructions withdrawn. These fees will be calculated according to the following sliding scale:

Cancellation/withdrawal of instructions...	**% of fee**
within 28 days of the hearing/date arranged for investigation/date report required, etc.	X
within 14 days of the hearing/date arranged for investigation/date report required, etc.	Y
within 7 days of the hearing/date arranged for investigation/date report required, etc.	Z

9. Disputed Fees

In the event of a dispute over the amount of the Expert's fees or disbursements, such sums that are not disputed shall be payable when due, irrespective of any counterclaim that may be alleged. That part which is in dispute can then be referred for resolution to a mediator acceptable to both parties or, if agreement cannot be reached, by using the services of the Centre for Dispute Resolution. In the event that the dispute is not resolved by means of negotiation or mediation, the Courts of England and Wales will have exclusive jurisdiction in relation to the dispute and its resolution.

10. Insurance

The Expert shall take out and maintain professional indemnity insurance for an amount of at least £[*amount*] [*for each and every claim OR for each and every claim arising out of the same originating cause or source OR in the aggregate OR in the aggregate in any year of professional indemnity insurance*] for a period beginning on the date of this agreement and ending six years after the date of completion of the Services, provided that such insurance is available at commercially reasonable rates and terms. The Expert shall take out and maintain that professional indemnity insurance:

(a) with reputable insurers lawfully carrying on insurance business in the UK;

(b) on customary and usual terms and conditions prevailing for the time being in the insurance market; and

(c) on terms that:

(i) do not require the Expert to discharge any liability before being entitled to recover from the insurers; and

(ii) would not adversely affect the rights of any person to recover from the insurers under the *Third Parties (Rights Against Insurers) Act 1930*.

11. Limitation of Liability

Without affecting any other limitation in this agreement, the Expert's liability under this agreement, however that liability arises (including a liability arising by breach of contract, arising by tort, including the tort of negligence, or arising by breach of statutory duty), shall be limited to £[*amount*] [*for each and every claim OR for each and every claim arising out of the same originating cause or source OR in the aggregate OR in the aggregate in any year of professional indemnity insurance*], provided that this clause shall not exclude or limit any liability of the Expert for death or personal injury caused by the Expert's negligence.

12. Liability Period

The Client may not commence any legal action against the Expert under this agreement after six years from the date of completion of the Services.

13. Third Parties

These terms of engagement set out the rights and obligations of the Appointor and the Expert only. For the purposes of the *Contracts (Rights of Third Parties) Act 1999*, nothing in these terms shall be taken to confer or purport to confer any right or benefit on any third party and a third party shall have no right to the enforcement of any term contained herein.

14. Termination

The Appointor may terminate the whole or any part of the Expert's engagement under this agreement at any time by giving [*x*] Business Days' notice in writing to the Expert. Either party may immediately terminate the other's engagement under this agreement by giving written notice to the other party if:

(a) the other party is in material breach of its obligations under this agreement and fails to remedy that breach within [*x*] Business Days of receiving written notice requiring it to do so; or

(b) the other party becomes Insolvent.

15. Entire Agreement

(a) This agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous drafts, agreements, arrangements and understandings between them, whether written or oral, relating to its subject matter.

(b) Each party acknowledges that in entering into this agreement it does not rely on, and shall have no remedies in respect of, any representation or warranty (whether made innocently or negligently) that is not set out in this agreement.

(c) No party shall have any claim for innocent or negligent misrepresentation based upon any statement in this agreement.

(d) Nothing in this clause shall limit or exclude any liability for fraud.

16. Governing Law and Jurisdiction

(a) This agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.

(b) The parties irrevocably agree that, subject to clause 9 hereof, the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this agreement or its subject matter or formation (including non-contractual disputes or claims).

Cancellation fees can be very hard to agree in publicly funded cases

Ensure you specify the governing law

Acceptance of terms

What constitutes 'acceptance' of your terms?

Bind the lawyer tightly

Once the expert has sent the instructing solicitor a copy of his written terms and conditions, should the solicitor's acceptance of the terms be in writing?

There is no requirement that it should be. The solicitor could simply telephone and make an oral acceptance, and that would be sufficient to create a binding contract. However, this can give rise to uncertainty. If it later becomes necessary to enforce the contract, the lack of a clear written acceptance could make it difficult to prove exactly what was agreed, when it was agreed and between whom.

However, some solicitors, whilst responding, couch their response to an expert's terms of engagement in ways that fall a long way short of a firm acceptance. They may, for example, 'acknowledge receipt' of them, or confirm that they 'understand' them. For that reason it could be unwise to leave the instructing solicitor (especially, perhaps, one the expert has not dealt with before) to phrase his own statement of acceptance of the terms. Instead, an expert might consider:

- providing an acceptance slip of his own devising, or
- prefacing his set of terms with a form of agreement such as the one set out in our sample set. (In this event experts will, of course, need to supply two copies of the complete document, signing both and leaving the instructing solicitor to date and sign the returned copy.)

Whatever the route adopted, the solicitor must sign, date and return one part of the expert's terms and conditions, signifying his clear and unequivocal acceptance.

Silent acceptance?

If the instructing solicitor receives the terms and conditions, duly notes them and tucks them into the back of his file, can the expert infer from his silence that the terms have been accepted?

Acceptance is final and unqualified assent to an offer. This must be made in response to an offer and correspond exactly with the terms of that offer with no variation. It is generally the case that acceptance must be communicated to the offeror to be effective, although sometimes conduct will be considered acceptance. Clearly, if the solicitor then instructs the expert to proceed, there is a strong inference that the solicitor has accepted the expert's conditions and a contract may have been created by conduct. However, in common law, acceptance of an offer cannot be implied by silence or failure to communicate rejection. Indeed, the *Unsolicited Goods and Services Act 1971* also makes statutory provision requiring acceptance to be communicated to the person offering the contract.

Get a copy of your terms signed by the solicitor

Where acceptance can be implied from the subsequent actions of a party, the court might choose to infer the existence of a valid binding contract in order to give effect to what the court sees as the intention of the parties. If an offer does not specify the method of communication for acceptance, then the offeree may communicate his acceptance in any way he chooses.

In practice, the offeror will want to make matters certain by prescribing the method of acceptance. It should be noted, however, that if the offeror prescribes a method, then the offeree must use that method to accept. Any attempt to accept in another way will amount to a counter offer (*Western Electric Ltd -v- Welsh Development Agency* [1983] *QB* 796). This rule may be relaxed where, for example, an offeror specifies a manner for acceptance but does not make it clear that only acceptance in that manner is binding – if the offeree uses a method of communication that is no less advantageous (from the offeror's point of view) than the method prescribed, then a contract is concluded. This, however, is not the certainty the expert will require.

Beware, also, the 'battle of forms' where the expert sends his terms of engagement and the solicitor sends a retainer letter containing his own terms. If the parties start to perform the contract without formally agreeing whose terms apply, the courts will try to characterise the parties' behaviour and communications as offer and acceptance (as it would otherwise fly in the face of commercial reality to hold there is no contract).

Acceptance is generally found in one party beginning to perform the contract, and the 'last shot' doctrine holds that the last communication exchanged by the parties which was not explicitly rejected by the recipient constitutes the offer. Although the court would look at all the documents and also at the relative positions of the parties, if there is a conflict on terms it will usually apply the 'last shot' method to determine the terms on which agreement was deemed to have been reached.

The expert is best advised, therefore, to ensure that the solicitor's agreement is provided in writing, ideally by requiring a signature on a copy of the expert's terms. Note that the expert (as the person making the offer) is entitled to stipulate the mode of acceptance.

Covering letter

The fee for expert services may well have been negotiated verbally. So, provided the expert's terms and conditions are clear about how the basis for charging will be calculated, it would be as well for experts to set out what has been agreed in a separate letter rather than to attempt to incorporate the details in an otherwise standard set of terms of engagement.

If, for example, a flat fee has been agreed for preparing a report, this should be stated. Alternatively, the letter could specify the hourly

rate on which a fee will be calculated, together with an estimate of the number of hours it will take to complete the assignment.

The covering letter ought also to make clear:

- the **hourly rate charged for time spent at meetings with other experts**, whether these are arranged by the parties or ordered by the court
- the **hourly rate charged for time spent answering written questions** about the report in accordance with CPR 35.6
- **estimates of any travel expenses or other disbursements** likely to be incurred in carrying out the instructions, and
- the **daily rate for attendance in court**, in case the action should proceed to trial and a court appearance be required.

Although, in civil litigation, the latter is likely to happen only in multi-track cases, at the stage at which experts are being instructed it may well not be known to which track the case will be assigned.

Furthermore, the civil court has the discretion to require experts to give evidence from the witness box even in cases assigned to either of the other tracks. Of course, most criminal cases will involve attendance at court.

Depending on the circumstances, the covering letter can either:

- accompany the standard set of terms of engagement submitted to the solicitor – in which case the letter should make clear that the expert's willingness to be instructed is subject to acceptance of the terms, or
- be sent once the expert has received back a signed and dated copy of the terms (or other written confirmation of acceptance of the terms) – in which case it can constitute acceptance of the solicitor's instructions, as well as of any time constraints that may have been specified.

It would be wise, too, for the expert to indicate at this stage any requirements he may have to enable the assignment to begin and be completed, e.g. the solicitor securing permission to examine the client's medical records.

If relying on a covering letter in relation to fees or any other term of the agreement, care must be taken to ensure that this does not clash or is made ineffective by the use of any entire agreement clause.

Terms of engagement and privilege

Correspondence between the expert, the law firm and the client (other than the instructions to the expert) will be legally privileged. It is good practice to mark such correspondence as confidential and privileged in case it comes into the possession of a third party.

The terms of engagement should be kept separate from the letter of instruction to the expert in order to safeguard, as far as possible, any privilege in the terms and to avoid having to disclose them to comply with CPR 35.10(3). Instructions are not privileged against disclosure, and the court could order disclosure if satisfied that there were reasonable grounds to consider the statement of instruction in the report to be inaccurate or incomplete. It is not thought that this applies to the terms of engagement because the expert does not base his report on these, and it is therefore unlikely that they would have to be disclosed. Accordingly, if privilege in the terms is to be retained, it would be unwise for the letter of instruction to refer to specific points in relation to the terms, or for the two to be incorporated together.

Terms will normally be privileged

A note on fees

Disagreements over fees between experts and solicitors are the most common area of dispute arising from terms of engagement. Whether the terms in relation to fees are set out in a covering letter or are contained in the terms of engagement, it is, therefore, important to set these out as fully and as clearly as possible.

It is worth noting that before 6 October 2011, Rule 2.03 of the Solicitors' Code of Conduct 2007 required solicitors to explain to clients, at the outset, any likely payments they would have to make, including expert fees. From 6 October 2011, however, a new Solicitors Regulation Authority (SRA) handbook containing the 2011 Code of Conduct replaced the 2007 Code, The new Code contains subtle differences to its predecessor.

The 2011 Code departs somewhat from the inference that the amount and extent of any expert's fees should be specifically disclosed and discussed with the client. Instead, the new Code comprises 'mandatory Principles, mandatory Outcomes and non-mandatory Indicative Behaviours'. Those relevant to the requirement to inform clients about likely payments to experts include the following:

- To act in the best interests of clients (Principle 4); to provide a proper standard of service to clients (Principle 5).
- Clients receive the best possible information, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of their matter (Outcome 1.13).
- Warning about any other payments (other than the client's lawyer's own fees and, potentially, the opponent's fees) for which the client may be responsible (Indicative Behaviour 1.15).

This gives less guidance than did Rule 2.03 of the Solicitors' Code 2007. However, the guidance in note 40 of the 2007 Code is thought to remain relevant. This states that, where possible, the solicitor should give details of the probable cost of an expert's fees and, if this is not possible, should agree with the client to review these expenses and the need for them nearer the time when they are likely to be incurred. If the costs seem unreasonable, this issue should be raised sooner rather than later.

Less rigid rules for solicitors could result in more delayed payments

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