



GUIDANCE NOTES FOR LEGAL PRACTICES

Communication with professionals

The way you communicate with those outside your organisation can have a major impact on the progress of a transaction.

This includes communication with experts such as barristers, clinical consultants, accountants, insolvency specialists and surveyors, and also lawyers acting for other parties. Poor communication can cause delay, increased costs and even negligence claims.

Ensure your retainer letter both sets out the work that you will be doing and specifies any work that you will not be doing.

Risks

- Instructing an expert very late in the proceedings
- Instructing the wrong type of expert
- Incomplete instructions so that the client does not get full advice
- Sharing responsibility for someone else's mistake

Last minute instructions

- Instructing an expert is often left until the last minute. Two reasons are commonly given: 'I thought the matter would settle and hoped to save my client extra expense' and 'it was only when I was reviewing the matter before trial, exchange or completion that I realised an expert's opinion was required'
- When this happens, your choice of expert will be limited. It is unlikely that the expert will have enough time to prepare a detailed report
- If your concern is to save your client money, why not put the options (and the risks) to your client and let them decide?
- If you need to involve experts, instruct them as soon as possible

The right expert

- Choose your expert carefully
- Check that your experts are competent in their chosen fields
- Check that you have chosen the right expert for the job. A good report from an orthopaedic specialist will be of little use if your client really needed advice from a neurosurgeon
- Check your expert's qualifications, experience and training. Do they understand what duties are owed to whom, how to structure the report, how best to give evidence?
- Whether you use your own in-house register of experts or a public directory, make sure the list is up to date. An expert is only as good as their last report
- Your chosen expert is not necessarily in the best position to judge whether they are the right person for the job. Remember: only rarely will an expert decline instructions

Drafting the instructions

- Summarise the background to the matter
- Provide all relevant documentation in a structured way
- Identify the issues that you want the expert to address. Give specific instructions – don't just present the facts of the case and wait to see what happens
- Set out clearly any questions to which you require answers
- Highlight the timescale within which you require a substantive reply
- If you are instructing any experts to provide reports, ensure that they will comply with the requirements of the Civil Procedure Rules
- Clarify whether the instructions are joint or on behalf of your client only
- Clarify who will be paying the fee

Ensure that your client understands the report when it is received and raise any queries on it without delay.

Counsel

- When instructing counsel, remember the points made above on timing and content
- Do not assume that counsel will remember the case because they advised on it previously. Nor should you assume they will read between the lines if information is not given in full
- The brief should be self-contained – you may have to accept a substitute counsel at the last minute
- If you disagree with advice from counsel, or do not understand it, ask further questions
- Remember your duty to use your own judgement: you do not abdicate your responsibility when you instruct counsel: *Locke v Camberwell Health Authority* [1991] 2 Med LR 24, and *Ridehalgh v Horsefield* [1994] Ch 20. If you think that counsel's advice is obviously or 'glaringly' wrong, it is your duty to reject it. See also *Langsam v Beachcroft LLP* [2012] WECS Civ 1230

Retainer

Ensure that your retainer letter states clearly the work that you will be covering and also the work that you will not be doing. If you do not limit your retainer clearly, you may be treated as having implicitly accepted responsibility for all areas of advice. In many cases, the courts see the lawyer's role as a coordinating one. Don't assume that your client understands this – spell it out.

When working jointly with professionals from other disciplines such as accountants, surveyors or actuaries as well as other lawyers, consider asking them (or your client) for sight of their retainer letter.

Dealing with other parties

Prepare letters and file notes on the basis that they could one day be produced to your client, the court or the Legal Ombudsman.

The acid test is: 'would you be happy for your letters or file notes to be read out in open court?'

Clarity and brevity are usually best. If matters are so complicated that they cannot be set out in a few pages, use schedules or other strategies for ensuring that your arguments are presented in the most effective way.

Be objective – put your client's case forward firmly, but don't make derogatory comments about the opponent or their legal advisors even if replying to a letter that casts aspersions on you or your client. It is always wise to draft a letter and then take time to reconsider it, and this is particularly important with the use of email. Remember that an email sent in the heat of the moment cannot be recalled.

If a claim is litigated against your organisation, you may be required to disclose all your emails as part of the discovery process.

If you genuinely believe another lawyer has acted in an unprofessional manner, write to them – or to the senior partner/manager of their practice – before taking further action.

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