



association of
personal injury
lawyers

News

letter

Volume 10 Issue 2
May 2000

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Experts as advisers

by Keith Carter, employment consultant, Keith Carter Associates, London

The role of expert is changing in the post-Woolf era. Keith Carter explores the benefits of a more flexible approach to using an expert.

Since the introduction of the Civil Procedure Rules (CPR), lawyers have had to seek permission from the court to call an expert. The result has been that many requests have been refused. While there continues to be major concern about such refusals there are some positive developments.

While many district judges are not adopting a flexible approach towards experts, there have been some exceptions.

Case 1

A district judge recently refused to give leave to call an expert. However, he stated that the expert (adviser) could provide labour market information to both parties.

Case 2

Leave was granted for a joint adviser to be instructed but not an expert. The district judge indicated in this case that the trial judge would benefit from expert information but the expert did not need to attend trial. He invited both sides to investigate matters further through interrogatories with the expert if they needed more detail.

These examples reflect a more considered approach towards the use of experts and are considered in more detail below.

Information only

Providing information-only is likely to be most useful in straightforward or fast-track cases. The information should assist solicitors with pre-emptive offers of settlement or payments into court, helping to resolve proceedings swiftly and fairly.

Expert as adviser

At any time, either or both parties can appoint advisers to assist them, without first seeking the court's permission. Advisers can be used in the following ways.

- *Advise on why expert evidence is required*
Civil procedure rule 35 indicates that "expert evidence shall be restricted to that which is reasonably required to resolve proceedings". If there is any doubt about whether there is a reasonable requirement, lawyers can

discuss the matter with their adviser.

- *Identify main issues*
The adviser can consider relevant documentation and explain to the instructing party the main strengths and weaknesses of the case.
- *Assist lawyers*
The adviser can help to prepare a case plan and statement of case; to calculate quantum; and to consider part 36 offers.
- *Comment on work of a single joint expert (SJE)*
If lawyers are not satisfied with the appointment of a particular SJE, they may use an adviser to consider the SJE's report, prepare a commentary and written questions, and assist counsel with cross-examination in court.

Terms and conditions of advisers

- Unlike appointed experts, the duty of an adviser is to the instructing party.
- Instructions and the work of advisers are privileged. If the adviser later becomes an expert, it is expected that all former information will lose privilege.
- Instructing party is liable for costs. Fees may be recoverable if agreed in advance by the court, or as a solicitor's disbursement, providing it is at a lower rate than that charged by solicitors and the work is not duplicated by solicitors. Advisers can work on a contingency fee basis.

The advantage of using experts in the above ways is that parties still have the benefit of specialist advice which can be crucial in assessing a case. Equally important is the fact that the new roles are cost-saving and aim to provide information which can help negotiate a settlement, thus remaining within the spirit of the Woolf reforms. ■