

Factsheet 15: Terms of Engagement for Experts

Last updated: March 2008

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.

Surveys reveal true extent of problem

According to the series of expert witness surveys conducted by the *UK Register of Expert Witnesses* (from 1997 to 2007; for survey results surf to <http://www.jspubs.com/Surveys/feesurveys.cfm> or see Factsheets 57, 54, 49, 47, 39 and 24), the number of experts who use a written form of contract when accepting instructions from a solicitor is fewer than 50%. That leaves over half of all experts claiming not to use a 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 upfront about their terms of engagement is now a requirement of the Civil Procedure Rules (CPR).

The Civil Justice Council's (CJC) *Experts Protocol* requires experts and lawyers to place their professional relationship on a firmer footing by ensuring a contract – ideally written – is in place before any work begins. §7.2 of this *Protocol* states:

'Terms of appointment should be agreed at the outset and should normally include:

- (a) the capacity in which the expert is to be appointed (e.g. party appointed expert, single joint expert or expert advisor);*
- (b) the services required of the expert (e.g. provision of expert's report, answering questions in writing, attendance at meetings and attendance at court);*
- (c) time for delivery of the report;*
- (d) the basis of the expert's charges (either daily or hourly rates and an estimate of the time likely to be required, or a total fee for the services);*
- (e) travelling expenses and disbursements;*
- (f) cancellation charges;*
- (g) any fees for attending court;*

- (h) time for making the payment;*
- (i) whether fees are to be paid by a third party; and*
- (j) if a party is publicly funded, whether or not the expert's charges will be subject to assessment by a costs officer.'*

Experts used to waiting in wistful hope of payment, but who do not have clear terms for payment embodied in written terms and conditions, must now move into compliance with the requirements of the *Experts Protocol*.

Personalising terms

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. Some experts prefer the convenience of having a set drafted to cover all eventualities which can be submitted in full with their estimates of fees and disbursements. Others want to be able to adapt them to suit the particular case and to incorporate details that have been agreed in preliminary discussions with the instructing solicitor. Either way, though, it is vital that the Terms cover a minimum of essential matters.

Given the diversity of assignments for which terms of engagement may be required, there is little point in attempting to draft a set for use by all experts in all circumstances. What follows here is more in the nature of a framework for a set of terms. Originally structured on the Model Terms of the Academy of Experts, this framework now incorporates features derived from other sources and material which individual experts have found useful. Do feel free, though, to omit sections (e.g. 'Definitions' or 'Cancellation Fees') that seem either self-evident or inappropriate, and to substitute personal and possessive pronouns for 'the Appointor(s)' and 'the Expert(s)' should you prefer.

Note that listed experts may create and copy a set of terms of engagement through our free-to-use website application 'ToE Writer'. Simply surf to <http://www.jspubs.com/experts/terminator/index.cfm>. Please remember that our terms are offered as a good starting point. Before use, you should check your terms with an appropriately qualified professional adviser.

Terms of Engagement Framework

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

Agreement made this day of 20... between [solicitor's name] (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

[Solicitor's name], of 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' mean (in the absence of 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' mean 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 pursuant to Civil Procedure Rule 35.7
 - (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 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 Area Office of 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 Area Office for interim payments on account to settle the Expert's invoices within the agreed time scale.
 - (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 [Civil Procedure Rules][Criminal 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:

EXPERT SUPPORT SERVICES FROM THE UK REGISTER OF EXPERT WITNESSES

- (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.

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 [Civil Procedure Rules][Criminal 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 agreed 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. 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.

Jurisdiction

This Contract shall be governed and construed in accordance with the laws of England and Wales, and both parties agree

that subject to Clause 9 hereof the Courts of England and Wales shall have exclusive jurisdiction in determining any dispute arising herefrom.

Acceptance of 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 agreement 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 above. (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?

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.

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. This, however, is not the certainty the expert will require.

The expert is best advised, therefore, to ensure that the solicitor's agreement is provided in writing, ideally by having him sign 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
- the daily rate for attendance in court, in case the action should proceed to trial and a court appearance be required.

Although, in civil cases, 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
- 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.

Footnote

For the text of the Rules and the Practice Direction relating to experts, see [Factsheet 35](#) in this series. For more detail of the CJC Experts Protocol, see [Factsheet 53](#).

EXPERT SUPPORT SERVICES FROM THE UK REGISTER OF EXPERT WITNESSES

Disclaimer

The information contained herein is supplied for general information purposes only and does not constitute professional advice. Neither J S Publications nor the authors accept responsibility for any loss that may arise from reliance on information contained herein. You should always consult a suitably qualified adviser on any specific problem or matter.

**J S Publications can be contacted at:
PO Box 505, Newmarket, Suffolk CB8 7TF
Tel: 01638 561590 • Fax: 01638 560924 • e-mail: ukrew@jspubs.com**