

Taking the stand

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Vivien King considers the issues involved when instructed to work as an expert witness

Why building surveyors want to be expert witnesses is one of life's little mysteries: simply there to be demolished by an aggressive barrister is no fun. But, if instructed, what is entailed?

First, expert evidence can only be called with the court's leave ([Part 35](#) of the [Ministry of Justice Civil Procedure Rules \(CPR\)](#)) and the court, not the parties, decides what is reasonably required to resolve proceedings.

In seeking leave, a party identifies the issues to be addressed, states the relevant field of expertise and the name of a proposed expert. They also give a budget for costs (see below). If proposed witnesses are from the same field, the court can order that a single joint expert be instructed.

An expert witness's duty is to help the court on matters within their expertise. This overrides any obligation to those instructing or paying them. Evidence is presented in a written report and exchanged by the parties' solicitors with that prepared for another party. Expert witnesses may or may not be called to give further evidence in court.

Independence is key

If one word describes an expert witness's evidence, it is 'independent': they provide to the court 'objective, unbiased opinions on matters within their expertise and should not assume the role of an advocate' (paragraph 2 of [Practice Direction](#) to Part 35 of the CPR (PD35)).

PD35 reminds experts to address reports to the court and specifies contents. It is verified by the witness giving a statement of truth:

'I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.'

In addition, witnesses should consider the [Civil Justice Council Protocol](#) for the instruction of experts to give evidence in civil claims (annexed to PD35). Drafted in 2005, updated in 2009, it was revised in draft in 2012 and is presently before the Civil Procedure Rule Committee.

Budgets and costs

In practice, a party's solicitor applies to court for leave to call an expert witness at a case management hearing. Prior to that hearing, a costs budget is prepared, exchanged with that of another party and lodged at court. As the hapless former chief whip Andrew Mitchell (of 'plebgate' fame) found, delay can lead to a party recovering only court fees (a fraction of the costs), even if successful in the litigation ([Andrew Mitchell MP v News Group Newspapers Ltd \[2013\] EWCA Civ 1537](#)).

The lodged budget includes proposed fees and disbursements to be paid to any expert witness. The court considers whether budgeted costs, fees and disbursements are 'reasonable and proportionate', and does restrict them.

In an extreme case, the court has power to award costs against an expert witness who, by their evidence, causes significant expense to be incurred

In consequence, when stating fees, proposed expert witnesses must discuss with instructing solicitors precisely what is required of them. For instance, in addition to preparing a report, will they be required at conferences with counsel, to attend without prejudice meetings with other experts and/or to give evidence in court?

Leaving aside a party's inability to recover fees from the other side, if the court limits fees or disbursements or declares them unreasonable and/or not proportionate in the circumstances of the dispute, the expert witness may find the party instructing them will refuse to pay their fees: no laughing matter.

Awarding costs

Finally, take care if you have been involved in the dispute before being instructed to be an expert witness. Although the general rule is that an unsuccessful party pays a successful party's costs, the court has discretion to make another order.

In so doing, the court will consider all the circumstances of the case (including the conduct of the parties and their representatives both before and during the proceedings); whether it was reasonable to pursue or defend a particular issue; and the manner in which a claim or defence was conducted.

In an extreme case, the court has power to award costs against an expert witness who, by their evidence, causes significant expense to be incurred 'and does so in flagrant reckless disregard of their duties to the court' ([Phillips and Ors v Symes and Ors \[2004\] EWHC 2330 \(Ch\)](#)).

So ? accept those proffered instructions to be an expert witness by all means, but only after careful consideration.

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Further information

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