ACTING AS EXPERT

Accepting Appointments

Upon initial approach for a potential appointment, it is necessary to start as you need to go on – calmly and rationally.

Check for conflicts of interest – you will be tested sufficiently by the fact that you must stay independent of the party that is paying you, so don't allow yourself to have any further conflicts. Even having a professional relationship with both parties' solicitors (on other cases, I hasten to add) can become a little uncomfortable.

You must have sufficiency of expertise – you can be roasted under cross examination, otherwise. This sufficiency may need to extend to the type of project if you are being considered for a construction related dispute – tunnels are built with different plant to roads, for example. But the question of sufficiency will always relate to your field of specialism – a quantity surveyor is not necessarily able to deal with any construction quantum matter, as valuing variations may be different to valuing remedial work on defects, which may be different to valuing losses of productivity.

How available are you and how available do you need to be? Sadly, sometimes it is only recognised late in the piece that there is a need for opinion evidence but you will need to comply with the procedural timetable as the witness box will beckon, ready or

not! It is always the case that the assignment will expand to fill all your time, so make sure that you have sufficient available before committing to it.

Finally, you need to establish your terms of appointment. Others are talking on the Ikarian Reefer guidelines so I will simply limit myself to urging you to incorporate a clause that allows you to stop work for non-payment, whatever other conditions your governing professional body may suggest or require.

Dealing with Major Cases

Major cases are wonderful to be appointed on! They boost your self esteem through their recognition of your experience and expertise and they are generally fairly long running and thus good for income. However, there is inherent conflict within such appointments as, generally, you will not be able to cope with the assignment alone. This means that, without particular extra effort, you will never be entirely knowledgeable about the matter on which you are expressing opinion. In addition, while you have been appointed for your expertise, you are providing someone else's capabilities, even though that may be under your management. The problem has two aspects:

1. The requirement to manage a team to assemble your opinion can divert you from spending time on the substance of the matter.
2. Your assistants must have sufficient capability to do any work that is delegated to them with the same skill that you have. Of course, in this age of rapidly advancing technology, the assistant may have greater skill than you do in some aspects of analysis. This, too, is a potential problem as you are responsible for the output that is incorporated in your report, so you may need to improve your skill so that you can satisfy yourself that the output is correct.

A further problem arises on major cases in that these often demand a multitude of experts – a major construction case may have a geotechnical expert a delay analysis or programming expert and a quantum expert. Procedural timetables are often set without reference to anything related to the expert other than his availability for the hearing, when there may be a requirement for sequential working on the part of the experts. Even if that is taken into account, the expert at the end of the work trail may find his time curtailed by lack of time management on the part of the upstream

experts. It happens time and again and leads to waste as the last expert must cover more scenarios and maintain more flexibility in his report than would otherwise be the case. You may only look to your instructing solicitor for coordination and he may be too busy with other procedural matters.

Your Commitment to Your Client

There are probably two reasons that would cause you to commit to your client's case, always assuming that you have formed an opinion in his favour: You may empathise with him or you may want to impress the legal team for future repeat business. In either event, honesty is the best policy – even if the piece of arbitration or litigation is likely to be a one-of for that client (a government department may be a serial disputant, however), the client is best served by resolution at the earliest point, whether it be through capitulation, settlement or judgement/award – the better the client and his legal team are informed, the better they are able to conclude the dispute, which reflects well on you.

That said, beware of becoming completely convinced that your opinion represents fact (it is by definition only an opinion) so that you have conviction that your client's case is right. For a start, you are unlikely to be a lawyer and thus unlikely to have a full grasp of the complexities or niceties of the case. Secondly, you are unlikely to have all the facts. Finally, being absolutely convinced of your client's case may cause you to lose objectivity so that you overstep the boundaries of your expertise and lose persuasive value.

Even if you are justifiably convinced of your client's case, you should not commit to your client to the extent of allowing your fees to remain unpaid pending the award. Even though your client may be struggling financially and your fees increase his burden, to allow your fees to be deferred pending the award is effectively to adopt a success related fee – if your client does not win, are you still going to get paid? Even if your client does win, deferring payment until then is dangerous, and not just from the perspective of remaining disinterested in the outcome of the dispute, as the client may go into liquidation immediately upon receipt of payment of the sum awarded.

The answer, particularly if your client is a commercial organisation, is to disengage yourself or cease work if you are not paid. Solicitors even use this tool if they must.

How does that sit with your duty to the Tribunal, to assist it on matters relevant to your expertise? I don't believe there is any conflict as your duties to the Tribunal are not compromised – not giving evidence is not the same as giving evidence that is misleading or may mislead the Tribunal.

Experts' Meetings

Experts appointed by opposing parties seldom sing from the same hymn sheet. For example, a pair of quantum experts will seldom adopt the approach: Does the claimant's quantum material support the quantum of its case? The question may be translated by the claimant's expert as: What, doing the best I can to be honest, may be made of the quantum material in support of the claim?, while the respondent's expert may ask himself: What defects in the quantum material render it inappropriate for use in this case? It is possible that, without some coordination, the respective expert's reports may not assist the Tribunal. The purpose of experts meeting is to enable them to find common ground for the assistance of the Tribunal and the starting point for this is to establish the extent of commonality in their respective briefs.

To that end it is vital to have a common agenda of issues to be addressed and, even, to produce a unified wording for the issues the experts consider relevant (normally after consultation with the legal team). It is also vital to make full notes and, if possible, get agreements signed off as and when they are reached. That is not to say that agreements are not retractable – they always are but you may have to endure some questioning on why agreement was retracted. However, equally uncomfortable is the expert's comment in his report on the extent of agreement when there is no signed agreement and the other expert's report indicates contrary views.

Another area of potential discomfort is in having your views, expressed in "without prejudice" meetings, aired in front of the Tribunal. It is always certain that the gist of your discussions with the other expert will be relayed back to his legal team. It is pretty certain that, if the solicitors for the other side see benefit in disclosing material passing from one expert to the other, they will do so. There may be some benefit obtainable if discussions are noted to be without prejudice but I simply don't bother with it – if you are being honest and your true intent is to comply with your duty to the Tribunal, nothing that you have said that is disclosed to the tribunal will be

embarrassing. But don't assume that the other expert is going to be honest – ensure that you choose your words carefully and that you understand fully what the other expert means by any of his statements.

Working with the Tribunal

I am not here considering Tribunal appointed experts.

Sometimes the tribunal will take charge of the experts (but without taking responsibility for their fees!). This is an approach that has been pioneered by Nael Bunni with, in my view (having seen it once and experienced it once), mixed results, depending on the integrity of the expert. The Tribunal cuts the experts off from their respective parties after they have served their reports and gets them to agree whatever they can with explanation to the Tribunal why they can't agree, with a time pressure to perform.

This changes all the dynamics for the expert but the most significant point is that the better prepared expert will have an advantage (so the integrity of the expert becomes significant) as the experts have no recourse to their instructing solicitors and parties so that the experts cannot ascertain or check facts or get such similar assistance as would normally be available.

The expert (and parties) will not necessarily know in advance that this will happen and the only answer for the expert is to be as well prepared as possible.

The Timing and Form of Your Report

The timing of your report will normally be set through procedural directions and what is important in that respect is whether experts are to meet to attempt to agree before their reports are served or afterwards. If before, you will not have any idea of the other expert's views and the meetings will take longer, lacking focus initially while views are canvassed. If after, there is arguably greater pressure on the experts to be objective and honest in their reports as the wider the gulf between the experts the more their reports will be scrutinised. While I prefer to commence meetings after I have prepared my report, it seems that meeting before issuing reports is most likely to narrow differences in reports and thus assist the Tribunal but I also have experience

where meeting before report nonetheless lead to reports that were so widely diverging that the other expert and I were summoned to an all-day meeting with the tribunal.

The form of your report may be influenced by the Tribunal's procedural orders but generally it is probably best to stick to a standard template such as may be adopted from the Academy of Experts' Model Form of Expert Report.

In terms of the form within the report, it is always essential to allow room for movement in your views – terminology like "it appears that [such and such] leads to …" is preferable to "[such and such] leads to …". It is likely that you will never have all the facts and an ability to view additional information objectively and change your opinion accordingly will be more persuasive than sticking to your guns.

It is also essential to show in your report that you have taken account of all the evidence available – don't comment on relevant statements in your client's witness statements without doing the same on the other party's witness statements. While that doesn't establish a partisan approach necessarily, it gives ammunition.

Role Changes

While your report may state

> *I understand that my overriding duty is to the Arbitrator rather than the Party that engages me, both in preparing reports and in giving oral evidence.*

that position will change after a hearing, once evidence is given, or in a mediation once your report is served.

The reason for this is that the dynamics of the processes change at these points.

In arbitration/litigation, after a hearing, the expert will become a full member of the advocacy team, assisting in formulating or responding to closing submissions. In addition, during the hearing, the expert will normally be required to assist with the cross examination of the other expert. While the overriding duty is as above, the expert is nonetheless engaged to assist his client in the dispute.

In mediation, the expert will behave normally in the preparation of his report, as if for arbitration/litigation, as this gives his client the proper basis for attempting to settle the dispute. However, mediation is, in my very personal view, a process lacking on

moral substance as there is no testing of evidence and claimants use it to obtain settlement on dodgy cases. The expert then becomes something of an advocate in a mediation meeting as he may be required to explain his views. However, this is only ever for the benefit of the other party as the mediator is seldom interested in right or wrong and is more interested in bridging the gap between the parties.

Time Recording and Getting Paid

Solicitors keep their time records in 6 minute intervals for very good reason – to assist with identification and compilation of costs in costs assessment. In my view, experts have as much of a duty to assist in this respect and should keep appropriately detailed records of time spent.

The best approach for getting paid is regular billing, maintaining an entitlement to stop work in the event of non-payment and insisting on regular payment. Circumstances may vary but only in the extent that you need to take account of the payment period realistically to be expected from your client – a commercial organisation such as a construction contractor should be able to pay on 15 to 30 days, a JV that needs to get funds from the JV members may require more time and a foreign government department may require up to 120 days.

As expert in dispute resolution processes, you will normally be valued by your client. Getting paid is the least you should want for the extent to which you will be sticking you head above the parapet in accepting instructions as an expert.

David Richards

06 June 2008

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Expert Testimony

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