

Getting started as an orthopaedic expert witness

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An expert witness is a person whose level of specialist knowledge or skill in a particular field qualifies them to present their opinion about the facts of a case during legal proceedings. Medical experts provide a fundamental role within the judicial system to provide opinions to assist the court to reach decisions. While you may be instructed and paid by a solicitor, your overall duty is to the court. It is important act within your defined area of expertise and remain impartial. Present your opinion on the evidence provided by examination and medical records.

Personal attributes required

- Probity
- Commitment to CPD
- Impartiality
- Declaration of interests
- Define scope of practice and act within limits of expertise
- Time management

Advantages of expert witness work

Working as an expert witness can be financially rewarding and intellectually stimulating. It can improve one's own clinical practice and documentation by analysis of the medical records of many cases from different hospitals. Working as an expert witness will provide greater insight into long-term outcomes of the injured. The work can be challenging but also fun and allows interaction with solicitors who have a different perspective on the long-term outcome of trauma and orthopaedic conditions. Whilst examination of the client will be required, a lot of the work can be performed at home.

Disadvantages of expert witness work

Expert witnesses can have their credibility, integrity and qualifications challenged by opposing parties hence an expert witness should be thick skinned.

The Supreme Court in the case of *Jones v Kaney* [2011] overturned 400 years of practice and has held that a party can sue its own expert witness for negligence in litigation. Hence acting within limits of expertise and producing reports which are for the court (and not being influenced by the instructing party) are critical.

Expert witness work is also deadline driven and you must be comfortable working to strict deadlines. Travel may be required for conference with Counsel and court attendance. A time commitment is required and this may involve evening work to complete reports. Payment for work is often delayed. Clinical duties can be interrupted with attendance at court, however employing organisations should be prepared to release staff if they are acting as an expert witness. Having said that court attendance is rare and settlement is often reached before a proposed court date.

What does an expert witness actually do?

- Review documents
- Take a history and perform a physical examination
- Search the literature for relevant papers
- Formulate an opinion
- Draft reports
- Attend conference with Counsel, solicitors and claimants
- Attend court

The majority of expert witness work is personal injury, through the civil courts. Some work involves cases of clinical negligence. Various bodies advise that surgeons should have been in consultant practice for several years before taking on clinical negligence work – professional reputations can hang on such work, and it may be fiercely contested.

Most cases are settled out of court, and hence court attendance is often not required. While attending court may seem daunting with the opposing party critically analysing your report;



if your opinion is fair, balanced and unbiased then court attendance should proceed relatively smoothly.

What is needed to get started in expert witness work?

It is important to receive appropriate training prior to commencing expert witness work. This is endorsed by the Academy of Medical Royal Colleges. Various organisations provide training in aspects of expert witness work, including but not limited to the British Medical Association, the Expert Witness Institute, Bond Solon, Inspire MediLaw, the Academy of Experts etc. The British Orthopaedic Association does not endorse any specific provider of such courses over any other.

Training allows an understanding of Practice Direction 35 also known as CPR Part 35. When acting as an expert witness, doctors must be familiar with the duties required and the courts will expect these to be understood and followed.

Part 35 of the Civil Procedure Rules governs the use of evidence from experts and assessors in civil proceedings [www.justice.gov.uk/courts/procedure-rules/civil/rules/part35].

Appropriate indemnity needs to be in place. It is unusual for an expert witness to face litigation but there have been cases where an expert witness has been required to pay back the costs of the case. This is extremely rare and as long as

you stick to what you know, don't advocate for either side and follow the relevant guidance – this should not occur. For reference the following are notable cases where experts have found themselves in hot water.

- *Jones v Kaney* [2001] https://en.wikipedia.org/wiki/Jones_v_Kaney.
- *Samantha Thimmaya v Lancashire Teaching Hospitals NHS Foundation Trust* [2020] www.hempsons.co.uk/app/uploads/2020/02/Thimmaya-v-Lancashire-NHS-Trust-Foundation-v-Mr-Jamil-Approved-Judgment.pdf.
- *Bux v The General Medical Council* [2021] www.mpts-uk.org/-/media/mpts-documents/a06-21-bux-v-gmc-2021-ewhc-762---circular_pdf-86085196.pdf.

Like many areas of medicine regular CPD is required to demonstrate that your practice is updated and develop areas of practice in both the clinical and legal arena. It is important to perform CPD and expert witness work should be declared on annual appraisal.

Text books

Books are available to assist with report writing. Having access to these is a useful guide in the preparation of medico-legal reports. This will help guide your opinion based on published research:

Medicolegal Reporting in Orthopaedic Trauma

Authors: Michael Foy, Phillip Fagg

Writing Medico-Legal Reports in Civil Claims – an Essential Guide (2nd Edition) (2015)

Authors: Giles Eyre and Lynden Alexander

Clinical practice and the law – a legal primer for clinicians (2018)

Author: Giles Eyre

Other considerations

A CV should be drafted which outlines your qualifications, experience, training and area of expertise.

It is extremely important to act within your area of expertise as this may be challenged in the future. If there is any conflict of interest this should be declared and work declined if there is conflict of interest. If there is any doubt about a specific matter you should ask the instructing party for guidance. It is important to address these issues at the time of instruction prior to preparation of reports or Court attendance.

The CV should include a corresponding address, email address, consulting addresses for appointments, relevant training, professional qualifications, education, languages spoken, turn-around time for production of a report, Claimant to Defendant ratio of reports written, and any positions of responsibility held at local or national level. >>

A separate document outlining terms and conditions needs to be prepared. This should outline the fee for report, hourly rate, fees for conference with Counsel and Court attendance. Payment terms need to be included in terms and conditions. Most instructing parties like payment to be made on conclusion of the case, however, this may be many months or years after you produce a report. Working with agencies there is some negotiation with payment terms. It should be stated on the terms and conditions if there is a DNA fee for missing appointments and a cancellation of Court attendance. Registration with ICO will be required. Compliance with GDPR should also be stated on the terms and conditions. All medical information provided and stored should follow the same guidelines of confidentiality as NHS and Private patients. Sharing of information with instructing party and solicitors must be secure.

A redacted report is sometimes asked for particularly when starting with a new firm. This is difficult if it is your first report but after a while you will have many to choose from.

The administration can be onerous when acting as an expert witness especially as the work-load increases. Appropriate secretarial and admin support must be available for arranging appointments, preparation of reports and chasing payment. Your skill is writing reports and treating patients so delegate the other tasks.

You will need to allow time within your weekly working schedule. A daily time commitment will be required to respond to instructions from instructing parties, deal with amendments of reports, and reviewing reports once dictated. This does require a daily commitment between 30-60 minutes to respond to queries. A time commitment per week is required to prepare and review reports and letters. Expert witness work is deadline driven and the instructing parties are under pressure from Court deadlines. If you are unable to meet these tight deadlines then you should inform the instructing party so they can arrange Court extension.

Guidelines

- General Medical Council: www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/acting-as-a-witness/acting-as-a-witness-in-legal-proceedings.
- Royal College of Surgeons of England: www.rcseng.ac.uk/standards-and-research/standards-and-guidance/good-practice-guides/expert-witness.

- Academy of Medical Royal Colleges: www.aomrc.org.uk/news-and-views/acting-as-a-professional-or-expert-witness-guidance-published.

Marketing

Once you have a CV, terms and conditions, indemnity and training you will need to market yourself for expert witness work. There are a number of avenues for this.

There are expert witness directories, this will involve paying a fee and the directories will advertise for instructing parties. When an instructing party is looking for a particular expert they will search the directory looking for appropriate witness in the location required. Some will require a short biography and artwork.

Instructing parties' solicitors often subscribe to law magazines, and adverts can be placed in these advertising the services you offer. These can be full page, or a banner and provide a link to contact details.

“The best advertisement for your work would be unbiased reports which are produced for solicitors with clear explanation and prognosis. In broad terms if instructing parties are happy with your work, they will instruct you for future cases.”

A personal website can be used and it is important to include key words to optimise search engines.

LinkedIn and social media can be helpful in advertising your skills as an expert witness. LinkedIn is particularly useful as many solicitors are listed here.

Solicitors can be approached directly with a CV and terms and conditions outlining the services you provide and your particular area of expertise. Providing presentations and training for solicitors is a good way to promote yourself. They are interested to hear from Orthopaedic Surgeons and the surgery we perform.

When starting expert witness work it is useful to be seen on all types of platforms for advertising as instructing parties will have different preferences on how they search for experts. Once they have gained confidence in you producing accurate reports within time-scales they will tend to use you again. Your last report is the best advert!

Some expert witness work is performed via agencies. The advantage of working with agencies is that they will promote you to instructing parties, provide you with all the relevant documents and there will be a steady stream of instructions. The disadvantages of working via agencies are that the reports are often fixed fees and for complex cases a greater time commitment will be required. The remuneration from working with agencies will be less than working directly with solicitors. However, it is certainly an excellent starting point and there will be less chasing of outstanding payments.

MedCo was established to facilitate the operational changes required under the Ministry of Justice pre action protocol for low value personal injury claims in road traffic accidents. Most agencies like their experts to be MedCo registered.

To be MedCo registered involves registering with their website and agreeing to their terms and conditions. An annual fee is required. If

working as an indirect medical expert (i.e. via agencies for MedCo work) the fee is £200/yr. If working as a direct medical expert (solicitors, claimant representative, insurers will contact directly) the fee is £500/yr. To be MedCo registered you will have to complete online training and

multiple choice questions which will ensure that your training is up to date and this CPD will need to be maintained on a regular basis. Hence being MedCo registered is useful as the training and CPD requirements will be met. The fee for a trauma and orthopaedic report via MedCo is £420 if working as a direct medical expert. If working as an indirect medical expert (via agency) then the fee will be less as the agency will take a percentage of the fee.

The best advertisement for your work would be unbiased reports which are produced for solicitors with clear explanation and prognosis. In broad terms if instructing parties are happy with your work, they will instruct you for future cases.

To summarise, expert witness work can be financially rewarding and stimulating. It will improve your own clinical practice as reviewing documents from other institutions will help assist with your own clinical practice. The work is deadline driven and it is important to set time in your daily and weekly schedule to deal with the matters that arise. ■