Code of Practice for Orthopaedic Surgeons Preparing Reports in Personal Injury and other Cases

Approved by the BOA's Professional Practice Committee

The British Orthopaedic Association Blue Book guidelines on this subject were last updated in August of 2006. The Woolf reforms came into force in England and Wales in 1999 following the Access to Justice Report published in 1996. They introduced the concept of the single joint expert. They gave clear guidelines on the nature of questions that could be put to experts.

They aimed to ensure that:

1. All parties in litigation were on an equal footing
2. Expense was reduced
3. Proportionality
4. Cases were dealt with more quickly

A new protocol was drafted by the Civil Justice Council in 2005 to supplement part 35 of the Civil Procedure Rules (CPR). This was updated in October 2009 and is a useful reference point. It can be accessed through the Ministry of Justice (MoJ) website. It emphasises the importance, role and responsibilities of experts in civil litigation.

The ground rules have changed again with the introduction of the Jackson reforms on 1st April 2013. At the time of redrafting these guidelines in January of 2014 it is too early to assess the impact of these reforms. There are a number of procedural issues relating to solicitors and insurance companies. As far as the expert is concerned the major changes are:

1. The requirement for compliance with Court timetables, with "sanctions" for experts who fail to do so
2. Compliance with budget requirements and the need to provide a clear estimate of costs to the Court at the time of receipt of initial instructions
3. "Hot tubbing", a technique developed in Australia to permit (but not require) experts of the same discipline to give evidence concurrently at the direction of the Judge i.e. without the necessity of the legal representatives agreeing to this. Barristers are permitted to put questions to the experts and the experts may question each other.
4. It is important to note that, although this rule change came into effect on 1st April 2013, the provisions apply to all cases after that date and NOT just cases commenced after that date. This means that although initial reports may have been prepared pre April 2013, any subsequent work undertaken will be subject to the new rules and potential budgeting provisions and sanctions.

Since the publication of the previous guidelines there has also been a significant change to the position of the expert witness following Jones v Kaney (2011). The expert is no longer immune from prosecution or retribution if their report or opinion is flawed or deficient.

>>

JTO Medico-Legal Features

Dealing with Instructions

The process is usually initiated with receipt of a letter from a solicitor, insurer or agency requesting provision of a report. If the letter is from an agency then it should be accompanied by a letter from the instructing solicitor. On occasions there will be a more preliminary, general enquiry prior to receipt of formal instructions querying whether the matter falls within the experts remit and requesting terms and conditions, CV, fee structure, waiting times, turnaround times etc.

Given the issues surrounding an expert's ability to comply with timetables and with budgeting restraints, initial enquiry as to competence and capacity are likely to be more common except where the instruction comes through an agency where the agency will usually deal with those issues.

The formal letter of instruction should include:

1. Name, address, date of birth and contact details concerning the person that the report is to be provided on
2. A brief description of the matter to be dealt with i.e. date, nature of injury (single/repetitive)
3. Whether it is necessary to interview and examine the claimant. Reports on liability and causation may, on occasions, be prepared from clinical records and radiology only
4. An outline of the main issues to be dealt with and whether the opinion is required on liability, causation or condition and prognosis
5. An indication of the claimants level of mobility i.e. whether they can manage stairs, whether they require wheelchair access
6. An indication of the requirement for a translator/interpreter if appropriate
7. An assurance that there is no claim against the expert or his employer
8. An assurance that all relevant medical records and other documentation together with X-Rays will be provided before the appointment
9. A copy of the claimants witness statement if available and any particulars of claim or defence available at that time
10. Copies of other expert reports relevant to the case
11. The instructing parties' timeframe for preparation of the report. Any important Court dates relevant to the claim. The new rules indicate that if a timetable has already been ordered by the Court, the instructing solicitor should provide a copy of the Court order with the instructions. It is then incumbent upon the expert to ensure that they are able to manage diaries to comply with any deadlines given the drastic repercussions for non-compliance (cases being struck out or parties not allowed to rely on reports that do not comply with timetables). If there is any doubt about the expert's ability to comply with the timetables set either instruction should not be accepted by the expert or enquiries should be made as to whether timetables can be varied to ensure compliance.
12. An agreement to the payment of the expert's reasonable fees within an agreed timeframe. This may now contain a provision that expert fees may be subject to a budget set by the Court and agreement may be sought as to whether instructions will be accepted on that basis. In Orthopaedics rules of supply and demand may apply, such that except for some very specialist areas, experts may be forced to accept restriction of fees.
13. An indication that the report is being provided within the CPR 35 protocols.

It is recommended that the expert should have terms and conditions giving clear details of their fee structure, settlement terms, travel expenses for attendance at Court, conferences etc. and Court attendance fees. It is recommended that the expert has these terms and conditions signed by the instructing solicitor before accepting instructions (see section on Fees).

Medical Records/ Radiology

It is the duty of the instructing party to obtain, at their expense, all relevant medical records including X-Rays and scans and to provide them to the expert in viewable format. Ideally, particularly in more complex cases, the clinical records should be filed and paginated in date order. Notes should be checked for relevance and legibility before posting.

Accessing CDs containing radiology can often be difficult because of the large number of different formats that they are stored and presented in and because of the increasing use of security layers to protect the information contained therein.

Storage of documentation can pose problems for the expert. When the report has been compiled the documents can be returned to the instructing party. However, this can be cumbersome, particularly if supplementary questions are raised subsequently and the records have to be sent back. Medical records on CD is one solution, but in complex cases these can be difficult to navigate and bookmark. Therefore, some storage space is usually required for active cases. All documents should be returned to the instructing party or destroyed at the conclusion of the case.

All experts who carry out this work should be registered under the Data Protection Act.

Long term storage of reports and correspondence is a matter for the individual expert. This can be done in paper format, CD or hard disc.

Responsibilities of the Expert

On receipt of a request to provide a medico-legal report the expert should:

1. Acknowledge the request and establish whether they are being asked to report as a witness to fact, an expert

A NEW PROTOCOL WAS DRAFTED BY THE CIVIL JUSTICE COUNCIL IN 2005 TO SUPPLEMENT PART 35 OF THE CIVIL PROCEDURE RULES (CPR). THIS WAS UPDATED IN OCTOBER 2009 AND IS A USEFUL REFERENCE POINT. IT EMPHASISES THE IMPORTANCE, ROLE AND RESPONSIBILITIES OF EXPERTS IN CIVIL LITIGATION.

witness or to provide advice to the Court on a particular matter. This should usually be clear from the letter of instruction. If in doubt the expert should immediately seek clarification from the instructing party.

2. Clarify whether or not there are any time constraints for provision of the report. This should be clear from the letter of instruction, but if in doubt, this should be clarified with the instructing party. If it becomes clear that the Court has already timetabled the case then the expert should request a copy of the Court Order and ensure that he/she can comply with all the terms of that order. This means that the expert can comply not only with the date for the disclosure of the report and any supplementary reports, but also the dates for expert meetings, preparation of joint statements and attendance at trial.
3. The expert should provide a detailed breakdown of fees to include:

a. The estimate of the fee or range of fees for the report (including an hourly rate and an estimate of the number of hours to be taken) together with any cancellation fees which may be incurred if the claimant fails to attend for assessment. The expert may have to justify the fee level by reference to the volume of records/scans or the complexity of the case
b. The estimated cost of any supplementary report/s
c. The cost of any attendance at conference with counsel
d. The cost of joint expert meetings and preparation of joint statements
e. Fees for attendance at Court, including late cancellation charges

>>

> "THERE SHOULD BE A CLEAR UNDERSTANDING BETWEEN THE EXPERT AND THE INSTRUCTING PARTY REGARDING THE RANGE OF FEES APPLICABLE TO THE CASE IN QUESTION."

f. Details of travelling expenses
4. Keep a comprehensive time sheet, recording all work done in order to justify the fees incurred.
5. Arrange to interview and examine the claimant in a suitable clinical environment allowing sufficient time to carry out a full assessment.
6. Ensure that at the time of the assessment, if appropriate, a chaperone is available.
7. Following the assessment the completed report should be sent to the instructing party within six weeks of the appointment at the latest unless there has been prior agreement that it will be provided at an earlier date or the date specified by the Court Order.
8. Return any original documents to the instructing party with the report.
9. Ensure that he/she has suitable professional indemnity insurance in case of later litigation following Jones v Kaney (2011).
10. The expert should ensure that they have appropriate clinical experience and knowledge to provide the report. For common conditions/injuries it would be expected that the expert would have regular exposure to such conditions in their clinical practice. For example it would be inappropriate for a specialist hand surgeon to give an opinion on a low back problem and vice versa. In such situations the expert may have to be prepared to defend his position when challenged by the other sides' barrister or by the Judge at "hot tubbing" session.
11. However, the expert should be aware that after the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO, 2013), there will be increasing pressure from Judges at directions stage or from instructing solicitors due to budget restraints to restrict the amount of expert evidence that is permitted. This may mean that an orthopaedic expert is asked to provide an opinion on all orthopaedic aspects of a case and not those within his/her areas of competence. In such circumstances, the expert should seek clarification, and if concerned about their ability to provide opinions on all matters contained within their instructions should write to their instructing party setting out their concerns and/or their inability to cover certain areas. This is likely to give the instructing party the ability to go back before the Judge for variation of the Order. If the Judge refuses to vary and the expert proceeds with the instruction, the expert should express any concerns or reservations in the report itself.
12. In general terms it is felt that experts should not give opinions on their own patients except on matters of fact. The consultant's primary responsibility is to his/her patient. The expert's primary responsibility is to the Court. These differing responsibilities can cause significant conflicts of interest which are best avoided. In some cases however, instructing solicitors may require a report from the treating consultant either because the Judge orders it or because an initial needs assessment is required. In such cases, the expert should clarify and ensure that the claimant/patient consents to the treating consultant acting as an expert in the case.
13. Under no circumstances should an expert accept instructions that are conditional on the success of the case. This would provide a significant conflict of interest and compromise the expert's independence. It is also formally prohibited under the Rules. This is in contrast to the fact that experts will increasingly be required to accept instructions on a fixed fee basis. In the latter case this is permitted by the Rules.

Fees

There should be a clear understanding between the expert and the instructing party regarding the range of fees applicable to the case in question. This should become more relevant following the Jackson reforms. This will be facilitated by:

1. Clear instructions outlining the nature of the claim, any unusual issues and a clear idea of the volume of documentation (including scans and X-Rays) that need to be reviewed.
2. Detailed terms & conditions provided by the expert as discussed earlier including expected time for settlement of fee note. The terms & conditions should include:

a. Basis of the charges (daily or hourly rate). Likely fee range. Preferably the expert should try to accurately assess fees to aid the legal team in cost budgeting.
b. Fees for travelling, subsistence and accommodation if required. It should be borne in mind that the Court will be scrutinising these.
c. Cancellation charges for claimant non-attendance for assessment. Charges for late cancellation of Court appearance. Details of timeframe (21 days/7 days/48 hours) need to be outlined together with relevant penalty. If the expert attends Court the full fee should be payable whether or not he is asked to give evidence. This matter is discussed further later in this section.
d. Fees for attending meetings with Counsel, telephone conferences, answering supplementary questions should be listed. Usually charged at basic hourly rate. Consideration should be given whether physical attendance is required at the conference or attendance is possible by telephone or video link.
e. If the expert works in the NHS it should be made clear that his employing Trust requires 6/8 weeks' notice for cancellation of clinical commitments and therefore ample warning is required for scheduling of Court appearances etc. during the normal working day.

The instructing party should pay the agreed fee within the agreed time.

>>

"UNDER NO CIRCUMSTANCES SHOULD AN EXPERT ACCEPT INSTRUCTIONS THAT ARE CONDITIONAL ON THE SUCCESS OF THE CASE."

It is a matter for individual experts whether they enter into deferred fee arrangements. Experts should be aware that there have been agencies (and more recently a large midlands firm of solicitors) that have gone out of business owing money to experts. They should also be aware that in such circumstances they will be at the foot of the queue when it comes to recovering their fees. The likelihood of recovery is virtually zero. Therefore it is not sensible business practice to run a large deferred debt book with one or two agencies or solicitors.

Experts should also be aware that agencies, insurers and solicitors are in the business of making money. Experts should also set themselves up in a business-like fashion so that they too are similarly minded. They need to adopt a different mind-set from routine clinical practice where their primary responsibility is to the patient. In medico-legal practice the primary responsibility is to the Court and the aim of the practice is to provide first rate expert opinions. However, it is important to be aware that in Orthopaedics, with the exception of a very few specialist areas, there is a potential over supply of experts. Therefore, when setting up in medico-legal practice some compromises may have to be made until the practice and the reputation of the expert is established.

Experts should be aware that since 1st April 2007 (following a European Court of Justice decision), the provision of expert medal reports is no longer VAT exempt. The VAT threshold in the United Kingdom from 1st April 2013 is £79,000. Therefore, once medico-legal income reaches this level the expert will have to register for VAT and charge VAT at the prevailing rate (currently 20%). Any VAT threshold changes are usually announced in the budget.

Under no circumstances should an expert accept instructions that are conditional on the success of the case. This would provide a significant conflict of interest and compromise the expert's independence. It is also contrary to CPR part 35.

The issue of cancellation fees is, and will, remain controversial. Solicitors/ insurers are reluctant to pay them. The recent changes to the expert witness rates for legally aided claimants (1st April 2013) indicates that cancellation fees will not be paid "where the notice of cancellation was given to the expert more than 72 hours before the relevant hearing or appointment". There is an assumption that experts can always find something else to do if there is late cancellation of Court cases in particular. There seems a lack of awareness on behalf of the Ministry of Justice that clinics and operating lists cannot be reinstated at very short notice and that busy clinicians involved in NHS practice usually have to take annual leave to attend Court/ Meetings in these cases. Generally the situation is best managed with clear terms and conditions agreed when instructions are accepted and close liaison with the instructing party in the weeks leading up to a potential Court appearance.

The legal profession warn us that with the advent of cost budgeting, it is likely that experts will be forced to accept instructions on the basis of fixed fees set by the Courts. Terms which seek to require instructing solicitors to pay above the fixed/budgeted fees are likely to receive short shrift in a climate where instructing solicitors own costs are restricted and the claimant may not have the means to meet any shortfall. They also believe that market forces are likely to mean that orthopaedic experts (with rare exceptions) will not be able to dictate fees.

Part 2 to feature in the next issue of the JTO.