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## A Guide for Actuaries

# The Actuary as an Expert

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## Introduction

This session is intended to cover:

- The various roles of an actuary as the expert in civil proceedings: from expert advisor to Court appointed single/joint expert
- Timetable to trial: an outline of the actuarial expert's involvement from pre-action through to trial
- The expert report: duties to the Court versus duties to the client and how to deal with instructing solicitors/Counsel
- Experts' meetings, hot tubbing and trial: what to expect and how best to deliver your evidence.
- Actuary as expert: An actuary's perspective



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## The Role of an Expert

Expert Advisors, Expert Witnesses & Single  
Joint Experts



### Expert Advisor

- Role is to advise the client
- Appointed outside of the court process
- May be instructed at any time
- Duties are governed by their contract with the party engaging them
- Possible to subsequently be instructed as a court appointed expert witness so long as impartiality is not compromised



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## Expert Witness

- Role is to assist the Court
- Instructed and paid by the party appointing them
- Consider all material facts, even if they are prejudicial to their client's case
- Provide objective, unbiased opinions
- Be clear about the limits of their expertise, and whether a question lays outside of it
- Must comply with the Civil Procedure Rules (Part 35)



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## Single Joint Expert

- Role is to assist the Court
- Duties are the same as an individual expert
- Instructed and paid by both parties
- Instructions should be agreed in advance between the parties
- Any queries must be addressed to both parties
- Tend to be appointed where the costs of individual experts would be disproportionate to the value of the claim, or in relation to issues which are either peripheral or relatively uncontroversial



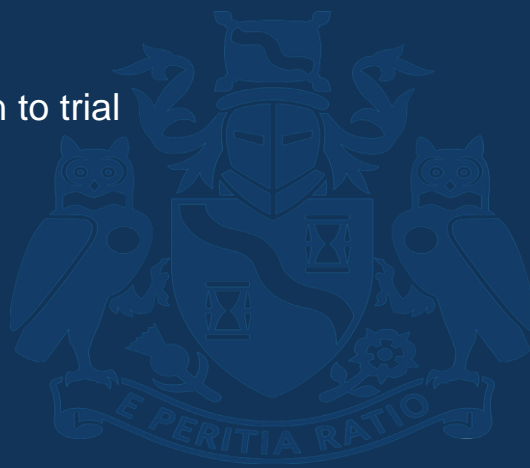
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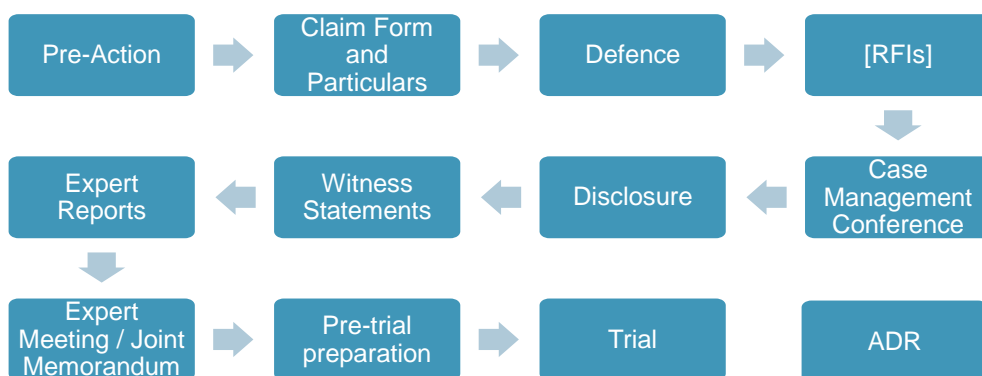
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## Timetable to Trial

Expert's involvement from pre-action to trial



## Timetable to Trial



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## The Jackson Reforms

- Came into force on 1 April 2013
- New focus on proportionality and controlling costs
- Costs budgeting and Case Management
- More rigid approach to the timetable
- Tougher sanctions for non-compliance



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## Expert's Input

- Ideally involved from the pre-action stage
- Pleadings, quantum, disclosure requests and likely timescales
- Need for a cost estimate of fees at the CMC
- Keep instructing solicitors apprised of fees, and warn them if you are likely to materially exceed your estimate (either in whole or in part)
- Be aware of any relevant court deadlines, and to flag at an early stage if you unable to meet them



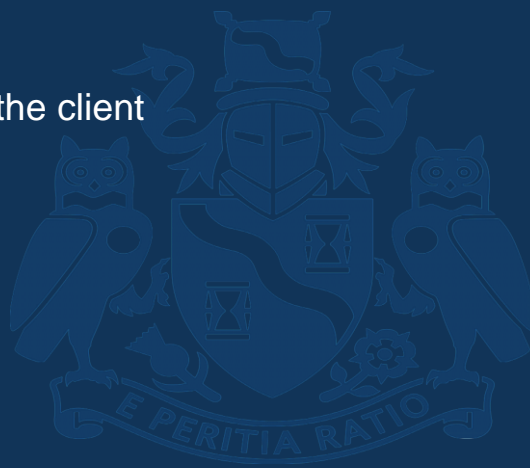
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## The Expert Report

Duties to the Court versus duties to the client



## Instructions

- Provided by Instructing Solicitors
- Set out scope of instructions and documents to consider
- CPR Part 35 and Practice Direction
- Instructions are not privileged, but will not be ordered to be disclosed in the absence of unusual circumstances



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## The Expert Report: Style and Contents

- Sets out the expert's qualifications
- Written in the first person
- Sets out all material relied upon
- Makes clear which facts are within the expert's own knowledge and indicates the sources of other facts
- Summarises and evaluates opinions where they differ
- Includes a summary of the expert's conclusions



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## The Expert Report: Instructing Solicitors' Input

- Usually reviewed in draft by Instructing Solicitors/Counsel
- Guidance on whether points sufficiently addressed/understood
- Permitted to ask why an expert holds certain opinions
- Cannot draft or redraft the report



## Supplemental Reports

It is occasionally necessary to amend or supplement an expert's report, for example:

- Because new evidence came to light after the first report was served
- Following an agreement reached at a meeting between the experts
- As a result of an exchange of questions and answers
- Because the expert missed an important or significant point



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## Civil liability of experts - Jones v Kaney

- Experts can be sued for providing negligent evidence
- The decision does not affect the absolute privilege of expert witnesses from claims of defamation
- The decision does not affect the immunity of witnesses of fact
- An expert will not be liable merely because he expresses a view which is unhelpful to his client's case



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## Expert Meetings, 'Hot Tubbing' & Trial

What to expect, and how best to deliver your evidence



### Meetings Between Experts

- Not mandatory unless directed by the Court
- Used to narrow down issues and identify areas of agreement – often recorded in a “Joint Memorandum”
- Parties and lawyers may not attend unless agreed
- Timing of discussions
- Changes in opinion



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## ‘Hot Tubbing’ (aka ‘Concurrent Evidence’)

- Alternative way for experts to give their evidence in Court
- Experts covering the same discipline are examined together, with the Judge chairing a discussion between them
- Both counsel and the experts are allowed to ask questions
- Intended to save time and costs (in relation to the hearing of expert evidence) and to allow for a freer flow of questions and challenges between experts themselves



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## The Manchester TCC “Hot Tub” Pilot

- Ran between June 2010 and December 2012 and involved nearly 20 cases
- Of the cases that participated in the project only four actually proceeded to trial, with the rest settling before trial
- The experience of the experts in the pilot was generally positive, with several of those surveyed commenting that it made giving evidence easier and more efficient
- Opinion amongst participants was more divided as to whether was materially more cost effective
- Concerns were raised about the extent to which experts with a particularly dominant personality might overwhelm the process



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## At Trial: Some Dos and Don'ts

### Do:

- Familiarise yourself with the Court and trial process
- Know your report thoroughly
- Address your responses to the Judge
- Listen to questions carefully and make sure you fully understand what is being asked
- Speak slowly, calmly and carefully
- Try to avoid taking extreme positions

### Don't:

- Forget that your duty is to the Court
- Be afraid to ask Counsel to clarify their questions or to point out deficiencies in any hypothesis they put to you
- Allow yourself to be railroaded into giving "Yes" or "No" answers, if the situation is nuanced explain how it is so
- Try and 'blag' your way out of a question if you can't remember (or don't know) the answer



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## The Actuary as an expert

An actuary's perspective



## Different Actuarial Roles

- Expert Adviser
  - Instructed by Client. Can advise client on tactics. Could evolve into expert witness role.
- Expert Witness
  - Owe duty to Court not Client even if appointed by Client. Act objectively.
- Determinations Panel
  - Appointed by the Pensions Regulator to provide evidence to the Determinations Panel.

**Get clear instructions at outset**



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## Actuarial experiences

- Even as expert advisor consider both sides of argument
  - Be honest and realistic with client at outset
- Avoid hindsight
  - What should have been done at the time?
- Litigation is very aggressive
  - Have clear logic and evidence based arguments
  - Your credibility will be challenged in Court
  - Good track record helps
  - Get support from experienced colleagues



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## Actuarial experiences with lawyers

- Nothing happens for months and then at short notice need to provide evidence urgently. Long hours!
- It is your evidence but beware of being drip-fed information or the lawyers trying to lead you
- Think carefully about the exact words you use

## Determinations Panel

- The Pensions Regulator seeking to get evidence for:
  - Setting Technical Provisions / Recovery Plan
  - Contribution Notice / Financial Support Direction
  - Assessing viability
- Less aggressive than Court based work but similar principles apply

## APS X3 : The Actuary as an Expert

- Draft published from Regulation Board in October 2013
- Will replace Information and Assistance Note
- Should be read in conjunction with:
  - Guidance for APS X3 from Regulation Board
  - Part 35 of the Civil Procedure Rules (CPR)
  - A Practice Direction to accompany part 35 of the CPR
  - Protocol/Guidance for the Instruction of Experts
  - Actuaries Code



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## APS X3 : The Actuary as an Expert

- Applies to court cases, tribunals and arbitrations
- Principles based
  - Get clear instructions
  - Have necessary skill and knowledge
  - Recognise duties on independence
  - Act in accordance with relevant rules and procedures
  - Remuneration must not be linked to outcome



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