



# Medico-Legal Forum Standards for Practice for Expert Witnesses

College of Occupational Therapists  
Specialist Section – Independent Practice

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## STANDARDS FOR PRACTICE FOR EXPERT WITNESSES

In these Standards the term 'Expert' refers to someone who is trained as an occupational therapist and is instructed on that professional basis.

### THE ROLE

We refer occupational therapists to *The Civil Procedure Rules* for specific information about the duties of an Expert.

As an Expert Witness, the occupational therapist's role is to provide impartial advice, clarification, opinion and information for the Court to assist the Court to reach a fair and reasonable conclusion.

An occupational therapist may alternatively be instructed as an Expert Advisor (to give advice to one of the parties in the litigation but not to prepare evidence for the Court) or as a Witness of Fact (to give factual evidence to the Court in the role of either treating professional or case manager). These are different positions from that of an Expert Witness.

*The occupational therapist must understand the fundamental difference between evidence and opinion for the Court and a role as a Witness of Fact.*

The occupational therapist may be asked to undertake both the Expert Witness role and the case manager role in the same case. This is a conflict of interest if conducted concurrently as the occupational therapist in that position cannot be acting impartially as an Expert.

Most cases undertaken by an occupational therapist as an expert witness are likely to be in the personal injury and medical negligence fields, and instructed through a solicitor. However, other expert opinion may be required for cases such as educational tribunal work, professional negligence cases, social services appeals, divorce cases involving disability, disability discrimination cases etc.

The occupational therapist may be asked for an expert opinion to assist the Court with ascertaining a Claimant's functional situation and consequent to that with quantifying the financial compensation (quantum). Less frequently the occupational therapist may be asked to help with decisions regarding liability (possibly in a breach of professional duty).

### Standard statement 1

**The Expert will be familiar with and adhere to all the provisions of Part 35 of *The Civil Procedure Rules* (Ministry of Justice 2005), and associated practice directions.**

- The Expert's opinion, advice and reports will be independent and objective and not influenced by those instructing or paying her/him.
- The Expert will sign a declaration at the conclusion of the evidence that the prime duty is always to the Court, not to the instructor.

### **Standard statement 2**

**The Expert will be clear whether the instructions are from the defendant's legal team or the claimant's legal team (that is, to act as a single party expert), or whether the instructions are jointly from both the defendant and the claimant's legal team (that is, to act as a single joint expert).**

- Whilst understanding the nature and source of the instruction, the advice will remain impartial.
- The purpose of the advice is to assist others in the decision making process. Primarily, this will be to the Court but it may on occasions also be to the instructing legal team.
- The Expert will not act as an advocate for the injured party.
- The Expert will not take on the role of negotiator in Meetings of Experts, but should limit his or herself to clarifying the areas of agreement and disagreement (and seeking to reduce the latter where possible as required by CPR Part 35).
- The Expert will ensure he or she understands the instructions and the limit of his/her responsibility.

### **Standard statement 3**

**The occupational therapist will provide advice and opinion only within his or her field of professional competence and expertise.**

- The Expert will be clear where the boundaries of his/her own expertise lie.
- The Expert will clarify in his/her evidence:
  - what is factual information
  - what is assumption
  - what is the range of opinion
  - what is his or her own professional opinion, and the basis for that opinion
  - what is advice or opinion lying outside the area of expertise
  - whether further information is needed before a conclusion can be made.
- The Expert will recognise his or her own need for support, information or clarification from others, particularly other Experts.

## THE EXPERT

The occupational therapist needs to be an expert in his/her own field and also needs to develop the knowledge and skills to operate within the legal field.

A guideline for consideration is that an occupational therapist should have *at least* six full time years of clinical experience, of which *at least* three should be in his/her field of expertise.

*It is essential that the occupational therapist understands the professional obligations entailed in taking on the Expert role.*

To present oneself as an expert without either sufficient practical expertise in occupational therapy issues or in the requirements of the legal world may jeopardise a case and result in financial penalties and loss of reputation for the occupational therapist.

Occupational therapists must be aware that in most cases the Court and instructing parties will not specifically refer to the professional status by the title 'occupational therapist', but often as a 'care expert' or a 'rehabilitation expert'. In every case it is necessary for the occupational therapist to ensure that his/her experience and competence is relevant to the case.

By taking on instructions, the Expert commits to cases that can take a number of years to settle, and the commitment has to be for the life of the case or until released. Within that timeframe the Expert has to meet the reasonable priorities and deadlines of the case as required.

### Standard statement 1

**The occupational therapist will be clear where his or her own clinical expertise lies.**

- The Expert will have a clear curriculum vitae which explains the level of expertise in occupational therapy and areas of expanded practice or knowledge.
- The Expert will demonstrate robust clinical judgement in his/her area of practice.
- The Expert will inform the instructor before accepting the instructions if he/she is unclear about the required clinical expertise.
- The Expert will seek advice if he/she is unclear about the required level of clinical expertise.
- The Expert will demonstrate good research and analytical skills to enable full evaluation of evidence related to the case.
- The Expert will be sufficiently numerate to enable him/her to evaluate all costs relevant to his/her report.

### Standard statement 2

**The Expert will have knowledge of the medico-legal field.**

- The inexperienced Expert will seek guidance from a skilled practitioner or work within a recognised network where guidance can be provided.

- The Expert will have evidence of training in the medico-legal process, including report writing, sufficient for him/her to participate in the conduct of a case.
- The Expert will understand the expectations required for expert witness work by the legal team and the Court.

### **Standard statement 3**

#### **The Expert Witness will have effective communication and presentation skills.**

- The Expert will be able to communicate evidence and opinion clearly and effectively in written format and in verbal presentation.
- When presenting evidence and opinion, or undergoing cross-examination, in the witness box or other formal situations, the Expert will be informed and measured.
- The Expert's evidence will fully address the issues raised in the instructions.
- The Expert will acknowledge alternative views or evidence and know or explain its relevance to his/her own evidence or opinion (this may require the Expert to have the flexibility to change his/her view).
- At all times during the process, the Expert will present him or herself and the evidence in a professional and business like manner.

### **Standard statement 4**

#### **The Expert will practice in an ethical manner**

- The Expert will demonstrate objectivity and impartiality in the evidence.
- The Expert will demonstrate openness, honesty and truthfulness in his/her work.
- The Expert will demonstrate integrity in conduct and practice.
- The Expert has a duty to meet agreed deadlines in the case.
- The Expert will treat claimants, clients, other experts and others involved in the case with respect, even if opinions differ.
- The Expert will:
  - evaluate the relevance of alternative views or additional information to the case and his/her own opinion
  - change his/her view if justified and explain the reasoning for so doing.

### **Standard statement 5**

#### **The Expert will practice in a business like manner and with integrity in managing the workload, keeping records and dealing with the financial aspects of the process.**

- The Expert will have clear Terms and Conditions.
- The Expert will have a clear fee structure.
- The Expert will have honest marketing and business information.
- The Expert will have sufficient professional indemnity insurance.
- The Expert will have secure storage of records, maintain confidentiality of relevant information and conform to Data Protection requirements.
- The expert will record all transactions and exchange of information.

References:

Ministry of Justice (2005) Experts and assessors. In: Ministry of Justice, *Civil procedure rules and directions*. London: Ministry of Justice. Part 35. Available at: [http://www.justice.gov.uk/civil/procrules\\_fin/menus/rules.htm](http://www.justice.gov.uk/civil/procrules_fin/menus/rules.htm) Accessed on 16.06.09.

Ministry of Justice (2005) Practice direction: experts and assessors. In: Ministry of Justice, *Civil procedure rules and directions*. London: Ministry of Justice. Available at: [http://www.justice.gov.uk/civil/procrules\\_fin/contents/practice\\_directions/pd\\_part35.htm](http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part35.htm) Accessed on 16.06.09.

## APPENDIX 1 – BACKGROUND TRAINING AND INFORMATION

### Information that it is advised to have covered prior to undertaking expert witness work.

Whilst an occupational therapist with appropriate level of skills and experience may be an 'expert' in his or her field, he or she may not be acceptable as an 'expert witness' as additional skills and knowledge (i.e. over and above clinical / professional skills) are required.

It is essential that anyone considering accepting work as an expert witness has a good understanding of the following, and training and supervision will be required to achieve this knowledge, and develop and maintain skills:

### Suggested initial training and information required before accepting instructions:

- Civil law: What is civil litigation? Who and what is involved? What are the main areas in which occupational therapists undertake medico-legal work, e.g.
  - personal Injury
  - clinical negligence
  - criminal injuries compensation.
- The Legal Process: The difference between liability, causation, and quantum, and the potential roles of the occupational therapist in each.
- Understanding the 'burden of proof' and how this affects your work.
- The role of the Expert Witness and the difference from a Witness of Fact.
- The Civil Procedure Rules/Part 35 - knowing the full legal process of the claim, the defence, Protocols, Practice Directions.
- You must know and understand your obligations under CPR. Non-compliance is very serious and could result in your evidence being disbarred and you being sued for professional negligence.
- Understanding how you are instructed – as a party appointment or as a single joint expert.
- You need to understand the concept of 'duty of care' as it applies to clinicians (but not to experts or advisors).
- Understanding the other requirements apart from an initial assessment and report, e.g. further assessments; comments; written questions; experts meetings; case conferences; trial.
- The Report: You need to know what is expected within the types of report commissioned from an occupational therapist, and understand how the terms 'care expert', 'rehabilitation expert', and 'vocational rehabilitation expert' are used in litigation.
- You need to know the standard of writing and presentation required of an expert report.
- If providing quantum reports, you need to be numerate and be comfortable working with figures.

### Further training

- Acting as a Single Joint Expert.
- Experts meetings.
- Courtroom training.

### On-going / Keeping up to date

- Case law up dates.

## APPENDIX 2 - GUIDELINES FOR PREPARING AN EXPERT REPORT

**Training in writing an Expert's Report is essential. These are basic guidelines only.**

### Content and structure

Your report is the first and maybe the only contact you have with a solicitor after the initial instruction and as such the presentation of the report is very important. A good report can help settle a case. It is likely your report will not only be seen by the instructing solicitor but by the Claimant, the Barrister, the Defendant legal team and other experts. Occasionally you may produce a report and then the case settles without further input. The report may be produced in Court and your written evidence cross-examined.

Your report is also a 'marketing tool' and a way of advertising your service. Use good quality paper and give some thought as to how you present the information. Key information must be presented appropriately but you may also develop your own style.

### Types of report

- Quantum with costs
- Liability
- Opinion reports – tribunals, divorce, disability discrimination etc
  
- Occupational therapy, equipment, aids and adaptations only
- Care only
- Care and occupational therapy together
- Employment/vocational rehabilitation
  
- Answer the questions set and address the issues raised
- Base it on evidence as far as possible
- Present it well
- Write it well
- Follow guidelines on layout as far as possible
- Reports may be:
  - preliminary
  - draft
  - updated
  - final.

Be sure that the date you have on the final report is accurate and reflects the dates of the documents you have stated as having read.

Always be aware of the date by which your report is required, and never produce it late.

## **Information to include in all reports.**

Additional information on the format and structure of writing expert reports for the court can be found in *The Occupational Therapist and the Court: A step-by-step guide for occupational therapists and their staff* (Bond Solon Training 2003).

- Purpose of the report.
- Claimant details.
- Address the report to the court and not to the party you have received instructions from.
- State the details of your instructions (written or oral).
- Include a CV stating your qualifications.
- State all materials and documents you have relied on in preparing the report.
- Include a statement that you as the expert understand your duty to the court and have complied with that duty.
- Include a Statement of Truth.
- Give details of any literature/references used in making the report.
- Where there is a range of opinion summarise the range and give reasons for your own opinion.
- Include a summary of your conclusions.
- Include a contents page.
- Add a glossary of terms if necessary.
- Sign and date the report.

## **Body of report**

- Name of instructing solicitors.
- General information such as the Claimant's name, address, date of birth, date of injury, date and location of your interview with the Claimant.
- Detail key dates/diary of circumstances since injury/alleged medical negligence.
- Clarify your understanding of events/dates to which the claim relates.
- Establish pre accident life i.e. social/home/work circumstances plus family background and involvement – obtain factual information on Claimant's lifestyle and aspirations but for the accident.
- Ascertain current post accident life i.e. social/home/work circumstances plus family intentions and ability to assist in the future – obtain Claimant's needs and wishes for the future.
- Determine current medical needs including residual disabilities, plus prognosis, as compared to pre-material incident level.
- Detail present functional level with regard to activities of daily living as compared to previous level.
- Identify needs.
- Identify and justify any recommendations.

## **Future needs**

- Care/Assistance with personal/domestic/household maintenance – level required to put the claimant into the position he would have been in but for the incident, based on claimant's wishes and pre-incident reasonable expectations.

- Equipment to all associated costs eg insurance, spares, warranty, maintenance – state rationale for recommending each item and a replacement period based on level of use/likely wear and tear etc.
- Therapy/rehabilitation.
- Travel/transport.
- Accommodation and adaptations – does the current or proposed accommodation meet the Claimant’s needs arising from injury and recreate the life the claimant would have had if uninjured.
- Holidays.
- Education and/or employment.
- Any other relevant future needs.

## Costs

- Include costs for all your recommendations under each head of claim.
- State source of costs.
- For equipment, and for other areas where possible, include not only the capital cost but annual costs as well based on the replacement period of each item of equipment.
- Summary of costs.

## Presentation

- The script should be clear, concise and unambiguous.
- Check for typographical errors.
- Use good grammatical English with no jargon.
- The report should avoid looking ‘crowded’ so it is recommended to use
  - font size no less than 12
  - minimum 1.12 spacing (some say 1.5 and some double spacing)
  - wide margins
  - numbered paragraphs
  - logical headings and sub headings.

## Reference:

Bond Solon Training (2003) *The occupational therapist and the court: A step-by-step guide for occupational therapists and their staff*. London: College of Occupational Therapists.

## APPENDIX 3 – BUSINESS ASPECTS

The main considerations regarding setting up in business and maintaining an ethical business practice are in the *COTSS-Independent Practice Code of Business Practice* (2008). However, the following should be remembered in expert witness work:

- Consult a solicitor in the development of your terms and conditions.
- Be sure you know exactly who is responsible for paying you, particularly if there is a joint instruction.
- Ensure the instructing solicitor is aware of your terms and conditions, and has signed up to them if possible. Even if the solicitor has agreed the terms and conditions, it is best to clarify when you are likely to be paid and do not do the work unless you agree.
- Ensure your instructing solicitor is fully aware of your fees and provide an estimate for the job.
- Do not undertake any work unless fully instructed in writing.
- Agree any changes to your terms in writing.
- If a solicitor does not pay, even after several communications, do not be afraid of threatening court action.
- At present medico-legal work is **NOT** VAT exempt.
- Make sure you have fully met your part of the agreement with the solicitor
- Make sure your professional indemnity covers medico-legal work, as some policies do not.
- Keep clear records of work carried out (what, where, when, who ) – this is sometimes required for scrutiny, possibly years later. Date and log everything.
- There is no specific requirement for keeping your legal reports. The solicitors will keep records of the other legal documents in the case. A guideline would be to follow the College of Occupational Therapists guidelines – good practice is probably to keep them for 7 years (from age 18 for children).
- Any case documentation no longer required should be destroyed as confidential waste.
- There has been an increase in the use of email as formal communication. Emails should be regarded as formal documents and kept as such. Good practice suggests that issues should be followed up with a letter.

### Reference:

College of Occupational Therapists' Specialist Section – Independent Practice (2008) *Code of business practice*. London: College of Occupational Therapists.



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