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How to make sure your **Client gets the most out of their single expert**

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The role of a single expert can sometimes be a lonely one. No one wants to talk to you for fear of breaching the perception of independence. Further, you are often instructed not to communicate with the parties directly and all communication with the instructing solicitors is to be in writing.

If we pause to think back to the days before the Single Expert regime, you will recall that the following might have often occurred:

- You might meet with or have a telephone discussion with the expert prior to sending the instructions, particularly if there was an issue that was out of the ordinary. The expert would provide suggestions on the issues thought to be more important or relevant to the case and perhaps even provide some suggested wording for the instructions.
- During the course of the expert completing their work, the expert might call to discuss certain matters. This could include clarification of existing instructions, new issues to be added to the instructions, or confirmation that what the expert is instructed to do justifies the cost of the work being completed.
- Before completion of the report, the expert might meet with the client to discuss their concerns and the matters important to them. The expert might explain why some of those issues will not impact their opinion or where they are relevant, ensure that they are considered and addressed in their report.
- The expert will complete their report and provide you with a copy. You and / or the client might call or meet with the expert to have parts of the report explained in more detail or to ask questions on matters they might not understand.
- If the matter proceeds to trial, the expert might attend a conference with the barrister, solicitor and / or client to discuss the expert's report and any strengths or weaknesses of the report relevant to the case strategy being adopted. This might include the expert highlighting that a relevant issue is based on a particular assumption which if proven incorrect would fundamentally change the expert's opinion. The appropriate effort can then be given to getting relevant evidence about the assumption adopted.

The first sentence of this paper noted that the role of a single expert can be a lonely one. Well if the single expert feels lonely, what about the client. After all, this matter is about them. From their perspective, they would hear names of experts mentioned that they have never heard of before, be guided by their solicitor in selecting an appropriate person to be the expert, be asked to provide certain documents, receive a report that they may not understand which was prepared by someone they have not met or spoken to and be asked to pay an invoice for an amount that some will consider to be expensive.

They might therefore feel left out of the process and question whether the expert has considered all the relevant matters – the matters that are important to them. Regardless of whether or not those matters may have influenced the expert's opinion, the client will never feel like the expert has done a good job if their concerns have not been heard and addressed by the expert.

So remembering that the Family Law process is all about the client, how can we make sure that the client gets the most out of the single expert? How can we change the appointment of a single expert from something that we need to do, to become something that is seen by the client to be a more valuable part of the Family Law process? The objective of this paper is to provide some suggestions as to how we, the lawyers and the experts, can assist our clients in this regard. In addition to making sure the client gets the most out of the single expert process, we too may make our jobs a little easier as well.

In particular this paper will consider the following:

- Tips and suggestions for drafting a joint letter of instruction;
- The ways in which a single expert gathers the information to form their opinion;
- The ways in which you and your client can clarify your understanding of the expert's report;
- What to do if you think that the single expert got it wrong; and,
- Some comments on calling the expert to give evidence at the final hearing.

1.0 Tips and Suggestions For Drafting A Joint Letter Of Instruction

1.1 Once the identity of the single expert has been determined, the next step is to finalise the letter of instructions. From the expert's perspective, it sometimes appears as though at the time of determining who the expert will be, a timetable is also agreed upon that would allow the expert sufficient time to complete their report – let's assume three months was allowed. What then seems to happen next is that it takes two months to finalise the letter of instruction and send it to the expert. The expert may then have insufficient time to complete his or her work within the agreed time table. This leads to the clients being disappointed and frustrated with the delays.

1.2 Possible causes of delays in finalising the letter of instructions include:

- Disputes about what information should be given to the expert;The ways in which a single expert gathers the information to form their opinion;
- Difficulty in agreeing and finalising the wording for the instructions due to the nature of what the expert is being instructed to consider is unusual; and,
- That one party wants the expert to perform additional work (in the case of a forensic accountant, this may include the valuation and some investigations).

1.3 Where the nature of what the expert is being instructed to do outside of the normal range of instructions, it is suggested that a telephone conference with both instructing solicitors and the expert be organised. This allows the expert to ask questions and clarify what they are being asked to do and the reasons why. The expert may be able to suggest other matters that should be considered or suggest an alternative which may achieve the same purpose at a reduced cost. The expert may even be able to provide some suggested wording for the instructions. This may avoid the expert having to correspond with the solicitors after receiving the instructions or performing costly work that is of little benefit to either party.

1.4 The more common reason for a delay in finalising the letter of instructions to the expert appears to be disputes about what information should be provided to the expert. From the expert's perspective, we much prefer simple instructions with an agreed set of facts. However, most experts will be more than capable of considering alternative information, identifying whether it has an impact on the valuation and providing two alternative opinions if appropriate.

1.5 Consider the following example. The Husband operates his business through a company. The Wife wants the expert to know that the company pays all the expenses associated with the Husband's luxury boat. Rather than dispute whether this should be included in the letter of instructions, it is suggested that the information be included and that the expert instructed consider the information if they believe it to be relevant to forming their conclusions. The expert may be asked to provide an opinion on the disputed facts or to provide alternative opinions in the event that the alternative facts would impact their opinion. The information may be disputed by the other party or an alternative may be provided. The following is an example of how this could be done:

To the extent to which it is relevant in forming your opinion about the value of the Husband's interest in the company, the Wife alleges that the expenses of the company include the expenses associated with the Husband's luxury boat and she requests that you consider the quantum of such expenses in reaching your opinion about the value of the company.

The Husband disputes the above allegation and notes that the expenses related to his boat are paid for by the company and debited to his loan account with the company.

You are instructed to consider the above and if the disputed facts would impact on your opinion, then you are instructed to:

i. provide an opinion on the disputed facts; or, in the event that you cannot provide an opinion,

ii. provide alternative opinions assuming that each of the Wife's and the Husband's allegations are correct.

1.6 The same could also apply to the provision of documents that one party might believe to be relevant and the other party believes they are not. Occasionally, the reason for not providing the additional information may be that one party does not wish to unnecessarily increase the expert's costs. While instructing the expert in matters such as this is likely to increase the expert's costs, also consider the cost associated with disputing the instructions and the delays that might be experienced. It should be noted that the expert can be asked, as far as practicable, to separately identify their costs associated with a particular aspect of their instructions.

1.7 However, the greater cost of not instructing the expert to consider the information that is important to one party, is that party may not accept the outcome of the report because the issues important to them appear to have not been properly considered by the expert – and if one party does not accept the outcome of the expert's report, the matter is not likely to settle.

1.8 Where one party wants the expert to do additional work, such as a valuation and some investigations in the case of a forensic accountant, there will often be reluctance from one party to instruct the expert to perform this work. This will either be because they are guilty of the allegations to be investigated or they are innocent and just see the investigations as a waste of time and money. Where there is a dispute about instructing the expert to perform additional work, it is suggested that the party requesting the additional work agree that they pay for the additional work and the expert be instructed, as far as practicable, to separately identify the costs associated with that work. I see little reason why the Court would not allow the single expert to be instructed to perform additional work if the party requesting the work is willing to pay for the work. If the investigations are useful, then that party may wish to seek an order from the Court to ensure that the payment of those fees by them is taken into account in the judgement.

1.9 This process also avoids the issue of trying to have another expert appointed to do the additional work solely on your client's behalf. However, the down side is if the single expert is being asked to perform the additional work, then your client may not have the opportunity to meet with the expert, discuss their concerns, and hear first hand what can be done to address those concerns, whether their concerns can be addressed in a cost effective manner or the reasons why their concerns will not impact the outcome.

1.10 Where the delays in finalising the letter of instructions cannot be avoided, it is suggested that both solicitors write to the expert to advise them that they have been appointed, details of any relevant deadlines or Court dates and that the formal instructions will be provided shortly. Doing this will mean that the expert is more likely to have the time available once the instructions have been finalised.

1.11 Another means of reducing the time taken to complete a report after the instructions are finalised is to write to the expert and ask if they have a standard list of information that is required to be provided. The expert's list of standard information can be provided to the client in control of the information and this can be gathered while the instructions are being finalised. Providing the instructions and the standard information can save time and cost associated with completing a report.

1.12 Attached as Appendix 1 to this paper is a sample letter of instructions with some tips and suggestions noted. An electronic copy of this document can be obtained by emailing forensic@cutcher.com.au.

1.13 With respect to the valuation of corporate entities, the instructions occasionally request a current valuation or a valuation at the current date. This might be possible if the business has reliable management accounts completed on a timely basis – although this is rarely the case with family businesses. It should be noted that it is generally far more cost effective for the expert to complete the valuation on the basis of the most recent annual financial statements. This is because completing a valuation at an alternative date will effectively involve the expert working out the balance of all the assets and liabilities as at the current date and thereby virtually completing an additional set of financial statements.

1.14 Where the value of particular assets have changed significantly since the date of the most recent financial statements, such as the recent down turn in the stock market, the expert can provide a comment to the effect of "The above valuation adopts the value of the shares as at 30 June 2008. Assuming there have been no purchases or sales, then the value of the shares [or other assets] held as at 30 June 2008 had a value of $###,### as at 28 February 2009, being a decrease of $##,### since 30 June 2008".

1.15 Both in the letter of instruction and throughout the matter, don't forget to keep the single expert informed of the progress of the matter and any Court or other relevant dates. As the single expert, it is not uncommon to feel as though you are nobody's expert as no one keeps you informed. I've had many matters that I did not know were about to go to trial until a few days or a week before when I have been asked to do more work or prepare to give evidence. Rule 15.50 of the Family Law Rules requires that you give the expert at least 14 days notice they will be called to give evidence at the hearing. However, most of us plan important things like holidays much more than 14 days in advance. Therefore, why not advise the expert of the Court dates when they are allocated, request that they note the dates in their diary and that they will be informed closer to the hearing if they will be required to give evidence.

1.16 If the matter settles, let the expert know. If the matter proceeds to a hearing and their evidence is referred to in the judgement, send a copy of the judgement to the expert. Seeing how your opinion and evidence is used and relied on by a Judge is invaluable feedback to ensure you are considering all of the issues that are important to the Court and presenting your evidence in the most appropriate and user friendly way.

1.17 Even before getting to the pointy end of the proceedings, keep the expert informed of any Court or other relevant dates. This assists the expert in planning and prioritising their work load. The expert may also set timeframes for responses to information or inspections that are required to occur in order for them to complete their work by the relevant date. If the clients are unable to meet the expert's timeframe, they can hardly blame the expert for not having the report completed on time.

Also, if the expert is aware of an approaching deadline, they are more likely to be proactive in following up on outstanding information. Therefore, keeping the expert informed of the Court and other relevant dates will increase your prospects of having the expert's report by the relevant date.

2.0 The Way In Which A Single Expert Gathers Information

2.1 The usual scenario for a single expert to gather information is by correspondence. The clear advantage of this process is that it ensures that all dealings with the expert are transparent and reduces the possibility of one party feeling like the other party has influenced the expert's opinion. However, the disadvantage is that it can add to the cost of completing a report as well as causing delay as it can take many weeks to go backwards and forwards corresponding in writing asking for information and clarifying responses. Delays can also be experienced when the requests for information and responses have to go via the parties' solicitors rather than directly to the parties or their accountant.

2.2 Despite the disadvantages, the above process is clearly appropriate in many situations, especially where there is a complete lack of trust between the parties. However, be careful not to fall into the trap of thinking that it is the way the expert must gather the information in all situations.

2.3 Prior to the single expert rules, the expert would usually meet with, or otherwise contact, the party involved with the business to gain an understanding of the business and the information in the financial statements. The outcome of this meeting usually meant that the client had told the expert everything they wanted to, the expert had gathered most of the information required and probably obtained a better understanding of the nature of the business than achieved by written correspondence alone.

2.4 For example, I recently had a business that had been making substantial profits and the Husband had alleged that the bottom had fallen out of the market for their product and they could no longer sell the product for what it cost to produce. Naturally, I had assumed that the Wife would not agree with the allegations of the Husband. Before proceeding with too much work, the accountant for the business had organised a conference at his office with himself, the Husband, the Wife and myself as the single expert. It quickly became clear that the Wife readily acknowledged that due to the global downturn, they could not sell their product for what it cost to produce – although there were differing opinions as to how long it might take for the market to return and whether the business would become profitable again, if at all.

2.5 After a meeting that lasted no more than a couple of hours, I walked away with a better understanding of the business than I could have obtained by asking questions in writing and receiving written responses. I also had a much better understanding of the differences of opinion between the Husband and the Wife which allowed me to address these matters in my report.

2.6 I believe that the above is an example of how a much better outcome can be achieved where the expert gathers information in a method other than in writing. It was still transparent because both parties attended the meeting. The outcome was achieved in a few hours rather than weeks of correspondence. And possibly the most important benefit, both parties had their opportunity to present their opinions and concerns to the expert – allowing them to be heard and the matters important to them be addressed in the report.

2.7 I have also been involved in similar matters where such meetings have been held with the Husband, the Wife and their respective solicitors. While in other matters, I have been allowed to meet and correspond directly with the Husband and the Wife.

2.8 As noted above, allowing the expert to obtain information other than in writing will not be appropriate for all matters. However, you should be aware that the expert, who has only received written instructions, will have little idea about whether the parties are relatively amicable and just need to know an appropriate value to come to a fair settlement or whether the parties cannot be controlled when in the same room as each other. Therefore, this is one area where the solicitors can be more proactive in suggesting alternatives appropriate for each matter.

2.9 In considering what is appropriate for each matter, your client's concern about their former partner being able to "pull the wool over the expert's eyes" may need to be taken into account. Where this is the case, you may wish to inform your client that part of the ability of the expert is to know when they are trying to do this – and from an experts perspective, it is generally fairly easy to spot and easy to check if you are concerned such attempts are being made. For example, assume that the party involved with the business says that as a result of current economic conditions, the business will not be as profitable. A quick check to the recent sales will confirm whether or not this is really true. I won't give away all our secrets, but there are usually ways for the expert to test whether they have received completely truthful responses to the questions they have asked.

2.10 Therefore, next time you are instructing an expert, don't blindly follow your standard letter of instructions. Consider what will be the most cost effective and timely way for the expert to obtain all the information they require, while balancing the needs of the parties to raise their concerns with the expert and maintain the independence of the expert.

3.0 The Ways In Which You And Your Client Can Clarify Your Understanding Of The Expert's Report

3.1 Most solicitors will be aware that the Family Law Rules allow for one set of written questions to be put to the expert within 21 days of receiving the report. However, many practitioners may not be aware that the Family Law Rules also provides for the parties to have a conference with the single expert, refer rule 15.64B.

3.2 Briefly, Rule 15.64B allows the parties to enter into an agreement about conferring with the expert for the purpose of clarifying their report and if the parties cannot agree on arrangements for conferring with a single expert, they can make an application to the Court. While the rules allow the parties 21 days to enter into an agreement, I see no reason why the terms of the conference cannot be finalised outside the 21 days provided there is agreement from both parties.

3.3 While not limiting the scope of the conference, the parties must agree on the arrangements for the conference. This may be that the parties confer individually or together and with or without assistance such as the attendance of another expert. Rule 15.67(1) requires that the expert's fees for the conference are to be paid jointly by both parties if they both attend the conference or by the party attending if only one party attends.

3.4 From an expert's perspective, the conference has many advantages over asking written questions, including:

- The rules only allow written questions to be asked once. Whereas in a conference, questions can be asked about the experts responses to the questions. This allows for the expert's response to be clarified and properly understood.
- Some written questions are poorly worded. This means that it may take extra time for the expert to understand what is being asked and the response may not address the issue that was intended by the question. By comparison when in a conference, the expert can seek clarification of the questions and ensure the answer appropriately addresses the intended question.
- The parties can be directly involved and attend a conference. They can ask questions of the expert themselves. If they don't understand the response, they can say this and the expert can attempt to explain using alternative methods, examples or analogies. The parties don't have this opportunity with written questions.

3.5 One of the perceived disadvantages of a conference over written questions can be from an evidentiary perspective, in that it may be difficult to produce the expert's responses discussed at the conference as evidence. However, the Family Law Rules do allow written questions to be asked within 7 days of the conference, refer rule 15.65(1)(a). Therefore, a further advantage of the conference can be to open a dialog with the expert to determine what are the appropriate questions to be asked in writing – and you will have an idea of the responses before the questions are put to the expert.

3.6 With respect to the arrangements for the conference, the following may be some matters to consider:

- If you wish to have a conference with the expert without the presence of the other side, they are likely to also request the same. Where this occurs, consider what should be disclosed. For example, should a summary of all the issues discussed be provided to the other side and who should prepare such a document? Alternatively, should there be no reporting of the discussions except an amended report in the event that something discussed causes the expert to amend his or her opinion.
- Similarly, where a "shadow" expert attends the conference, should experts produce a joint statement of the matters agreed and disagreed? If this is done, does this constitute a conference of experts pursuant to rule 15.69? Could this allow you or the other side to indirectly get the shadow expert's opinion before the Court? Should there be no written documentation about the conference unless something discussed causes the expert to amend his or her opinion?
- When both parties (with appropriate representation) attend the conference, should each party take turns in asking a question or should it be structured similar to cross examination and re-examination?

4.0 What To Do If You Think That The Single Expert Got It Wrong

4.1 The answer to this question will very much depend on the reasons why you think the single expert got it wrong. The best outcome will be to have your own expert allowed to give evidence and for the experts to produce a joint statement. However, the Courts are somewhat reluctant to allow this to occur and therefore you need to be aware of what other action you can take.

4.2 From my experience as a shadow expert, it is very difficult to cause a single expert to amend their opinion – even more difficult than under the old regime of two experts and getting the expert on the other side to amend their opinion. Initially, you might expect an expert engaged only on behalf of one party would be biased towards an outcome in favour of their client. However, when two experts conferred under the old regime, what usually occurred is that each expert might become aware of additional information and / or hear a sound and logical alternative position to their own.

Each expert would then return to their client and advise that they have become aware of some additional information that caused them to reconsider their opinion and that the expert compromised their opinion on some other areas of professional judgement in order to reach agreement. There can also be a feeling of comfort for the expert that while they have amended their opinion, so too has the expert on the other side.

4.3 When you have a single expert, there is no alternative opinion. Therefore, there is no need to compromise your position in order to reach agreement. There is not another expert who has also moved from their reported position. What can occur though is the single expert appears to become biased to defending their own opinion – especially where the clients could call into question the fees paid to the expert where they acknowledge that they got it wrong or their professional judgement was outside the normal range. I fear that not all experts are brave enough to admit they are human and made a mistake and be honest enough to correct it.

4.4 So what do you do? Consider the other reason why an expert would change their opinion when we had two experts conferring under the old rules – they were provided additional information that they were not aware of at the time of completing their report. Therefore, try and think of some information not referred to in the expert's report that relates to the reason why you think the expert's opinion is wrong. For forensic accountants, a common area of contention would be that an earnings multiple on a business valuation is too high or too low. Rather than just ask why the expert thinks the multiple should be this and not that, provide some additional information and ask if that would cause the expert to reconsider their position. The additional information may cause the expert to reconsider their opinion.

4.5 Another suggestion is to consider any assumptions that have been made by the expert in forming their opinion. You could ask the expert to consider an alternative assumption and whether that would cause them to change their opinion. This will allow you to consider the areas where you can get the expert to change their opinion. You will then need to consider which assumptions you need to provide further evidence about or have the Court make a finding on so that the expert can adopt the Court's finding as the appropriate assumption.

4.6 The above approaches could be put to the expert at a conference, written questions or at Court giving evidence. However, why wait until you get to Court? This should be done as soon as possible in order to avoid any additional fees for the client in the event that the expert does amend their opinion and a settlement can be reached without going to Court.

5.0 Some Comments On Calling The Expert To Give Evidence At The Final Hearing

5.1 From an expert's perspective, the first thing that we think when we receive notice about being required to give evidence is "what are they going to ask me to give evidence about?". Under the old regime where each party had their own expert, you usually had a joint statement of the experts and any matters that were disagreed upon usually formed the basis for cross examination. When you are the single expert, the questions to the expert, if any, are usually your only guide.

5.2 Unless you have an idea about what you might be asked to give evidence about, an expert needs to be well prepared on all matters. To assist the expert, if you are able to indicate the areas on which they will be called to give evidence, this will allow them to focus and reduce their preparation time which in turn reduces the costs for the client.

5.3 From my experience in giving evidence at a hearing, it is usually for one of two reasons. Firstly, to provide further clarity on a particular issue and make sure that the Judge is aware of and understands this issue. Secondly, is where one party is seeking to have the expert amend their opinion.

5.4 I believe that requesting an expert to give evidence to provide clarity of an issue and ensure the Judge is aware of and understands the issue can be very effective. Where I have given evidence on this basis it is common for the Judge to ask various questions. On such matters, it may have been difficult for the Court to make an informed decision without the opportunity for the Judge to clarify their understanding.

5.5 I always find it interesting when a single expert is called to give evidence in an attempt to have them change their opinion. In the first instance, I would generally think that this should have been attempted by asking questions to the single expert prior to going to a hearing. If the expert has been asked questions and did not amend their opinion, why would the expert be likely to then turn around at trial and amend their opinion? If you are seeking to have an expert amend their opinion, then consider the approaches discussed at section four above.

5.6 You should also consider your objective and the potential outcome when cross examining the single expert. In the event that you are successful in discrediting the single expert such that their opinion cannot be relied on, then you may be faced with postponing the trial until an alternative expert opinion can be obtained. Also, consider if the single expert is effectively "Teflon coated" in the witness box – it is very difficult to make something stick to the expert because there is no alternative opinion.

Even if you manage to call into question some of the single expert's methods or conclusions, all they need to do is say that having considered all the information and performed appropriate reasonableness checks, that they believe their opinion is appropriate in the circumstances. It is the only opinion before the Court so therefore the Court has little choice but to accept and rely on the expert's opinion.

5.7 This brings me to the final matter for this paper. A matter that is important to most experts (particularly a forensic accountant). Fees. It seems to becoming more common that there is a dispute about who should be responsible for paying the expert's fees for giving evidence. Unfortunately, at the time of writing I am not aware of any guidance from the Court on this issue. Where there is a dispute, it is usually from the party who did not call the witness to give evidence and they are objecting to paying one half of the single expert's fees.

5.8 There is also no guidance on this in the Family Law Rules. Rule 15.47 states that the parties are equally liable to pay the single expert's fees for preparing a report. Rule 15.67 deals with the fees associated with a conference or written questions. While rule 15.50 states that a party can call a single expert to give evidence, it does not specify who should be responsible for the costs of the expert giving evidence.

5.9 Therefore, it is suggested that until there is further guidance on this issue, the solicitors and expert get agreement on who will pay the expert's fees prior to the need to prepare and give evidence.

6.0 Summary

6.1 The introduction of this paper noted that it is important to remember that the clients are often left out of the single expert process and have limited opportunities to have their concerns and issues addressed by the single expert. There are things that we can do to assist in ensuring that the client accepts the outcome from the single expert process. Consider including the matters important to them in the instructions to the expert. In appropriate matters, it may be possible to allow the parties certain contact with the expert during the preparation of the report. Alternatively, it may be appropriate to consider a conference with the expert after preparation of the report. Hopefully if the client is included more in the process, they are more likely to accept the outcome and this could increase the prospects of a settlement.