

How to get the Most out of Your Barrister

The webinar will start shortly

Next time: On 9th September, in the next episode of Prager And Friends, Sarah Prager will be tackling an issue of your choice - so make your proposed topics known!

What to expect from your barrister

What to expect from your barrister

- Knowledge of the relevant area of law;
- Ability and willingness to assimilate the evidence;
- Ability to communicate in plain English;
- Professional respect and courtesy;
- Collaborative working;
- Willingness to listen and involve the lay and professional client;
- Ability to take and own decisions.

Choosing your barrister

Choosing your barrister (1)

- First and foremost - think about your client;
 - Who is the right personality fit, who also has the skills and expertise for the job?
- Then think about the other side;
 - Who do you think you need to help win the day as part of your client's legal team?
 - Which choice of counsel might provide you with a helpful insight into the other side's game plan / internal processes / commercial drivers?

Choosing your barrister

Choosing your barrister (2)

- The directories can tell you which barristers are specialists in the relevant area;
 - Adopt an issue based approach?
- Webinars and talks can tell you how they communicate;
- Colleagues can tell you whether they work collaboratively;
- Clerks can help you identify their personal skill sets;
- All barristers love beauty parades;
- Silk vs. Junior?
- If it's not working - don't be afraid to change...

Direct Access barristers

How best to engage with a Direct Access barrister

- Provide more information rather than less;
- Marshal documents in order;
- Provide a summary telling the barrister what the case is about and what you would like him or her to do;
- Direct Access barristers tend to be more able to deal with logistics.

When to instruct your barrister

When to instruct your barrister

- Instructing early means you can shape the case together
 - And you get to bag your preferred choice early - conflict them out if you think the other side might want to instruct;
 - But you will need to review as further information comes to light;
- Instructing at pleadings stage means the way the case is run will be consistent - but if the barrister would like more information you will be working to a deadline;
- Instructing at CCMC or application stage saves brief fees - but your barrister has no input into how the case is run;
- Instructing at trial saves brief fees - but may be problematic in CFA cases;
- Instructing only on appeal saves brief fees - but can be stressful for all concerned.

When to instruct your barrister

How far in advance should you instruct your barrister?

- Too far in advance and you may incur an irrecoverable brief fee in the event of settlement;
- Too close to hearing and your barrister has no opportunity to have any input into the hearing;
- Some barristers have personal lives. Your barrister is not delighted to receive 8,000 pages of evidence on Friday afternoon for a Monday morning trial.

How to instruct your barrister

Instructions

- The continuum: post-it note on box of papers to 30 page document;
- Do not assume your barrister remembers the case or anything about it;
- The first paragraph should describe the facts from which the claim arises;
- The next paragraph should set out the procedural history and point the claim has reached;
- Pointers on your view of the case are helpful;
 - However, try to be objective - share your views but don't assume counsel will agree or try to lead counsel (if ever that were possible!) to a particular conclusion.
- Be clear, and also realistic, on timescales and expectations.
- When to contact your barrister directly and when to contact clerks.

How to instruct your barrister

The brief

- The continuum: email with 58 attachments to hyperlinked bundle with instructions sent separately;
- Photographs and other pictures - how did they copy?
- Advising on scarring in the absence of photographs;
- Advising on foreign law and standards in the absence of evidence;
- Advising on medical negligence in the absence of notes.

How to instruct your barrister

GDPR

- Providing information pre-instruction:
 - Covered by the exemptions as there is a lawful basis under GDPR that both the instructing solicitor and barrister can rely on: Arts 6(1)(b) and (f) and Art 9.
 - Careful with confidential information, which goes further than personal data under GDPR. You need consent if a retainer is not in place (assuming the retainer expressly deals with this - it should!).
- Providing information about third parties:
 - There needs to be a lawful basis; disclosing to advance your client's legitimate interests would be, but there is a balance to be struck with the "rights and freedoms" of the third party.

How to instruct your barrister

Costs budgeting

- Seek counsel's input when preparing the budget - particularly in substantial litigation.
 - This will help ensure your budget is realistic.
 - It will assist counsel, if instructed at the CCMC, to better defend and advocate for the budget you are seeking for your client.
 - It makes it easier to have a discussion about fees once the budget has been set by the court.
- Once the budget is in place - think about how you intend to use counsel - you will have to cut your cloth accordingly and counsel may need to do the same.
 - At this stage, you may need to be mindful of ad hoc emails/copying counsel in, as you can expect them to charge for their time spent in the same way the solicitor does!

How to instruct your barrister

The fees

- Fees are negotiated with clerks, not counsel;
- Fees should be agreed in advance;
- If in doubt, request a fee quote;
- When to pay - a thorny issue?;
- Interim payments on account of costs - sharing is caring;
- Requesting a reduction in counsel's fees;
- Detailed assessment - input from counsel may be required to justify time.

Conferences

When to have a conference

- Early on, in sensitive cases - every complainant in cases involving sexual assaults and deaths deserves to know who is representing them;
 - Consider whether you should travel with counsel to the client's home for a visit - not for every case, but for many it will be invaluable;
- Consider having a conference with counsel and the experts in difficult cases;
- Pre-trial conferences;
- Consider holding conferences remotely by Zoom or Teams;
 - Although this may be better suited to bringing several experts together in one con, rather than the first meeting with the client.

Conferences

What to expect from a conference

- Communicate with your barrister in advance regarding who will lead the conference;
 - Is counsel (or you) preparing an agenda? If so, get it in good time as it may be helpful to circulate to participants;
- Let us know if the lay client has any particular sensitivities or foibles;
- Give the lay client some idea of what to expect;
- If counsel gives you homework (as Sarah calls it) before or after a con - make sure you do it, or if you can't then have an explanation for counsel as to why something was not possible;
- Dealing with disagreements - you and your barrister should never disagree in front of the lay client.

Remote hearings

Whether to have a remote hearing

- Issues of fundamental dishonesty and exaggeration;
- Reminding witnesses to pre-read their witness statements;
- Reminding witnesses to dress and act appropriately;
- Issues with hardware or software - pre-test;
- Expert evidence;
- Document heavy cases.

Settlement and ADR

Counsel and ADR

- Courts are increasingly willing to penalise parties for failing to engage in ADR;
- Relationships between counsel are not affected by the day to day litigation process;
- A pre-JSM conference with the client will save time at the JSM and help manage the client's expectations;
- Preparing for a JSM will assist in preparing for trial;
- Make counsel aware of your expectations in terms of involvement in negotiations - if you're like Chris then you won't want to be side-lined while counsel-to-counsel discussions take place. But you may reach a point in negotiations where that will be helpful;
- Don't leave all the work to counsel - do your own liability and quantum analysis - it may help counsel when advising your client on the day;
- Don't be shy about your knowledge of the case as the instructing solicitor - have confidence - you will do the best for your client and secure the best outcome if the legal team's approach is collaborative.

Updating your barrister

Do counsel like to be kept updated?

- Under the terms of our CFAs we should be kept updated on offers made;
- We are happy to be updated on major developments;
- Be mindful of copying counsel into emails/every development - this could increase costs;
- We should also be updated on outcomes, which will help with fee collection.

The Peter Hale grenade

Our personal bugbears

- Sarah - issues around bundles.
- Chris
 - Counsel who have not read everything you have sent (or don't tell you they haven't read everything and pretend they have!);
 - Not receiving a formal written advice when that is what I have asked for (email is fine but an advice by telephone is not a substitute);
 - Counsel who talk in metaphors and similes - they have their place, but use plain English and save the metaphorical language for emphasis/illustration.

STEWARTS



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And Special Guest Chris Deacon of Stewarts

19th August 2021