



Case management and file organisation

BACKGROUND

This practical perspective sets out some best practice relating to the management of a forensic case and file organisation. It does not deal with the vast topic of how to perform your detailed investigation, but it necessarily touches upon certain related issues. By definition, it cannot take account of massively complex cases such as BCCI, Wickes, Maxwell and the like. However, the only real difference between these huge cases and others is that there is much more documentation requiring to be ordered, filed and referenced. The recommended guidelines on case management apply to all forensic assignments, large and small.

INTRODUCTION

The aim of this guidance is to provide some useful, simple, and practical guidelines. If these are followed, dangerous pitfalls should be avoided. None of what follows is ‘rocket science’, and little will be new to most readers, but this gentle reminder may help. At present, experts cannot be sued for negligence unless they are acting pre-litigation, as an adviser, or as a shadow expert. However, that is not to say this situation will continue, and your files, documentation, and decision-making processes may become open to inspection, challenge, and litigation against you.

In any case, best practice is to have a first-class file. Generally, forensic files should be able to withstand greater scrutiny and contain more detail than audit files. Audit files tend to be standardised, have the previous year’s figures to compare with, work probably to a less than absolute confidence level and apply a materiality threshold. They only have to support a ‘true and fair’ opinion on the accounts prepared by management.

Although the courts will apply ‘the balance of probabilities’ in determining a civil case, the forensic opinions expressed by an expert have to comprehend the full range of possible answers; the absolute answer required for criminal work is even more demanding. In either case, the opinions have to be as accurate as possible and fully supported by evidence and reasoning in preparation for joint expert meetings, cross-examination, and so on.

THE FILE

Engagement

The obvious starting point, and probably the most important document, is the letter of engagement. Experience has shown that it is best not to rely merely upon the letter of instruction you have received – however encompassing it may be. Your terms are paramount, so reply with your own complete letter of engagement. (See the practical perspective on engagement letters.)

Conflict of interest

This is self-explanatory. Do not seek to hide behind 'Chinese walls'. They can destroy your case in the final conclusion, i.e. in court! At the very least, you should be able to evidence that you have performed your own conflicts check.

The case

Prepare a simple case summary, preferably on a single sheet. This is not as difficult as it sounds, even though there may be many side issues. The exercise is a useful discipline as it helps to focus the mind at the start of the case. In criminal cases, there will be a prosecution summary, although this is usually quite long and detailed, and may drift into other areas.

Planning

Planning is crucial. As with any assignment, spend time at the beginning to identify the initial:

- areas of investigation;
- necessary expertise;
- relevant people to speak to;
- research areas; and
- issues that may need clarification, either from your instructing solicitor or even directly from the Court, though the latter should be regarded as a last resort.

You should also consider timescales, scope for delegation and the staffing – including the use of other partners.

Planning is necessary for forensic cases of any size. This will ensure that adequate and appropriate attention is devoted to the different areas of the case. It should identify what has to be done and by whom, and who may need to be consulted for additional assistance. Allocate time to the tasks, as this also helps with setting client expectations and cost monitoring.

Documentation

Schedule all documentation received and when, and confirm its receipt in writing. Do not merely record 'three lever arch files of papers'. If these are not already paginated and referenced, do it yourself (or use one of your able staff). This needs to be done with every batch of documentation, and is particularly relevant in criminal cases where often there are several 'Notices of Additional Evidence' – some of which can be received quite late in a case and near to trial.

Witness statements

File the statements separately for each person, in chronological order given that there are often supplementals and amendments. Ensure that they are signed and dated. If not, file them in the date you receive them, noting this on the face.

Court directions and counsel's advices

Request copies of all court directions and any relevant advice(s) by counsel if appropriate. You cannot then be held responsible for missing deadlines and/or a line of enquiry of which you had no way of knowing, which can happen. Consider having a separate correspondence file, as this tends to be the most frequently used file; but do not then file witness statements and the like there, just because they came in attached to a letter!

General

Be aware, your report should be clear, concise, simple, readable, easy to follow, and cross-referenced to text, exhibits and appendices. Your files should be just the same. How often have you witnessed others rummaging through a mass of poorly filed papers, and perhaps not finding the sought document(s)?

Costs

No file would be complete without a thorough schedule of the costs incurred. The recording of time spent is a standard discipline for accountants and most lawyers, but its importance cannot be stressed too much. Detailed records should be kept for all cases – especially criminal cases and civil cases covered by public funding. Hourly recording in six-minute periods is common, but you should also provide a brief explanation of what was done. This is especially useful in the detailed assessment of costs by the courts, cost disputes and when costs are challenged (for example, by an insurer).

Good case management should include regular, say monthly, billing, or at least making your instructing party aware of the cost amount on a regular and timely basis. Statements of account and payments schedules should be used if appropriate, and your file will need a section covering this area. Your independence may be seen to be impaired if you get to court with unsettled costs.

Professional negligence cases

In most litigation cases, the forensic accountant's role is focused solely on the issue of quantum. However, in professional negligence cases, he is often engaged to assist on other issues within his experience. Thus, separate file sections may be useful for the various elements, noting your initial views/evidence on each, especially where different people cover parts of the different aspects. The following are examples of this:

- duty of care or contract;
- breach thereof;
- causation/reliance;
- negligence;
- financial loss;
- mitigation;
- damages; and
- consideration of contributory negligence.

Personal injury

File medical reports in separate sections in the name of the individual medical expert. It is common for each to provide more than one report, supplements and/or letters. File in chronological order and note the date you received them. Read them, because medical reports are also of relevance to forensic accountants since they put the injuries into the context of the claimant and the pre-accident employment. They also provide details of any prognosis so that future losses can be calculated by reference thereto. The disparity in medical views is something that you will need to bear in mind in considering the possible range of your opinion.

Matrimonial

Despite having a so-called summary, Form E is not user friendly, with its numerous subtotals and carry forwards, etc. Try to break it down to a single page of A4 with 'his' and 'her' versions of the figures. Such a summary can be a remarkably useful document and, if on a spreadsheet, easy to update as the case progresses to allow for ongoing changes to bank/building society balances, share value fluctuations, policy value, liabilities emerging, etc.

Have separate file sections for each major asset or liability. As a pension is not a liquid asset, add the CETV of a pension after striking the total of the rest of the assets.

Commercial disputes

Again, in these types of cases, files should include separate sections covering, for instance, some or all of the following:

- knowledge of the business;
- knowledge of the industry;
- copies of relevant contracts, agreements, meetings, minutes, legal documents, and the like;
- the legislative and regulatory environment;
- the accounting system; and
- management and annual accounts covering an appropriate period, as well as forecasts, budgets, and trends.

Expert meetings and Joint Statements

It is imperative to keep a record of all communications between experts. Meetings can be by telephone, e-mail, fax, and correspondence, in person or a combination of these. Agree at the outset who is to take the notes, and expand these to proper minutes to be agreed by both sides. Keep your papers chronologically.

These comments apply equally to Joint Expert Statements.

Do not use either the expert meeting or the Joint Statement to negotiate or mock. Do not lightly describe your opponent's views as 'totally incorrect'. Say that you are unable to agree for the reasons in your report; the Judge will decide who is correct.

CASE MANAGEMENT

To a certain extent, the specification for file layout is intermingled with case management, for example, costs, time records, actual instructions, etc. To clarify and simplify, the following matters as a minimum need to be considered in every case.

Correspondence

Be careful with chronology, as it can be crucial. A letter written on the 10th of a month may not reach you until the 15th, and a lot can happen in the intervening period. Similarly, when using the fax machine, even with 'hard copy to follow', retain the time/date sheet for the fax (and make sure the fax settings are right, and know what your procedure is for time changes). The same goes for e-mails and deliveries by hand, and so on.

Avoid bland references to 'recent correspondence', especially in relation to incoming mail. This usually means the letter was sent some months ago and the writer is trying to disguise a delay in replying. Again, the preference is to have a separate correspondence file, as this tends to be the record of information provided and expectations.

Telephone conversations

Contemporaneous notes are crucial – even down to the time the call was made or received and the length of time it took. If it is a crucial conversation, you must expand your 'rough shorthand' after the call. Do not leave that task until you think you have the time – do it there and then. If necessary (and only you can determine the importance) follow it up with a letter of confirmation: 'It is my understanding, after our telephone conversation on... that', etc.

Keep all contemporaneous interview and telephone notes (both original rough and any expanded version). They may be disclosable documents.

Drafting

No matter how you write your report (manuscript, typed, dictated, etc.), it is useful to keep your drafts chronologically. This provides an 'audit' trail. Changes will inevitably be required as evidence changes or clarifies, and this can easily affect figures, calculations and opinions. Hence, as previously mentioned, it is important to keep a detailed record of information received, when it was received and its source.

Document clearance

Devise your own personal way of ensuring that a document has been read, considered and dealt with. If necessary, cross-reference your notes to the relevant documents for later consideration and possible inclusion in your report.

Whole batches of documents may have been provided which are of no real assistance or relevance. A brief file note to say why you have formed a particular opinion is useful, if only to remind you why!

Never leave a query unresolved, and always deal with every document provided.

Date and initial the working paper at the outset; again when queries are raised, and again when they are finally cleared.

Copy documentation

Unless a document is 'innocuous' (e.g. a gas bill), try to see the original document, since a copy may not contain important information. For example, an invoice may have different manuscript writing on it, showing the involvement of different individuals, or it may be illegible, or in a foreign language. Get it translated if you need to.

Even more importantly, do not write on the originals – it has been known. Even with copies, it is best to write your queries or comments on an attached note.

Client awareness

Keep your client informed – whether that is your instructing solicitor, the insurer, the claimant, the defendant, or a combination of these.

Timetable

Keep a schedule of all-important dates, past and in particular future – for example, Court Directions deadlines, joint expert meetings, etc.

Managing the work done

Co-ordinate, supervise, review and apply a flexible approach to additional information, evidence and changes to instructions. These should be recorded on the file as the facts unfold or change.

It is worth repeating that the source of any information (written and/or oral) should be noted on the file, and ultimately in the report if that information is used.

All work performed should be recorded and evidenced, and any conclusions thereon should be scheduled, whether they are favourable or unfavourable to the case. All matters that require the expert to use his expertise to form an opinion should be recorded, not just those that are significant. The extent of the actual recording is a matter of professional judgement in the context of the case. Later on in the case, it may be very important to demonstrate the relevant facts and conclusions reached earlier on in a case, particularly as cases can run for many years.

As referred to in the Forensic helpsheet on 'Reports', there should be a section where the person who independently checks the report for logic, calculations, spellings, cross-referencing, and so on, confirms that they have done all of this. Clearance of the points then raised and evidence of this should also be recorded on file.

Most major firms of accountants will have the equivalent of their own inhouse 'Forensic Manual' to ensure elements of standardisation, file, and case management.

Limitations

Record in your file, and in your report, any restrictions, limitations, conditions and the like that may have been placed upon you and your work. They may be justified – for example: serious time constraints, areas of investigation not to be considered, reliance upon other people's figures, review of a specific period. None of these may suggest anything untoward, but they may have an unknown effect on your opinions.

Record also how you have dealt with each obstacle. State clearly what information you would expect to see but which is not available and why you would have expected it to be available. It may also be useful to record your thoughts on how or when evidence may have accidentally been destroyed. Check whether there is any alternative evidence or copy source available elsewhere.

Post-report section

Subsequent to the issue of your report, events may arise that affect its contents. These should be carefully considered, and appropriate action taken since you have a continuing duty to inform those instructing you, and ultimately the court. This may involve writing to your instructing party (or both sides if you are acting as an SJE), clearly setting out the event and its repercussions on your

report. If you are unsure, seek guidance from your legal advisers or the court. The relevant period is any time from the issue of your final report to the conclusion of your involvement.

Some useful sources of guidance

- Accountancy Litigation Support Manual – Tolleys.
- Members Handbook – Academy of Experts
- Expert Accounting Evidence: A Guide for Litigation Support – (Croner CCH, 1998)
- Part 35 Civil Procedure Rules & Part 33 Criminal Procedure Rules (These Rules are constantly updated)
- Auditing and Reporting – CCH

ETHICAL ADVICE

If you are ever in doubt as to whether or not your conduct is ethical, you should step back from the situation and analyse it. It often helps if you put your thoughts down on paper or take a second opinion. Section 100 of the Code of Ethics (paragraphs 100.16 – 100.20) includes a framework for ethical conflict resolution. This outlines a series of steps that can help you not only to identify the problem but also to resolve the ethical conflict. In resolving such ethical conflicts it is important that you make a file note to explain the rationale for your position. This will help if your conduct is later challenged.

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