



EXPERT WITNESS INSTITUTE NEWSLETTER

Spring 2005

Accreditation and the Institute's role

Public scrutiny of the competence of expert witnesses has made many practitioners feel challenged. In particular, three high-profile cases in the criminal courts attracted much attention from the media and undermined public confidence in experts. One proposed solution is a system of accreditation for expert witnesses, which may involve an enhanced role for EWI.

In 2004 the report of a working group under the chairmanship of Helena Kennedy QC, 'Sudden unexpected death in infancy', recommended that experts should be accredited and that judges should be pro-active in exercising their duty to establish the expertise of witnesses appearing before them. Subsequently the Legal Services Commission published a consultation paper which puts forward the view that experts who regularly provide forensic services in Commission-funded cases should be 'quality assured', which the Commission equates with accreditation.

The Institute's response has been circulated to members by e-mail and is available on the EWI website. In March the Civil Justice Council organised

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an experts' forum to discuss accreditation and it's timely to consider the implications this may have for EWI members.

First, it is important to consider the role of the Council for the Registration of Forensic Practitioners (CRFP). In the 1980s there was a series of criminal cases where convictions were set aside as being unsafe because the scientific evidence was considered flawed. The CRFP was set up to ensure that forensic scientists working for the prosecution in criminal cases were able to satisfy a basic standard of competence. The

Council's independence has been questioned on the basis that it relies on Home Office funding, but as more forensic practitioners are registered it expects to be self-financing through registration fees.

Initially, the CRFP targeted experts such as those employed within

the Government Forensic Science Service who have no Royal College or Institution to monitor their competence. More recently it has been talking to certain professional bodies to consider whether their members might be brought within the ambit of the CRFP's register. Unsurprisingly, the CRFP was identified by the Legal Services Commission (as it had been earlier by Lord Justice Auld) as the one organisation that could lead the way in accreditation.

What is the attitude of the EWI, particularly as expressed by its Governors, to this issue? Initially we have taken the view that our membership criteria – based on a proven track record, confirmed qualifications and three references from solicitors or barristers – do not fully satisfy the requirements of the accreditation scheme but rather indicate an acceptable level of competence at a point in time. However, before provisional members can meet the criteria for full membership, we require evidence of appropriate training and compliance with the EWI continuing professional development scheme, and we make Fellows of the Institute available as mentors to encourage and help them.

At the experts' forum of the Civil Justice Council (CJC) presentations were given on behalf of various organisations, including all the expert witness bodies. The EWI was represented by John Cowan, one of our Governors and a member of the CJC Experts Committee, and Brian Thompson, EWI Secretary, who made the presentation on behalf of the Institute. He suggested that the reason the debate on accreditation was important was encapsulated by Dame Elizabeth Butler-Sloss, President of the Family Division, who said, 'Expert witnesses are a crucial resource ... Without them we [the judges] could not do our job.'

A dictionary definition of 'accredit' is 'to certify or guarantee as meeting required standards', but what standards are the courts looking for? It has to be recognised that, in respect of the scientific evidence, the judge, the lawyers and, where present, the jury are

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all laymen. They need a specialist to explain the implications of the facts of the case. This implies that the expert's specialist knowledge is up to date, that he can put across technical matters in a way that the layman can understand, and that he understands the requirements of the court so that he can perform with confidence.

The court needs some assurance that the expert evidence is credible. In an adversarial system it is tested by cross-examination or by opposing solicitors raising questions on the report. However, with the increasing use of single joint experts, many more cases are being settled before they get to court and any testing of expert evidence may be perfunctory.

Perhaps, therefore, mere certification of standards is insufficient. Will a registration scheme provide the reassurance of ongoing competence that the court needs? It is unlikely that it will do so to the extent that some proponents of registration suggest. There are limitations, such as:

- Any scheme of validation must be independent. Who will validate the assessors?
- If the scheme is to succeed it should not be over-complex or bureaucratic.
- The expert must understand that it is the court that permits expert evidence to be adduced and therefore ...
- Experts on the register should not regard it as another directory from which they will gain instructions.
- A registration scheme cannot be compulsory, otherwise the court will never hear from the Nobel laureate who may be called only once – but that raises problems of how to police the register.
- Discipline can be exercised by judges who may, and often do, criticise expert witnesses or consider making a wasted costs order. What will a register of expert witnesses offer? It is suggested that it will indicate nothing more than that the expert met the applicable standards at a particular point in time. Unless some kind of performance assessment is introduced there can be no guarantee that the expert will perform satisfactorily in the witness box. Competence must be ongoing and maintained. This suggests that the required standard is the one adopted by many professional bodies for the services their members provide and which has been derived from sale of goods legislation: fitness for purpose. This is usually assessed under continuing professional development schemes but it must be acknowledged that such quality assurance schemes vary considerably in credibility. Moreover, validating the competence of an expert witness is a more complex process. It is a two-part exercise, first to certify knowledge and experience in the relevant skill or profession, then to confirm an understanding of and compliance with the duties of an expert witness.

We maintain that it has to be a collaborative exercise. The specialist professional bodies, Royal Colleges, Institutes and Institutions, should monitor their own members' competence. In parallel, the expert witness organisations are able to ensure that their members have the opportunity to remain up to date with the requirements of the courts. There is also a role for the solicitors who instruct experts and who are concerned to monitor their performance and contribute their own experience.

What about new expert witnesses? It is important for the proper administration of justice that the pool of expertise available to the court is continually replenished, but if an expert has not previously acted as an expert witness and has no track record he has no chance of being registered. This means that the EWI category of provisional member is very important.

Behind the debate is a problem that is centuries old, going back to cases such as *Folkes v Chadd* (1782) 3 Doug KB 157. That is, that scientific knowledge progresses through experimentation, discussion, debate and disagreement. When scientists enter the courtroom it is totally inappropriate for them to bring their disagreements with them. Even though they may be honestly held differences of opinion or simply a different range of opinions, the outcome is likely to be chaos and confusion. The individual scientists may

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believe themselves to be totally objective but what the court requires is certainty, and unfortunately that is often just what the scientist cannot provide.

The problem is still with us today. In the Angela Cannings appeal Lord Justice Judge took the view that where the scientific evidence is at the cutting edge and the experts disagree, it is unsafe to convict. But that is no more than a pragmatic acceptance of the situation; it is not a solution to the problem of handling scientific evidence in the court. Nor was it likely that the discussion at the CJC experts' forum on accreditation would suggest how this problem might be resolved. Accreditation looks at the competence of the scientist and cannot validate opinions.

Nevertheless, it was fascinating that over the course of the event the consensus view moved from a belief that accreditation was unnecessary to a concerned acceptance that the professional bodies, the Royal Colleges, and the General Medical Council will have to assess the competence of their members as expert witnesses. That was not because they saw it as their responsibility to ensure that the proper administration of justice was supported. Rather, they saw that any incompetence or irresponsibility on the part of their members in discharging their role as an expert witness could lead to their organisations being brought into

disrepute. This suggests that they are likely to see it as a disciplinary matter rather than a quality assessment issue to assist the court.

If this is borne out in practice it is more than likely that the concept of accreditation of expert witnesses could be taken up by the professional bodies. For those with no

such organisation, to look to the CRFP may well be the fall-back option. In either case there is an opportunity for EWI, as an organisation concerned with enhancing the standards of expert witnesses, to play an important advisory role.

A long view of the expert witness system

Lord Woolf, Lord Chief Justice, will be the principal speaker at this year's EWI annual conference whose theme is 'The expert witness system: yesterday, today, tomorrow'. His reforms have transformed civil practice and procedure and its effects are now spreading to the criminal and family jurisdictions.

The conference offers an exceptional opportunity to hear some of the outstanding personalities of the legal world speaking about their particular areas of expertise. Can you afford to miss it?

Lord Mustill, a past-president of EWI, will take the chair and introduce this distinguished assembly of speakers which includes James Badenoch QC, EWI Chairman, who will give a policy speech. In a session devoted to 'Assessing the authority of expert witnesses', Professor Allan Jamieson, Director of the Forensic Institute, will discuss the controversial topic of accreditation. Professor Jamieson will, be followed by Senior Master, Master Turner on 'The judge as gatekeeper'.

Lord Justice Auld, whose report was the prelude to the first overhaul of the criminal justice system for more than a century, will talk on the new rules in criminal procedure, Then Mr Justice Calvert-Smith, former Director of Public Prosecutions, will speak on 'The expert witness in the criminal jurisdiction'.

The final session will be devoted to civil procedure issues, with Roger Clements FRCOG asking is 'Capping fees – a threat to the proper administration of justice?' and Professor Sir Alan Craft looking at 'The expert witness under fire.' The day will end with an open forum followed by a reception.

The conference takes place on 14 October 2005 at the Conference Centre, Church House, Dean's Yard, London SW1. It will count as five hours towards individual CPD/CPE requirements with the Royal Colleges, the Bar Council, the Law Society, and the Institute of Legal executives.

Further details and a booking form can be obtained from the EWI office.

Changes in Civil Procedure

The 38th and 39th amendments to the Civil Procedure Rules were published on 24 March 2005 and came into force from 1 April 2005.

The Practice Direction to Part 35 now has a new paragraph 6A in the section dealing with the Single Joint Expert. The new paragraph states:-

"Where an order requires an act to be done by an expert, or otherwise affects an expert, the party instructing that expert must serve a copy of the order on the expert instructed by him. In the case of a jointly instructed expert, the claimant must serve the order."

The thinking behind the new paragraph is that an expert must be advised exactly what the court has directed in relation to him, so if you have not been told you cannot be blamed for any delay as a consequence. It is also suggested that this will assist experts applying to the court for directions where problems are being encountered with the instructing party.

There is also a new, revamped pre-action Protocol for Personal Injury Claims. Whereas the old protocol applied specifically to the fast track claims for road traffic, tripping and slipping and accident at work cases with a value of less than £15,000 the new protocol suggests that its "cards on the table" approach could be appropriate to the higher value claims. It is accepted that the timetable and the arrangements for disclosing

documents and obtaining expert evidence may need to be varied to suit the circumstances of the case.

The protocol encourages joint selection of, and access to, experts, but the report produced is not a joint report for the purposes of CPR Part 35. The procedure is for the claimant to obtain a medical report which is then disclosed to the defendant who may ask questions and/or agree it but does not obtain his own report. If proceedings are to be issued a medical report must be attached, but this does not prevent the parties, with the permission of the court, from obtaining further expert reports. It is for the court to decide whether the costs of more than one expert's report should be recoverable.

The new protocol recognises the use of medical agencies in these cases. If this is the preferred means of handling the claim, the defendant's prior consent must be obtained and the defendant can request that the agency provides the name of the doctor or doctors they are considering instructing. The full protocol can be viewed on the website of the Department for Constitutional Affairs (www.dca.gov.uk)

From the Secretary's desk

New Criminal Procedure Rules have implications for expert witnesses and may mean that they have earlier and greater involvement in cases, though many details have still to be clarified. Brian Thompson takes a critical look at the rules and reports on other matters of interest to members.

The much heralded Criminal Procedure Rules have been published and were laid before Parliament on 4 March 2005. (Statutory Instrument 384 of 2005). The full text of the document is available on the HMSO website (www.hmso.gov.uk). The rules came into force on 4 April. Unfortunately Part 33, which relates to expert evidence, is blank. A helpful note states: 'There are currently no rules in this Part. For the obligation to disclose expert evidence see Part 24.'

So, as far as expert witnesses are concerned, it is necessary to take note of the general thrust of the Rules and to be on the lookout for the specific requirements of Part 33 when they are published. When this is likely to happen is not clear, but the Department for Constitutional Affairs states that the Rules are likely to be updated twice each year.

The Rules, it is claimed, have been designed to bring about a culture change in the management of criminal cases, but the change is stated to be evolutionary rather than revolutionary. Lord Woolf, in submitting the Rules to the Lord Chancellor, referred to Lord Justice Auld's view that 'the criminal justice system and public confidence in it are readily susceptible to damage by disjointed, sporadic and precipitate change'.

The new Rules introduce into criminal proceedings the concept of the overriding objective and impose new detailed requirements for case management

Accordingly, most of the new Rules that have been published simply adopt the procedures from the old ones, bringing them together in a single place, rather than the 50 different sets of rules that previously applied.

But in two important respects the new Rules are more than mere consolidation. First, as foreshadowed, they introduce into criminal proceedings the concept of the overriding objective, and second, they impose new detailed requirements for case management by the court.

Rule 1.1, which sets out the concept of the overriding objective, has already been subject to some criticism. It is drafted very much on the lines of the overriding objective of the Civil Procedure Rules so that it is required that criminal cases be dealt with justly, which includes dealing with the case efficiently and expeditiously. The court, it appears, is also required to give equal interest to convicting the guilty as it does to acquitting the innocent. How does this sit with the presumption of innocence?

Expert witnesses should be aware that Rule 1.2 imposes a duty on every participant in the case to

prepare and conduct the case in accordance with the overriding objective. Rule 1.2 (2) makes clear that anyone involved in any way with a criminal case is a participant in its conduct for the purpose of this rule. It would seem that this includes expert witnesses.

The relevance of this for expert witnesses becomes even clearer when you turn to Part 3, which deals with case management. Rule 3.2 defines what is meant by the court 'actively managing the case'. This imposes on the court the requirement for the early identification of the real issues and ensuring that the

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evidence, whether disputed or not, is presented in the shortest and clearest way. This suggests that expert witnesses are likely to be involved in the case very early on.

The court is also required to monitor the progress of the case and to discourage delay. To this end Rule 3.4 requires each party and the court to appoint a case progression officer with the responsibility to ensure the timetable is complied with. Rule 3.5 (2)(1) provides that the court may 'specify the consequences of failing to comply with a direction' although there is no indication in the Rules as to what those consequences will be.

There is already enough here to suggest that members instructed in criminal cases in the future will have to ensure that they are on top of the issues. Clearly we will need to engage in a more detailed briefing of members, particularly when the content of Part 33 becomes available.

Civil procedure

Activity on the criminal procedure front does not mean that matters have been quiet in respect of civil procedure issues. Publication of the consultation document 'The Use of Experts' by the Legal Services Commission (LSC) has certainly helped to concentrate attention.

The Institute's response was lodged with the LSC by the deadline of 25 February 2005 and can now be viewed on our website. Many thanks to all members who responded to our Chairman, James Badenoch's request for comments. Many of you submitted them direct to the LSC as well as copying them to the Institute. Additionally we held a well-attended meeting of the Professional Bodies Advisory Group and a very successful seminar where the speakers

included Simon Morgans of the LSC. As a result the Governors had a very clear steer from the members which was most helpful in putting together our response.

The latest indication from the LSC is that they had received 158 submissions by the deadline so the task of analysing and evaluating them is substantial. They were, however, hopeful that they would be able to post a first reaction on their website by the end of April.

Accreditation

One of the recommendations in the LSC paper was that solicitors in commission-funded civil cases should be encouraged to instruct only those experts who were recognised by the LSC as being appropriately accredited. The LSC saw this as being a guarantee of quality assurance. In March the Civil Justice Council (CJC) ran an experts' forum on this subject which was attended, on behalf of the Institute, by Governor John Cowan and the Secretary (see page 1).

At this forum it was disclosed that neither the Judges' Council nor the Civil Justice Council itself were very supportive of the LSC in their formal responses to the consultation paper. Nevertheless, it appears that the issue of the maintenance of competence by an expert witness is something that is going to run and the EWI Governors have set up a small committee under the chairmanship of Alex Brown to consider the implications for EWI.

Position papers

One of the recommendations of the Marketing Sub-Committee (see the article by David Asker-Browne in the autumn/winter 2004 Newsletter) was the production of a series of position papers on current issues of importance to members. The first of these, on best practice on instructing expert witnesses, was

drafted by Geoffrey Lloyd and has been approved by the Governors. The paper is included on page 6. Comments by members will be warmly welcomed.

The referral service

Members may recall that in the autumn/winter 2004 issue we published correspondence with Charles Stimpson about a solicitor's concern that experts who had been identified to him under our referral service should not approach him independently. The Governors' view was explained: it should be left to the solicitors to take the matter forward.

While we have not received any further comment on this from members, the issue was discussed fully at a recent meeting of the Membership and PR Committee. It was accepted that members should not be precluded from marketing their services to the legal profession and, while not departing from the generality of the view already communicated to members, it was accepted that, if the circumstances warranted it, the expert should still retain the discretion to approach solicitors to whom his name had been given. It should be emphasised, however, that the onus is on the individual expert to handle this with sensitivity.

Newsletter editor

It will have been noticed from the last issue that John Finch is no longer acting as editor. Having developed the Newsletter over the past two years and expanded it, he felt his task was done. We were very sorry to lose his enthusiasm and I take this opportunity to thank him on behalf of our members for the constructive and authoritative contribution he made to our chief means of communication with members. Contributions to the Newsletter are still very welcome and should now be sent to the EWI office.

Child Abuse and the Expert Witness

A one day conference organised by the Royal Society of Medicine in association with the Expert Witness Institute

Date: Monday 6 June 2005

Venue: The Royal Society of Medicine, 1 Wimpole Street, London, W1G 0AE

The objective of the conference is to present how expert evidence is dealt with in court and how the civil and criminal courts should use the evidence of expert witnesses in order to improve communication between the medical and legal professions. Further details and a booking form can be obtained from Jennifer Lake at the RSM on 020 7290 3919 or visit our website.

CONTRIBUTORS INCLUDE:

- The Right Honourable Mrs Justice Heather Hallett DBE
- The Right Honourable Lord Justice Hooper
- The Right Honourable Lord Justice Wall
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- Professor Tim David, University of Manchester
- Mr Philip Geering, Director, Policy, CPS
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Solicitors Looking for a Suitable Expert Witness or Adviser

Guidelines to Experts

The Report on the Marketing sub-committee which appeared in the Autumn/Winter 2004 Newsletter mentioned that we were trying to identify topical issues relevant to expert witnesses, on which we could produce informative position papers. The first of these has now been approved by the Governors and covers the critical subject of the expert witness/instructing solicitor relationship

Introduction

Enquiries from solicitors may come by letter, by fax, by e-mail or by telephone. Most enquiries come by telephone

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in the first instance. It is essential, therefore, that the expert looking for new work is well prepared, especially when the initial contact is by telephone. There are many matters which need discussing thoroughly to avoid problems later.

The size and quality of the solicitors' firms who may approach you will vary from the relatively small firm away from the big cities to the very large firms in London who operate internationally. Large firms of solicitors in the City have their own litigation departments with very experienced lawyers engaging in litigation regularly. Many smaller firms in the provinces will only occasionally be handling a dispute where your expertise is required.

The approach of solicitors to appointing an expert varies. Sometimes the initial enquiry about your services will come from the partner involved; sometimes

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from his or her colleague assistant; and sometimes from a trainee solicitor whose lack of experience will sometimes be quite evident.

Solicitors are not always clear on the precise expertise they need. This needs to be established early and guidance provided. There are hundreds of different types of expert: the Sweet & Maxwell Directory, which at one time was endorsed by the Law Society, lists about 1,500 different expert classifications. Other matters where some solicitors lack experience include the appointment and management of Single Joint Experts (SJE). The expert should be ready to provide guidance on this and other issues in a constructive and tactful manner.

Ideally, solicitors should consider the appointment of an expert at the very outset of a dispute so that they get the pleadings right. Also, experts can guide them on whom to sue because in certain disciplines several parties could be involved.

It is essential to demonstrate an air of confidence when contacted by a solicitor. He may not know you but your contribution to the success of his case could be substantial. Of course, the more cases you do the

greater will be your self-assurance. However, your state of well-preparedness when he telephones you is a start. You should fully understand the difference between acting as an adviser and providing a Civil Procedure Rules (CPR) compliant report to the court; be familiar with the Civil Procedure Rules, especially Part 35; the Codes of Conduct put out by the Expert Witness Institute and the Academy of Experts; and the potential minefield of problems if you are instructed as a Single Joint Expert. In particular, some experts need to be mindful of pre-action protocols.

The Civil Procedure Rules apply only in England and Wales at present. Experts need to be aware of the different legal systems that apply in Scotland, Northern Ireland, the Isle of Man and the Channel Islands. Similarly, experts are often required in the Republic of Ireland where the system is based on English Law but practice differs from England.

Questions to ask, discuss and reach agreement in principle

1. Name and Status of Solicitor(s)

In many cases you will deal with one partner from start to finish of a case. In the larger firms you may be contacted initially by a trainee solicitor, an assistant solicitor or a Legal Executive before being involved with the partner running the case. Additionally, you may find that another more senior partner is carrying out a watching brief on the case who may occasionally wish to speak to you directly.

2. Claimant or Defendant?

Which side is your instructing solicitor on?

3. Legally Aided Case?

4. Precise nature of the dispute

This needs careful probing to ensure that the subject-matter of the dispute is within your expertise.

5. Who are the claimants?

Any conflict of interest?

6. Who are the defendants?

Any conflict of interest?

7. What is required?

Full report to the court or a letter of advice? A full report to the court, CPR compliant, will take as long as you decide is necessary to do justice to the issues and not compromise your own professional

solicitors want this to be thorough because, on the strength of your advice, may depend subsequent steps on the road to litigation

reputation. On the other hand, care needs to be exercised on a request for a letter of advice. Some solicitors will talk about “advice” or a “preliminary view”. Generally, solicitors want this to be thorough because, on the strength of your advice, may depend subsequent steps on the road to litigation. But make sure that your solicitor has no grounds for complaining about your charges for initial advice.

The solicitor may indicate that he wants advice first with the possibility of a report later. There are some who believe that experts should accept an assignment to do a letter of advice or a full report but not both. Individual experts will need to decide this for themselves. The problem is that even after doing a full report in the first instance solicitors sometimes later will want an expert to give some advice on a particular point wide of the full report.

Other points to discuss and gain agreement on include:

- a) Is a site visit necessary? Are the costs (professional and travelling time) fully appreciated?
- b) Scientific experiments necessary?
- c) An audit required?
- d) Research necessary?
- e) Are pre-action protocols involved?

8. Has the brief been established?

If you get the assignment, remind him - especially if they are provincial solicitors - that you will be expecting a clear brief in writing as to the precise areas of focus for your letter/advice. (You will get this as a matter of standard practice with leading nation-wide solicitors or those in the City).

Unfortunately, there are still some solicitors who attempt to instruct you by sending a range of documents with the simple injunction “we look forward to your report”. A solicitor can reasonably invite you to provide a wide-ranging appraisal of all the issues in a case but clarity in what an expert is expected to do is vital. Try and secure a brief which asks one or more specific questions.

9. What are the deadlines?

For a full report to the court obtain a copy of Court Order

With tighter case management by the courts since CPR were introduced various deadlines will be set in the Court Order. Ascertain those deadlines.

You are entitled to see a copy. Do not be surprised if it was made weeks before you are instructed even though the court authorised the appointment of experts.

The Order will encompass:

- a) Deadline for delivery of full report
- b) Trial Date
- c) Meetings of Experts

For a letter of advice

The deadline for this is entirely a matter to be agreed between the expert and the solicitor

10. Party-appointed expert or Single Joint Expert (SJE)?

Many solicitors do not fully appreciate all the implications of the appointment of a SJE because they have had little or no experience of having to use one. Apart from your over-riding duty to the court you have duties to two firms of solicitors. You must do the following:

- Ensure that you have a clear brief, agreed in writing by both firms of solicitors.
- Get both firms, separately, to confirm, in writing, that they accept your Terms of Appointment for acting as a SJE, your fee scale AND that they will be jointly and severally liable for your fees. Although this is expressly provided for in the CPR, experience has shown that this is an essential precautionary reminder.
- Confirm to both firms that everything you do will be copied to both firms and that the substance of any telephone calls with one will be conveyed to the other.

11. How many inches thick is the file(s) of papers?

Important when considering “reading time”

Documents sometimes arrive not in chronological order and with illegible photo-copies. It is worth, diplomatically, enquiring about both quantity and quality of the documentation.

12. (If necessary) Provide guidance on what documents you would expect to see.

Follow this up in writing.

13. Obtain clear understanding of your terms of appointment and your fees.

You will be confirming in writing, of course, if the

solicitor wants to appoint you but make it clear that you will be asking him to confirm in writing that he will be responsible for your fees and that they will be paid on presentation of your invoice (usually on completion of the report/letter as a first stage).

Although by the terms of the Law Society Guide to the Professional Code of Conduct of Solicitors (Principle 20.01) they are required to pay experts even before they get paid by their client some flexibility is necessary especially in large cases where you are acting for very large organisations, e.g. insurers, who are frequently in the courts as defendants. These organisations tend to have monthly or quarterly accounting arrangements with the solicitors they instruct.

Apart from having your CV on computer to send quickly to interested solicitors it is also useful to have your fee scales available on computer for attaching to an e-mail. Some experts charge the same hourly rate for all their work. Some have different scales for different types of work. The scale should encompass, hourly rates, daily rates for court attendance, travelling time rates and cancellation charges.

Very occasionally, one or two solicitors - mainly in the City - will attempt to fix the basis of your appointment on their terms. Experts should decline to work on this basis. Professional expert bodies like the Expert Witness Institute have

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comprehensive, well developed and tested Model Terms which all experts are strongly recommended to use on all occasions (both for full reports and letters of advice).

It has been known for solicitors to refuse to accept responsibility for the expert's fees. This is a wholly unacceptable basis on which to work for a solicitor and is contrary to the Law Society Code.

14. Ask for the solicitor's e-mail address.

Letters continue to form a large part of the communication process of lawyers but much of the day-to-day contact with them may be done by e-mail. He may want your CV and fee scale immediately.

Throughout this document:

- a) Words importing the singular include the plural and vice-versa where the context so requires
- b) Words importing the masculine also include the feminine where the context so requires

15. Obtain the solicitor's direct line phone number. His mobile number could be useful too.

16. Try and avoid fixed-fee cases

It always takes longer than you think. This tends to arise more with letters of advice. At the outset of a case when a solicitor is not sure whether there is viable case at all there will be understandable concerns by him and his client about

In your own interest, reserve the right to go back to him if after closer examination of the documents in the case it is clear that there is much more work than you were led to believe initially.

costs. It is not unreasonable for the solicitor to want to know what sort of ball park your bill will be in. It is vital to talk this through fully. In your own interest, reserve the right to go back to him if after closer examination of the documents in the case it is clear that there is much more work than you were led to believe initially.

17. Introductory Source?

Some experts derive much work from the same solicitors; others get sporadic work from a wide range of sources. To reduce the risk of "feast and famine" experts should monitor their sources of work by asking solicitors how they became aware of them. This enables you to monitor your advertisements, improve your website and generally keep under review your most effective exposure thus enabling you to maintain a pro-active marketing role. No one owes you a living.

18. The Expert's Office Management

Most experts use a computer these days for word processing and spreadsheet records of fees, business expenses and other data to run their practice. However, some experts, in addition, find it helpful to use an operational summary sheet on the top of their general correspondence file with the solicitor which pulls together all the essential information about a case - names of the parties, solicitor's details, names of Counsel, trial dates and other deadlines like experts' meetings. All this information can be useful to have to hand in one place.

Experts must create and keep up-to-date a Time Sheet which records briefly the type of work they carry out on a case on a daily basis with associated timings.

Negligence of medical experts

Participation in a recent medico-legal exchange left *M C Bishop*, a consultant urological surgeon, thoroughly dissatisfied with the outcome. Questions of negligence and causation were not debated and the decision was not based on evidence.

Medical negligence absorbs victims – patients and doctors – and disgorges them years later, often damaged and disgruntled, while its functionaries benefit. Despite the move towards closer regulation of clinical practice, medical negligence remains firmly in the dark ages that existed before the Kennedy report and the Bristol debacle. Scant interest has been shown in it by our governing bodies, the Royal Colleges, the General Medical Council, or organisations involved in patients' safety.

The central players are the expert witnesses. The public assumes that they are in the forefront of their specialty, giving up-to-date, balanced opinions that are based on their own practice — honed by continuing professional development — and a detailed knowledge of the literature on their subject, to which they are major contributors. They are also supposed to be unbiased.

In a number of well publicised recent criminal cases, experts have been challenged on the factual quality of their evidence and sometimes on an *idée fixe*, which may amount to an obsession, on which

Medical negligence remains firmly in the dark ages that existed before the Kennedy report and the Bristol debacle

their eminence may have become established. Are these notorious cases the tip of an iceberg of unsatisfactory professional activity?

Most medical negligence work is handled in camera between the medical experts, the defence organisations, the NHS Litigation Authority, and a body of solicitors

of varying expertise in the subspecialty. The litigant's case can be established at the outset only on the opinion of a medical expert. Therefore the objective is likely to be damage limitation and compromise rather than vigorous defence through a strong intellectual argument.

This is understandable and even laudable when considerable expense can be expected in the uncertain process of judgment in court. Unfortunately court procedure provides the only opportunity for the experts to be challenged, and then only if a penetrating cross-examination can be undertaken by a barrister who has some familiarity with complex medical issues and is prepared to put aside his defence for the opinion of a professional colleague.

However, most cases never come to court and the data are therefore unavailable for analysis. It is not surprising that there is little consistency in the settlement of similar mishaps, sometimes even dealt with by the same medico-legal

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team, but it is not in anyone's interest to use this knowledge to shorten the legal process.

Medical experts may be offered a case for comment by solicitors for a variety of reasons other than their perceived expertise. These reasons include a reputation for prompt delivery of reports, familiarity with the legal process, and a good bearing in court. The experts may be selected from a register whose membership signifies nothing other than the ability to pay the annual premium.

The quality of expert reports varies greatly. Events may be minutely chronicled, with little effort at critical analysis. Some experts may

not be at all familiar with majority opinion, particularly if they are retired or inactive. Quoted source material often amounts to a page or two from a very ancient textbook. This seems to be acceptable in the legal process but expert witnesses would not dare to offer such inadequate references to support a clinical presentation to their medical colleagues.

The terms 'negligence', 'breach of duty', and even 'causation' are arcane, legalistic and pejorative. The distinction between probability and possibility is often ludicrous but still determines what is reasonable and what, on the other hand, is culpable.

Lawyers cannot be expected to remain informed on who is an expert when new techniques within the subspecialty develop quickly. However, they should set greater store on the quality of a report and its sources rather than quantity and presentation. The experts should surely exude the wholesome smell of the clinic rather than the conservative mustiness of the courtroom.

Governance, audit, appraisal, and peer review should penetrate this area of medical endeavour. The process of medical negligence should be transparent, with all agreed settlements and their discussion published in the medical and legal literature. A nationally managed register of coded incidents and their outcome would be a great help in defence of claims and in the broader aim of learning from error.

It is unlikely that initiatives such as no-fault compensation will replace the adversarial process that is based on the reports of medical experts working ostensibly for the court but in reality from a partisan standpoint. It is increasingly important that medical experts have real authority and expertise if they are to retain the respect of their colleagues.

Correspondence

Conflict of interests

Alexander MacLachlan, reporting on 'Is there a need for medico-legal reporting organisations?' (Newsletter, autumn/winter 2004/04), says that, 'We believe that utilising a claimant's own GP ... throws up insuperable conflicts of interests.' I would add that utilising a claimant's own dentist is a thousand times worse.

GPs do not have much of a pecuniary interest in special damages. It is often quite the reverse. To instruct a claimant's regular dentist, the specials represent a veritable bonanza for the practitioner. An RTA resulting in two root treatments will inevitably be £5000 for implants, quite apart from the interim crowns.

**Edgar Gordon MSc DDS BDS
MGDSRCS FFGDP**

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5 September 2005.

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Case notes

The first case discussed by *Camilla Macpherson* of *Allen & Overy* aroused much interest in the legal world because of the judge's critical comments about witness training. Others deal with single joint experts, seminars for judges, expert shopping, and criticism of reports.

R v Momodou and R v Limani [2005] EWCA Crim 177

Momodou and Limani were imprisoned following their involvement in a disturbance in 2002 at Yarl's Wood Immigration Detention Centre. They appealed on various grounds, one of which was that Group 4, which ran the centre, had arranged witness training for its witnesses with Bond Solon, a well-known witness training organisation. As soon as counsel for the Crown found out that this training had been arranged (which was after it had begun) he advised that it be stopped immediately since, in the context of a criminal trial, such training was wrong and could even amount to contempt. The training programme was stopped and the jury told which of the witnesses had already attended it.

A copy of the case study prepared by Bond Solon for training purposes was also exhibited at the trial. It bore a close similarity to the actual events that were to be tried. Group 4 had, however, given instructions that it should not be used. The course instead involved one-day group sessions in which the theory, practice and procedure of giving evidence were explained (including the layout of the court, cross-examination and handling questions that were not understood) and there was then a practice cross-examination on experiences not connected to the riot.

Both the prosecution and the defence agreed at the trial that the training had been 'wholly inappropriate and improper'. The judge at first instance agreed. Lord Justice Judge, giving the lead judgment at appeal, made the following comment:

'There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of a well-known principle that discussions between witnesses should not take place, and

that statements and proofs of one witness should not be disclosed to any other witness. The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussion or informal conversation.

'The rule reduces, indeed hopefully avoids any possibility that one witness may tailor his evidence in the light of what anyone else has said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying,

There is a dramatic distinction between witness training or coaching, and witness familiarisation

or indeed not quite what is required of him. Where, however, the witness is jointly trained with other witnesses to the same events, the dangers dramatically increase.'

Lord Justice Judge went on to say that pre-trial arrangements to familiarise witnesses with the layout of the court, the sequence of events when the witness is giving evidence, and the different responsibilities of the participants were to be welcomed since they ensured that witnesses did not feel disadvantaged by ignorance of the process.

Nor was it prohibited for there to be training of expert and similar witnesses in, for example, the technique of giving comprehensive evidence of a specialist kind to a jury, both during evidence-in-chief and in cross-examination, and developing the ability to resist pressure to go further in evidence than matters covered by the witnesses' specific expertise. However, training of this kind should not be arranged in the context of any forthcoming trial.

By way of further guidance he said that where such familiarisation programmes are run by an agency other than the Witness Service, then the CPS should be informed in advance of any proposals for such familiarisation and should be able to comment on them. The process should also be supervised by a solicitor or barrister not involved in the case and records should be kept

of those present and what programme was followed.

Although ultimately the appeals were not successful because the issue of training had come to light prior to the original conviction, this case is significant for all lawyers and all witnesses involved in criminal proceedings.

Marston v Lewis [2004] WL 2945211 (4 November 2004)

The judge had, in an earlier hearing, decided in favour of the claimant on liability and, in consequence of this decision, directed that a single joint expert be appointed to report on the nature and structure of the defendant's

The defendant ... applied for permission to call a second expert, [who] reached quite a different conclusion

businesses ahead of the quantum hearing. The defendant was unhappy with the report, specifically the valuation evidence, and applied for permission to call a second expert. The second expert reached quite different conclusions on valuation.

It was argued for the defendant that 'the difference in valuation is so substantial that it would be unfair and unsatisfactory for the court to have to proceed on the basis of only the joint expert', even allowing for the possibility of cross-examining the joint expert at the quantum hearing and production to him of further documents. It was argued for the claimant that having two experts at the hearing would delay the conclusion of this matter.

The judge concluded, in part because he felt it would still be possible to hear the case in the time allotted for it, that the second expert could be called. He said: 'While I accept the proposition that in principle a single joint expert ought to be sufficient in many cases, I am satisfied ... that this is a case where, having regard to the size of the discrepancy and the size of the sums overall as regards valuation, it would be unsatisfactory to exclude the further expert evidence ... given that ... it should be possible to preserve the trial date.'

It is worth noting that even though the quantum hearing was only a week away when this decision was made, the judge still asked that the experts make efforts to contact each other with a view to narrowing the differences between them and producing a joint

statement of those matters that had been agreed and those that had not.

Kirin-Amgen Inc and others v Hoechst Marion Roussel Ltd and others [2004] UKHL 46

This case began as a claim by Amgen for patent infringement and, by a series of appeals from both sides, came to be heard by the House of Lords.

Amgen, a US pharmaceutical company, was the proprietor of a patent relating to production of erythropoietin (known as EPO) by recombinant DNA technology. EPO is used in the treatment of anaemia. A US-based company, TKT, developed a way of making EPO by a process called gene activation and the resultant product was referred to as GA-EPO.

Amgen's claims were for (1) a DNA sequence for use in securing the expression of EPO in a host cell, (2) EPO which was the product of the expression of an exogenous DNA sequence, and (3) EPO which was the product of the expression in a host cell of a DNA sequence according to (1).

Without going into further detail of the facts or background (except to note that in the event Amgen's claim failed) it will already be clear from this description of the case that the technology

A professor of biochemistry at Oxford University gave a series of seminars to the judges before the appeal

behind it was complex. Lord Hoffman therefore suggested at a preliminary hearing that the House of Lords call for additional assistance.

As a result, Michael Yudkin, a professor of biochemistry at Oxford University, gave a series of seminars to the judges before the appeal on the relevant aspects of recombinant DNA technology. His work came in for considerable praise. Lord Hope of Craighead said:

'The work which Professor Yudkin did by means of these carefully prepared seminars enabled all those involved to concentrate on the issues of law in the appeal without having to spend a good deal of extra time in the course of the hearing on learning about the technology. This had the result of shortening the length of time that it was necessary to devote to the hearing by several days ... I suggest that it is a course which might usefully be adopted in the future in cases of this kind, where the technology is complex and un-

disputed and the parties are willing to consent to it.'

Lord Hoffman, giving the lead judgment, noted that he would also warmly associate himself with Lord Hope's tribute to Professor Yudkin.

It will be interesting to see if this approach is adopted in other cases but it should be noted that its application will generally be limited. It was suitable in this case only because there was no dispute as to the technology, therefore Professor Yudkin's seminars were simply by way of background.

Nicos Varnavas Hajigeorgiou v Vassos Michael Vasiliou [2005] EWCS Civ 236

The claimant had brought a successful claim against the defendant for breach of covenant of quiet enjoyment and it was left to the court to decide the amount of damages to be awarded. The defendant sought permission to appoint an expert to give evidence on various relevant issues including the value of a restaurant which was the subject of the proceedings and its possible trading profits had there not been a breach of the relevant covenant. The defendant went so far as to identify a particular expert (who we shall call expert A) who could deal with these issues. An order was made allowing both parties to 'instruct one expert each in the specialism of restaurant valuation and profitability'.

Expert A went on to carry out an inspection of the restaurant premises, but shortly thereafter was replaced by another expert (let us call him expert B) who carried out another inspection (to which the claimant did not object). The claimant argued that the defendant should not be able to adduce the evidence of expert B without giving an explanation for the substitution, and furthermore the claimant was entitled to see any report produced by expert A.

At first instance the claimant succeeded. The defendant appealed, arguing that the order simply identified a field of expertise and not a specified expert, and therefore there was no requirement to use expert A or to apply to the court for permission to instruct expert B. The claimant argued that once expert A had been instructed as per the terms of the order, the permission of the court was required.

The Court of Appeal decided in favour of the defendant on the grounds that no specific expert had been named

in the order, and in any event (and despite the wording of the directions order) the court could not order a party to *instruct* an expert; it could merely give permission to a party to call and put in evidence from an expert.

Having made this decision, the Court of Appeal need not have considered the second part of the claimant's case, which

The court could not order a party to instruct an expert; it could merely give permission to a party to call and put in evidence from an expert

was whether, where permission was required to change experts, a condition of that permission should be that the report of the first expert be disclosed. Nevertheless they did so, on the grounds that it was a matter of general importance.

Dyson LJ, giving the lead judgment, reiterated the decision in *Beck v Ministry of Defence* (reported in EWI Newsletter, autumn/winter 2003) that a court could indeed waive privilege and order the report of a witness previously appointed and then replaced to be disclosed.

He summarised the position as follows: 'If a party needs the permission of the court to rely on expert witness A in place of expert witness B, the court has the power to give permission on condition that A's report is disclosed to the other party.'

He went on to say that where, as in this case, the first expert had not produced a final report, then the court's permission could be conditional on that interim report being disclosed, particularly where no reason had been given for the change in experts and where such a report contained the substance of the opinion.

Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd and others [2004] EWHC 44

I will not go into the detail of this long and complex case. Suffice to say that Days Medical Aids Ltd (DMA) was seeking damages from Pihsiang for wrongful repudiation of an exclusive distributor agreement and Pihsiang also had a counterclaim for damages against DMA. Experts in several fields were involved and, in particular, in assessing the alleged loss and damage, forensic accountants.

Each forensic accountancy expert produced three reports, the third of which in each case was produced only when the trial was under way. One of these experts came in for considerable criticism in the judgment. Justice Langley started by noting a 'very marked difference in the quality of the expert accounting evidence'.

While DMA's expert was praised for his 'thoroughly professional and objective' reports, particularly the third, which was prepared 'under very severe time pressure', Pihsiang's expert was criticised for appearing 'in some important respects to have as his target sustaining Pihsiang's case with whatever arguments he could muster'. The judge added, 'nor can his changes of view between his reports be explained as he sought to do on the basis of changes in the information available'.

This judgment is a useful reminder of how important it is for expert witnesses to be objective. It is also clear that the judge did not take kindly to the introduction of a third expert report so late in proceedings, particularly where there was no convincing explanation as to why the view of Pihsiang's expert had changed.

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*19 May 2005, 17.00–19.30
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