



Summer 2006

EXPERT WITNESS INSTITUTE NEWSLETTER[©]

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Meadow and the General Medical Council: important implications for expert witnesses

Chairman of the EWI, James Badenoch QC comments on the recent judgment of Mr Justice Collins

The judgment of Mr Justice Collins in the appeal of Professor Sir Roy Meadow will have come as a relief to expert witnesses generally and not just to paediatricians; (Meadow and General Medical Council [2006] EWHC 146 (Admin)-17 February 2006). The Fitness to Practise Panel of the GMC [the "FPP"] had decided, following a disciplinary hearing in June and July 2005, that Professor Meadow, when an expert witness at the trial of Mrs Sally Clark, had given statistical evidence which was seriously flawed in a number of respects, and that despite his having done so in good faith he was guilty of Serious Professional Misconduct. The penalty was erasure of his name from the Medical Register.

That FPP decision had raised very grave concerns in the minds of expert witnesses and legal commentators - concerns which were shared by many of the governors of the EWI. There was already evidence of an orchestrated campaign against paediatricians, which Professor Sir Alan Craft, the President of the Royal College of Paediatrics and Child Health, said: "*has had an absolutely enormous effect on paediatricians*" and made them "*frightened of getting involved in child protection work*". The possibility that a challenged, rejected, mistaken, or unpopular opinion (regardless of its having been given in good faith) might lead to discipline and even erasure appears to be deterring experts from providing reports and giving evidence to the court.

To some, including Collins J. himself, the implications of the decision appeared more fundamental than the frightening of some experts, so much as to threaten the wider interests of justice. As Dame Elizabeth Butler-Sloss said when she was President of the Family Division: "*Expert medical witnesses are a crucial resource. Without them we [the judges] could not do our job*" (Journal of the Royal Society of Medicine vol 95 September 2002). If experts declined instruction for fear of discipline and sanctions affecting their careers how was the court to deal with cases justly? The judge held that serious damage to the administration of justice had already been done by the FPP's decision, damage which would continue "*unless it is made clear that such proceedings need not be feared by the expert witnesses.*"

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The judge nevertheless accepted that the FPP was entitled to consider the conduct of a doctor which was not directly connected with his practice but which could amount to professional misconduct sufficient to merit disciplinary action. Bad faith was not in his judgement a prerequisite of serious misconduct, but negligence of a high order was. Here Professor Meadow had taken his statistics from authoritative published material, and was in no respect challenged or cross-examined about their interpretation or validity by the defence. The trial judge had given a specific direction to the jury: "*we do not convict on statistics*", and the ground for the quashing of the conviction at the second appeal was the fact that important and relevant microbiological evidence had not been disclosed as it should have been before the trial began, by the pathologist in possession of that material.

Collins J. concluded that that FPP had judged Professor Meadow's mistake too harshly. He had never put himself forward as a statistician; he had not concealed the source of the statistics; he had acted in good faith, and he had rightly expected that the evidence would, if there were a perception of error, be challenged and tested by the adversarial process, so that mistakes, if any, would be exposed. That this did not happen was no reflection on Professor Meadow. He allowed the appeal against the conviction of Serious Professional Misconduct and the penalty of erasure, holding that a determination that the Professor's conduct was fundamentally incompatible with what was expected by the public approached "the irrational".

The judge went further. He reviewed the question of whether the GMC had any standing in the matter, and whether the historical immunity from suit of a witness in respect of the evidence given to a court of law should apply to the proceedings of a professional regulatory body. He set out the long history of the witness immunity rule, extending back over 300 years to Lord Mansfield's dictum that: "*neither party, witness, counsel jury or judge can be put to answer, orally or criminally, for words spoken in office*" (*R v Skinner* (1772) Lofft 54)

In *Staunton v Callaghan* [2002] 1 QB 75, Otton LJ said; "*Immunity is not granted primarily for the benefit of the individuals who seek it. They themselves are the beneficiaries of the overarching public interest which can be expressed as the need to ensure that the administration of justice is not impeded*". The rationale for such a principle was that the expert witness, who owes a duty to the court which overrides the duty to the client, should not be vulnerable to claims from disgruntled clients, the possible facing of which might inhibit the expert from giving truly impartial opinion evidence. Further support came from Lord Hutton who in *Darker v Chief Constable of the West Midlands*, [2001] 1 AC 435, said: "*If this protection were not given persons required to give evidence in other cases might be deterred from doing so by the fear of an action for defamation*".

Although these authorities were concerned with immunity from being sued in a civil court, the judge decided that the rationale behind the immunity rule should apply equally to disciplinary proceedings. He emphasised that the effect of his ruling was not that practitioners who fell below the standards set out in the judgment of Cresswell J. in the *Ikarian Reefer*, [1993] 2 Lloyd's Rep 68, or who failed to comply with their obligations under the Civil Procedure Rules Part 35 and its Practice Direction, should be allowed to practise uncontrolled. However it was the judge, who had managerial control of the court proceedings, who was best placed to refer an errant expert witness to the relevant regulatory body. He could do so if satisfied that the expert's conduct fell so far below what was expected that it justified

disciplinary action, but evidence given honestly and in good faith would not normally warrant such a referral.

It had been argued that because barristers and solicitors have lost their historic immunity from suit in respect of their role in court, the immunity of witnesses should no longer apply. Of this Collins J. was not convinced, not least because expert witnesses often became involved in a case fortuitously, for example because they happened to be the treating doctor. Nevertheless the precise basis of the expert's immunity would need to be established on a case by case basis, and a blanket immunity was not appropriate. What was important, in his judgement, was recognition that expert witnesses must give their evidence honestly and in good faith, and must not deliberately mislead the court. Those who did not need these standards could not expect protection.

This extension of the expert witness' immunity from suit into immunity (provided those standards are met) from professional discipline has caused some critical comment, as has the notion that the trial judge is the best or right arbiter of professional standards (of which the professional regulatory bodies may know better and understand more). The GMC, while accepting the decision in relation to Professor Sir Roy Meadow personally (in the sense that they will not seek to restore against him a finding of Serious Professional Misconduct or the penalty of erasure), has appealed the judgment, and has thus given the opportunity for the Court Of Appeal to review the whole question of the rationale and justification for immunity of witnesses from suit in general, and of expert witnesses from disciplinary process in particular. The appeal is due to be heard in July this year. As an Institute dedicated to the interests of expert witnesses we shall be closely monitoring the progress of the appeal, and will report in due course on its outcome.

Dates for your diary

EWI Events (in London unless specified)

08 June 2006	Seminar: Experts' Meetings
12 June 2006	10 th Anniversary Celebration Dinner (Manchester)
12 June 2006	Course: Basic Law for Expert Witnesses (Manchester)
26 June 2006	10 th Anniversary Celebration Dinner (London)
06 July 2006	Seminar: How to instruct experts
04 Sept 2006	Course: Basic Law for Expert Witnesses
10 Nov 2006	10 th Anniversary Conference: Communicating your expertise

*We also intend to run some seminars outside of London
Please contact the EWI office for details or booking forms for any of the events above

News and Views.....

EWI successfully completes move to new office

As previously mentioned, the Institute's lease at Africa House ran out in February. The lengthy search for new premises was beset with problems and disappointments, but eventually in March this year the move to new offices was accomplished. Much credit for this successful outcome must go to the Institute's staff who are already appreciating the much improved environment offered by 7 Warwick Court. The Governors decided that Vicky Bartlett's title should be changed to reflect her increased responsibilities and she is now our Office Manager. However, another change that was perhaps not so welcome was that our Membership Secretary, Anita Abena-Amoako, decided to seek new challenges elsewhere and has left EWI to join the FSA. We wish her every success in her new role. She has been replaced by Grace Bonnici who is already settling in well.

Criminal Procedure Rules

In the previous issue of the Newsletter we mentioned that EWI had been invited to comment on the draft of Part 33, Expert Evidence, of the new Criminal Procedure Rules. The Governors decided that any response should be as representative as possible of the views of the members and accordingly they were invited to submit their comments and suggestions. An excellent response produced some very helpful contributions. As part of our new spirit of co-operation with the Academy of Experts we worked together with them and on the final form of the submissions, which went forward in our joint names. While the final version of Part 33 is still awaited, the joint paper was very well received, and it appears that our suggestions have been acted upon.

Professor Sir Roy Meadow

Since the last issue of the Newsletter, Professor Sir Roy Meadow has been successful in his appeal to the High Court. The implications of the judgment of Mr Justice Collins are covered in an article above by EWI chairman, James Badenoch QC. While many members may breathe a sigh of relief that the issues raised by Sir Roy's disciplining by the GMC have been dealt with so robustly by the judge, the matter is not yet totally resolved. Whilst the GMC have accepted the decision as regards the penalty imposed on Sir Roy, they are appealing the judgment in respect of the extension of the expert's immunity from suit so that it applies to disciplinary proceedings by regulatory bodies. The Governors of EWI will be watching this development closely. However, nothing in this alters the responsibility of the expert witness to behave professionally and to comply fully with the requirements of the court.

So you want to be an expert witness?

This issue of the Newsletter contains two items contributed by Jenny Cotton and Steve Redhead.

These were conceived as position papers which the Institute might endorse, in similar fashion to the way in which the position paper on handling instructions from solicitors (Spring 2005 Issue) was approved. The two papers look at the position of an expert who has the opportunity to undertake expert witness work and wants to know firstly what is involved and how to go about setting up an expert witness practice, and, second, having established a practice, how it should be developed and marketed.

At a time when many experts are deciding to retire and take life easy, it is critical for the proper administration of justice that the pool of expertise available to assist the court is maintained. It is important that younger experts are encouraged to dip their toe in the water and some practical guidance on what is involved is needed. We hope and intend that the long-standing experienced members of EWI will be happy (notwithstanding Meadow) to provide that encouragement to their younger colleagues. Specifically, at this time, any comments or suggestions you may have for improving the two papers before they are put before the Governors for approval will be very welcome.

The role of the expert witness I

Just as expert witnesses have come to terms with the overriding duty to the court there comes a suggestion that this may be "a bridge too far". Giving the keynote address at the Arbrix Open Conference on Rent Review Arbitrations, Lord Justice Neuberger challenged the received wisdom that expert witnesses must be independent and unbiased. He suggested that it was unrealistic to expect experts, who have emotional and financial ties to their clients, to present unbiased evidence. It is relevant to note that he was addressing an audience of surveyors who initially act as advocates on behalf of their clients before being instructed to act as witnesses, so they could have a conflict of interest. He suggested that "we might as well run with reality rather than try to achieve the impossible".

He accepted that this would have implications for the Civil Procedure Rules but his approach was to say: "There is a strong case for saying that the CPR will be staying and we will be better off overhauling them". Even non-surveyor expert witnesses may have some sympathy with Sir David's views. After all, a party instructed expert may spend considerable time working with the lawyers, assisting them with the compilation of their case, so that he or she will naturally feel part of the team. It is difficult to put this completely to one side when it comes to assisting the court. Perhaps, if any amendment of CPR be considered, as suggested by Lord Justice Neuberger, this might be the way to go.

The role of the expert witness II

A frequently asked question of the EWI helpline is how someone who is familiar with producing reports in civil litigation should go about writing a report in a criminal case.

We hope that the Criminal Procedure Rules will eventually produce some guidance, but EWI Governor Dame Linda Dobbs has already drawn attention to the increasing convergence of civil and criminal procedure. This means that an expert witness preparing a report for the criminal court who follows the practice acceptable to the civil courts is likely to be viewed favourably by the judge. A recent judgment of the Court of Appeal (Criminal Division) has given added strength to this view. The case of R v Thomas Bowman [2006] EWCA Crim 417 is reported more fully elsewhere. It is significant that Lord Justice Gage felt it appropriate to refer to a civil case, namely The Ikarian Reefer, as regards the matters to be included in the expert's report and then to add seven additional inclusions which he felt necessary.

As a postscript, many members will endorse the final sentence of his judgment: "We should add that it may be that some of the difficulties experienced by the experts were caused by late supply to them of information from whatever source".

Brian Thompson

Marketing Update

David Asker-Browne reports

The focus of the Membership and PR Committee is firmly on increasing the number of members, and the marketing sub-committee has been making a number of suggestions. We have made a number of recommendations to the Governors via the Membership & PR Committee. The most visible recommendation involves our corporate appearance. We have suggested changes to our printed material so that it has a cohesive design feel, complete with a simpler strap line – "Impartial, Independent Expertise for Justice".

We have recommended that the EWI should have position papers and Portfolio holders, so that we are not caught napping when the media want a response on something. We have two ready by Jenny Cotton and Stephen Redhead which are included in this issue of the newsletter. We are looking for another on expert's immunity following the Meadow case (see also the article by James Badenoch on this issue). We could do with one on Accreditation of Experts (any volunteers to write it?). We also need a mechanism for peering over the horizon to see what is coming up that we might wish to have an opinion on. This leads us to considering setting up a communications team, who would be trained to liaise with the media. Recommendations have been made.

We have recognised the need to reach out to other professions that act as experts. We have sought permission to invite movers and shakers from other Institutes to the imminent 10th Anniversary dinners.

Lastly, EWI members can help by introducing a new member. This is a quick way to add to our numbers and income. Who do you know that would benefit from EWI membership? Sound them out. Bring them to an EWI event. Encourage them to apply.

EWI's ANNUAL CONFERENCE

ON

10th NOVEMBER 2006

A GREAT DAY IN STORE

A message from the Chairman

Last year's conference was our biggest and most successful ever, with over 200 delegates and a formidable list of speakers. It was much appreciated and acclaimed. This year's is going to be better still. It is being held in the splendid surroundings of the Institution of Civil Engineers (George St, at the Parliament Square end of Birdcage Walk).

The principal theme is "communicating your expertise", a crucial task for the expert witness, made especially difficult by the total ignorance of specialised subjects which is often and unavoidably displayed by the average judge and juror. The speakers already committed include:

Lord Woolf, who as our Founder Patron is especially glad to join our tenth birthday celebrations, and I have his solemn promise that no other commitment will keep him away this time.

Steve Jones, Professor of Genetics at UCL, famous and prolific author and broadcaster, and supreme communicator of complex science intelligibly, will be sharing his insights with us. Always entertaining, it is a privilege to have him join us.

Anna Ford, the broadcaster, will chair a panel of experienced expert witnesses from diverse fields, and lead them in a question and answer session which will involve you the delegates. She will bring her charm and flair to this new facet of the conference, and means to involve the audience to the full.

Quite soon you will receive full details of the excellent programme we are lining up, and of all the participants. There will not be a great emphasis this year on the law and the judges (fortunate though we were to have such a distinguished lot last year!).

Please be sure to put this date in your diaries, and sign up for the conference when we circulate the complete programme for the day. I hope that we will welcome a really large attendance of our members, but please also that you tell your colleagues and friends about this event, and encourage them to attend as well. It promises to be a great day.

Let's make this another real success for the EWI. I look forward very much to seeing you there.

James Badenoch Q.C.

Correspondence

Sir,

I recently received this short email from a junior barrister in Dublin:

Dear Wendy, I am a lawyer and I intend citing your article in an autism trial. Could you furnish me with a copy of your CV so that I can display to the Court your experience etc.

My query relates to copyright. I understand that an article published on the internet does not have copyright protection as it has been *published to the internet*. However, in this instance my article was extracted from the website of the original publishers and posted by the National Autistic Society onto their own website. The NAS did tell me that they had posted the article and they asked me whether I had any changes to make. I only included a reference to the original publisher of the article; I am very happy for the article to be there.

What, however, would the copyright situation be if a third party posted my work to their website without my knowledge or permission?

Can EWI members help me with the possibility and legalities of wording a 'restrictions' statement to be included at the end of any known postings, e.g. that the article can only be cited as a whole and with my permission?

Yours sincerely

Wendy Barbara Fidler

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Forensic Education Consultant - Education Law,
Education Negligence & Special Educational Needs*

We have asked a copyright expert about this letter and have been advised that the broad position is as follows:

1. Ownership of copyright is not lost by publication on the internet, whether the publication is first made on the internet or by reproduction from some earlier material such as a printed journal.
2. Normally therefore people are not free to copy material on the internet
3. This will be subject to the general exceptions that fair use for particular purposes (e.g. criticism or review or reporting public events) is permitted provided there is a sufficient acknowledgement of the original source
4. Exceptionally the circumstances of publication will give rise to an inference that permission to copy has been given. Merely putting on the internet it not enough for this.
5. Any such "implied licence" can be completely headed off by an express copyright warning. Something like the following would do:

© John Doe, 2006. Neither the whole nor any part of this article may be reproduced in any manner without the licence of the author. For permission contact the author at JohnDoe@hotmail.com

10TH ANNIVERSARY DINNERS

COME AND JOIN US FOR AN EVENING OF ENJOYMENT AND CELEBRATION

We are proud to record that the Expert Witness Institute is ten years old this year, having been launched in November 1996. To celebrate this significant anniversary in style we are holding **two dinners at special venues, one in Manchester and one in London**, to suit our geographically widespread membership.

Dinner at The Lowry

Pier 8, Salford Quays, Manchester M50 3AZ

Date: 12 June 2006 [Inv Ref: EW/ACD/120606]

Price: £55.00 Time: 18:30 hours

This venue is chosen principally with our northern membership in mind, but all are welcome. The Lowry provides a magnificent waterside location at the heart of the redeveloped Salford Quays in Greater Manchester. The dinner price includes pre-dinner drinks and a 3-course meal with wine included. We are delighted that **Mr Justice Peter Smith** (High Court Judge of "The Da Vinci Code" fame, a Mancunian, a football fan and an expert on naval history) will be our guest speaker at this dinner. Come and enjoy meeting and hearing him.

Dinner at The Royal College of Physicians

10 St Andrews Place, Regent's Park, London NW1 4LE

Date: 26 June 2006 [Inv Ref: EW/ACD/260606]

Price: £70.00 Time: 18:30 hours

The London dinner is being held at the Royal College of Physicians, a remarkable modern building which overlooks Regent's Park, and was designed by the renowned architect Sir Dennis Lasdun. The price includes a pre-dinner cocktail reception in the Lower Hall, and a four-course meal in the Platt Room with wine included. Our guest speaker will be recently retired EWI Governor, **The Rt Hon Sir Robin Jacob**, Lord Justice of Appeal. He is one of our most eminent judges, and one of the most interesting and entertaining. His practice at the bar was in Patents, Trademarks, Copyright and Designs, and his insight into the role of expert witnesses is second to none. It will be a privilege to hear him.

Both are black tie events, and promise not just a very good dinner, but also a thoroughly enjoyable evening in interesting surroundings, with top quality speakers. A warm invitation is extended to all our members, and to their partners and guests. Make plans now to get to one or the other occasion (or even both!).

If you have friends or colleagues who are thinking of joining, why not introduce them to the EWI by bringing them to one of these evenings, where they will meet governors and members in a relaxed environment?

We look forward to welcoming as many of you as possible at this double celebration of the Institute's first ten successful years.

**To avoid disappointment book early.
These are very special occasions, and not to be missed!**

Position Paper - Preparing To Start as an Expert Witness

Presented by Jenny Cotton

Business development/ marketing consultant, Academic and Marketing sub-committee member of the Expert Witness Institute.

Initial questions - What is an Expert Witness?

Do I have what it takes?

1. How you answer these two questions will influence your whole approach to this opportunity to apply your specialist expertise. You may know your answers in advance of your first enquiry and Instructions or you may be approached before you have considered them. In either case you will want to give a confident reply and you should be aware that you would be asked to express an opinion on the facts of the case, facts which may be determined by someone else or by your own personal assessment of the details of the case.
2. For some it may be that a colleague is or has been a successful Witness. On the basis of your observation and open discussion, you wish to offer your specialist expertise to the Courts. Alternatively it may be that the Courts have authorised Solicitors to instruct in a particular specialist expertise and they are searching for an appropriate Expert individual. They have found and have approached you.
3. Some specialisms are in more demand than others. Any quick check of a directory of Expert Witnesses will show that there are many medical, accounting and engineering specialists but very few in some other areas, for example, marketing and business development.
4. **Be prepared** In the first case, you know the answers and are suitably prepared. You are likely to have taken the time to make certain checks, done some background reading, perhaps gone on a relevant course or attended a seminar as an observer. You have decided, in advance of any approach, that on the basis of information you have gathered, that you believe that you have what is needed in experience, skills and contacts. This will include the relevant specialist experience and qualifications, an awareness of the needs of the Court and the clients for reviewing, reporting and appearing in Court.
5. You will need to have the capacity to fit into the timetable agreed with the Courts, at the time of receiving and agreeing instructions, as well as the capabilities briefed. You have thought it through and you believe confidently that you can offer a mutual benefit of good service at a reasonable fee. If this is the case, you are ready to start on the Instructions received or to approach marketing yourself as a potential Expert Witness.
6. **Be recognised by others** However it maybe that the Solicitors, at whatever notice, are looking for an individual with the required specialism, the ability to review and write a report, to appear in Court, if required and at their timescale, which is already in place.
7. You receive an enquiry that you had not expected. Your name has been suggested or your organisation has been approached and colleagues have nominated you. Your name may have been selected from a directory of your specialism or over the "grapevine."
8. In these circumstances, you are pleased to be approached but you had no notice and are requested to consider becoming an Expert Witness, perhaps immediately, without necessarily understanding what is required and expected. If this is the case, phone a suitable friend and find out quickly. This friend may be a colleague, who you know to be an Expert Witness or may be an individual within your own Professional Body with Expert Witness responsibilities or may be an individual from your own specialism within the EWI - Expert Witness Institute.
9. You are not necessarily "unready" but you are unprepared and will do well to check up what is required. If you are confident in your specialism, qualified and experienced over time, have the administrative and public speaking experience, the instructing Solicitors are likely to have confidence in you. You would not have been approached or recommended by colleagues unless you were known to be a potentially suitable expert. You can become prepared quickly with the help of experienced mentors and with reference to relevant Codes of Practice and guidelines.
10. **Own specialism competences and experience** These are what the Court believes it lacks and wishes to have provided, to ensure that the case in question is appropriately understood. In providing these in a clear, concise and cost effective manner on time you are fulfilling the Courts' and clients' needs.
11. Checking that it is indeed your own and not another's specialism that is really required is your own responsibility. The importance of asking yourself this question can hardly be over stressed. Be proud of the number of enquiries which you reject as well as those which you accept. List them as part of your own copy of your EW CV. Do not accept Instructions that you believe to be outside your training, knowledge and experience. For example, is a market research expert required to check techniques and method ie the statistics and/or psychological issues? Or is a marketing practitioner required who can check the

appropriateness of the research brief to the marketing issue, check the methodology in outline and concentrate on the impact of the outcome by experience of that type of research applied in a similar manner, especially if in a similar market?

12. **Your own specialism** It is essential to check carefully that your specialism is relevant and that you are up to date on current qualifications, Codes of Practice and sector expectations. For some specialisms this is easier than others. For some forensic skills qualification is by experience eg lip reading. These specific skills acquired by experience are often linked to other skills which are defined by qualification and training. In some cases experience of specialisms in the past is relevant, eg medical issues resulting later in life from maternity and birth complications. Record keeping becomes an important issue. Different specialisms have different timescales recommended. Know what these are and keep relevant records.
13. **Your administration, review and report writing experience** This is likely to have been developed in the context of being a practitioner of your specialism. The reviewing procedures are likely to be similar but the reporting needs for Expert Witness reports are likely to be different. These *new to you* reporting requirements have been subject to change and guidelines are available, as is training. Some solicitors have their own styles and preferences, even to stating that they have a house style. Any conformance with style must not influence the independence of your report. Content is influenced by vocabulary, prominence within the report or any other device which you may find difficult. It must be your report.
14. **Your skills in meetings** Typically where there are reports prepared on behalf of both parties in a case, there will be a need to exchange the reports on the specialism. Witnesses are required to comment on the areas of agreement, disagreement and the extent of differences. There may in addition be a request to comment on specific issues addressed in either report. A joint report, signed by both Witnesses or all if there are several Witnesses, is the required outcome, usually to a stated deadline. It is not unknown for the reports to be written on different sets of Instructions and reading materials supplied. The guidelines for reports indicate that both Instructions and materials reviewed should be listed in appendices. These meetings may be face to face and may be telephone conferences.
15. **Your Court appearance** In accepting instructions for Court reports a willingness and ability to appear is implied. By specialism the likelihood of attendance varies. Many Expert Witnesses have completed numbers of reports, over the years and yet not been required to attend. These cases tend to be where case law

has established a precedent and your report is required to ensure that the claimant's case is within the earlier conditions. It is worth checking at the initial instructions stage if Court attendance is likely and if so to check your own availability.

16. Where a Witness is required to attend Court, case conferences in advance provide preparation in terms of likely content and in Court procedure. These are meetings with the Solicitor and the Counsel. Again a more complete introduction can be read from texts and specific training can be taken in advance. Basic Law for Experts courses are also available.
17. **Expert Witness reviews will impact on your practitioner projects** Given that for many, Instructions are received at relatively short notice, a few days or weeks in some cases, the issue of capacity to provide this service is important. Especially as you develop your Expert Witness role, you will want to fulfil these responsibilities as well as your planned work load, without excessive overtime or stress. Typically expenses reimbursement and fee paying is on a solicitors' timescale, which may be different from your current specialism projects. Check cash flow issues with your accountant. Be sure to confirm verbal terms and agreements in writing.
18. Will your current contacts be influenced by your acceptance of or seeking of this new application of your specialism? For those familiar with the principles, it is most likely to be seen as an acknowledgement of your expertise and should have a positive response.
19. **Expert Witness checklist**
 - a) *Own specialist qualifications, Codes of Practice and relevant experience.*
 - b) *Knowledge of the requirements for an Expert Witness, Codes of Practice, CPR 35/ Practice Direction, Expert's Protocol, a briefing in Basic Law*
 - c) *Review, reporting, administration and presentation skills for meetings and the Courts*
 - d) *Expert Witness colleague/ friend and mentor, Expert Witness Institute for reference, reading, seminars and mentors*
 - e) *Assuming you have some checking to do, given the above, where can you find help? Contact relevant organisations such as the EWI, individuals and friends.*

Continuing and growing as an Expert Witness? Is this sustainable?

Your specialism and practitioner experience have potential applications in parallel with that of being an Expert Witness for the Law Courts. Tribunals, such as a VAT Tribunal, require expert specialist input. For those with negotiating and mediation skills there are further applications. For those with language skills and knowledge of other markets and legal systems, work outside the UK may be considered.

Some individuals become mainly and wholly Expert Witness or Forensic specialists in their subject. Their practitioner role is kept up to date with CPD and training in that specialism, as in their earlier roles. Here

an understanding of the volume of potential work and the frequency and size of Instructions is helpful to your forward workload planning and potential career prospects.

Position Paper - Marketing Your Expert Witness Work

Presented by Steve Redhead

Member of the Expert Witness Institute Marketing Sub-Committee

Introduction

1. Once you have decided to enter into the specialist field of being an expert witness (EW) it is important to consider what proportion of your working time you wish to devote to it; noting this covers both chargeable and non-chargeable time. Do you wish to do only the odd case every so often; do about 50% or do it full time; or whatever combination you think will suit you best – both in terms of satisfaction with what you do and profitability.
2. Because experts spend different amounts of time on their EW work, it is important to emphasise that no “one-size” marketing solution fits all cases. Also, there is no single right or wrong approach as we all have different strengths, weaknesses and skills. Thus, at first, you should only adopt those marketing methods with which you are most comfortable. The others can be developed as you gain more experience and exposure. The type of marketing also has to be appropriate to your particular expertise. What works for one expert field might be wholly inappropriate for another.
3. The purpose of this paper is not just to produce an exhaustive list of methods and tools. It seeks to endeavour to provide the framework for you to create your own strategy for marketing, so that it applies to the majority of experts.

Why do Expert Witnesses need to market?

4. Unless you are very well established and have a very high professional reputation that you never want for work, most EW's need to do some form of marketing. Further, the legal scene is constantly changing, often with surprising speed, and the EW must demonstrate to his clientele that he is up to date.
5. One of the major factors determining the need to market is that an expert's work is not of a recurring nature (e.g. year on year audit). Each case is unique and no supplier (e.g. a solicitor) of work for say an accountant can be guaranteed to maintain loyalty to an expert. It is a highly competitive market. He may change his firm where they have a different panel or list of experts which they prefer, or their policy on choosing an expert may be different. The fee may also be a significant determining factor.

Data base

6. The first step is to prepare and religiously update a data base of work providers and networking contacts, perhaps arranged as follows:-
 - Solicitors – individual names (current and dormant)
 - Firms
 - Barristers
 - Others e.g. insurance contacts, brokers
 - Target list of potential clients
7. At the same time, it is important to update your CV at least once a year and amend it at other times for special events e.g. appointment to a particular committee, involvement in a reported case, etc.
8. Listed below are the most widely used marketing methods. However, it is not exhaustive. The EW should always try to be innovative and aware of what your competitors are doing.

Marketing expenditure

9. It is obvious that the most important resource is your time. How much (or how little) time you spend is your choice. But remember, you only get back what you put in. The second factor is how much have you got available to spend. There is no useful guideline as to how much to spend as that is determined by which methods you wish to use.

The Plan

10. Do not carry around your ideas/plans in your head. Commit them to paper. That way you have a record which you can regularly review; changing methods and emphasis as you gain experience; thus establishing the most effective combination for your needs.
11. In particular, make sure it is an action plan which contains words like “done” and not “carry forward”.

Membership of relevant organisations

12. While membership of the EWI is recommended, the EW should also be aware of and consider the services offered by:
 - a) The Academy of Experts
 - b) The Society of Expert Witnesses
 - c) CRFP
 - d) APIL (for those involved in personal injury)This is not an exhaustive list and you may also consider seeking an entry in a relevant directory such as the UK Register of Expert Witnesses (published by J S Publications Ltd).

13. Financial resources are probably limited and you probably do not wish to join them all. Establish the expenditure required for each, such as initial joining fees and ongoing costs. Consider the aims of each organisation and what they provide by way of newsletters, meetings, training etc. Choose which is the most appropriate for you.

Articles/letters

14. Beware of writing a highly technical article and hoping it will attract solicitors. This type of article is better aimed at your own profession or industry. Getting an article published in one of the legal magazines (e.g. The Gazette, Solicitors' Journal etc) gives excellent exposure to your work providers. Even an article or a quote on a hot topic in your local newspaper can be worthwhile.
15.
 - a) Bearing in mind that articles do take time to write and you cannot always guarantee placement it may be wise to ring the editor to see if they would be interested in the topic. The difficulty is that articles are often only published if you also buy some advertising space.
 - b) One excellent way to get free coverage is to write letters relevant to expert work for local and national papers, but more importantly, the legal journals. They do not have to be mind-blowingly brilliant. For instance, a fairly mild but long letter responding to an article on the Carter Review of Legal Aid Procurement was recently published in The Law Society Gazette. Make sure you use your business letterhead.

Advertising

16. This method is always the subject of great debate. There is no useful data available on how to evaluate the benefit of formal advertising. For some disciplines, it is inappropriate. It is also quite costly and there is a real art in making it punchy enough. One helpful tip is to review the EW Supplement that the Solicitors Journal publishes, usually every six months, or the New Law Journal quarterly EW supplements. This is a major document for advertising and also contains various articles written by experts in different disciplines. Depending upon your particular expertise, you may wish to focus on a more specific journal e.g. MASS – Motor Accident Solicitors Society, or the APIL Newsletter.
17. An alternative way of advertising yourself and your expertise is by way of a glossy brochure. This can be a simple A4 which folds over into three. It can be one sheet or a folder with inserts. The inserts might each represent a different service e.g. for an accountant, it might be loss of profits, fraud, divorce, company valuations etc. Again, look at some of your competitors' brochures but make yours distinctive in some way without being full of technical jargon. A list of authorised quotes from

satisfied customers will help to attract interest.

Website

18. Having a website is not appropriate for every expertise. It is also an area fraught with problems but this should not put you off. However, it has proven to be a source of work for many and can be an important tool. New contacts will check you out and if it is done professionally, it conveys a powerful image of yourself. More and more solicitors are using the internet.
19. It is costly to set up properly and there are ongoing costs. It also needs regular updating to avoid becoming stale. A poor website can actually put people off especially if it is not user friendly. A good site is well worth the investment.
20. If you choose to go down this route, seek out at least three designers and carefully compare what each offers and gauge how they understand what you do. Ask to view a cross section of their work and definitely review several of your competitors' sites. It is possible to advertise your services on the EWI website by taking a personal page on the members section, and to have a link to your own website.

Newsletter

21. If this is to be effective, it needs to display quality – both in presentation and content.
22. However, this is exceptionally time-consuming and is only appropriate in a few disciplines where a lot is going on e.g. not dentistry for instance.

Chemistry and Meetings

23. For most experts, work does not just land on our desk. We have to go out and find it. Advertising, articles, lecturing etc are all tools to be used carefully. However, the most important factor is usually the ability to “engineer” a face to face meeting with a potential work provider and sell yourself. This is also usually the hardest thing for most Expert Witnesses to do.
24. Typically, such meetings can be arranged:-
Over coffee or lunch, or over dinner which takes more time and is probably best left to loyal providers of work rather than potentials.

Lecturing

25. If you are comfortable with lecturing, you can offer your services to litigation departments, and/or local law societies and nationally through IBC etc. This is very time consuming but can be very rewarding. It is not for the fainthearted.

Sport

26. Hospitality at Sporting events offers the chance of a captive audience for a relatively lengthy period of 2/3 hours e.g. rugby & football. However, golf, motor racing, cricket & horse racing are much more costly (both in time & expense) and are usually a "jolly" for loyal givers of work.

Attending Seminars/conferences

27. An excellent way of combining CPD, learning and marketing is to attend seminars and conferences. For instance, Family Law provides one-day updates which are primarily aimed at lawyers but there is usually several topics that would relate to certain experts.
28. This particular forum is very good value for money and while some, events can be very expensive, just one new case would cover the cost. At such events you therefore have to really market at every opportunity e.g. registration period, tea & coffee breaks, lunch, afterwards and of course those sat near you. Organisations such as EWI run regular seminars and conferences, which apart from assisting the expert to keep up to date with the requirements of the court also provide valuable networking opportunities.

Reciprocity

29. No marketing plan would be complete without considering this matter. For example small firms, particularly purely forensic accountancy practices probably will not stand a chance with many large firms of solicitors. In many other disciplines, probably most medical arenas, this may not be an issue. Some specialist PI legal practices do not regard reciprocity as an issue. They just want the best expert for the right price.
30. It may be that one of your business contacts asks you to recommend a lawyer for a particular problem. If so, use it to your best advantage by giving him, say, three firms and let him choose. That way, you do not feel too guilty if he is not satisfied (although hopefully this will not happen) and you have demonstrated to 3 firms that you can reciprocate even if they did not win the beauty parade.
31. Doing a first class job at a reasonable fee is always expected of the EW. However, the expert rarely receives verbal, let alone a written thank-you and accolades.
32. Be brave; ask the solicitor whether he was satisfied and could he recommend you to one of his colleagues or even another firm! If you don't ask, you will never know! And if you don't sing your praises, no-one out there will know what you do and how well you do it.

Round-robin letters

33. One very cheap way of keeping your name to the forefront of your clients is to correspond.
34. For example, the ethical rules changed so that a company's auditor is not really independent enough to value a company's shares in the event of a shareholders' dispute which was previously permitted in many cases by a company's Articles of Association.
35. Therefore send a mail-shot to the appropriate solicitors to advise their private client base that it would be prudent to change the Articles of Association. This would not involve much work for the solicitors but it will show their clients that they are "on the ball" as well as putting the expert's name on many lawyers' desks which might one day lead to some new work.

Mail shots

36. These are notoriously ineffective. Most recipients do not like them. The success rate is very low and even then, usually you have to follow them up with a cold call. It may work for certain fields of expertise but nowadays it is much less used by professionals.

Networking

37. Depending upon your particular expertise, networking can pay handsome dividends.
38. An example will illustrate this: using the Manchester Chamber of Commerce and several lunch/breakfast clubs, it is possible to come into contact with "owner-managed businesses" but also many other professions and some "big" business. Experience shows this can produce on average, one new case every two months which more than covers the cost of time and expense. It is also a very informal atmosphere which makes it easier to do compare to a formal speaking engagement.

Record-keeping

39. Draft a short action plan for each client. No matter how simple, keep records of what you have done for each client – e.g. lunch dates, copy of one of your articles, marketing letters etc. Review these on a regular basis as there will always be another EW knocking at their door for work.
40. Happy marketing.

Case notes: Camilla McPherson, Allen & Overy

Gillies v Secretary of State for Work and Pensions [2006] UKHL 2; [2006] 1 All ER 731

This case concerned the rejection of an application for the renewal of the applicant's disability allowance. The applicant had appealed from a decision of the Benefits Agency on the ground that there was a reasonable apprehension that the medical member of the tribunal had been biased. The case ended up in the House of Lords.

One of the members of the tribunal acted as a medical expert and had for many years provided reports for the Benefits Agency as an examining medical practitioner (EMP). In addition to acting as an independent expert for the Benefits Agency, in more recent years she had acted as a tribunal member at an average of one session per week.

The House of Lords held that the test to be applied was whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. In applying this test, the fair-minded and informed observer should be assumed to have access to all the facts that are capable of being known by members of the public generally; however, it is the appearance of these facts that may give rise to bias, not what is actually in the mind of the tribunal member, i.e. the question was whether it appeared to the fair-minded and informed observer that the tribunal member was biased, irrespective of whether the tribunal member was in fact biased.

Lord Hope of Craighead, giving the lead judgment, stated that a fair-minded and informed observer would appreciate that the expert's relationship with the Benefits Agency was premised on a professional detachment and the ability to exercise independent judgment on medical issues. These qualities were equally capable of being exercised by the expert when sitting as a medical member of an appeals tribunal.

In light of these findings, he considered that the question then to be answered was whether there were any grounds for thinking that the medical member was likely to be unconsciously biased because of a predisposition to prefer an EMP report to any contrary evidence submitted to the tribunal, on the basis of her own expertise in providing reports to the Benefits Agency as an EMP.

In assessing this question, Lord Hope of Craighead noted that in performing each of these roles, the individual in question was being asked to exercise an independent professional judgment and the fair-minded and informed observer would have no reason to think, in the absence of any other facts to the contrary, that the individual would apply his medical knowledge and experience in the same impartial way when sitting as a tribunal member as when acting as an EMP. Furthermore, bringing experience to bear when examining evidence was not related to bias. If tribunal members were not permitted to hear cases because their experience was likely to give them an advantage over those who did not have the same background, this would greatly undermine the practical utility of the tribunal system. Lord Hope of Craighead considered that neither impartiality nor integrity was compromised by the use of specialist knowledge or experience when the tribunal member is examining the evidence.

Lord Rodger of Earlsferry added that there was nothing in

the facts to suggest that the expert was actually predisposed either consciously or subconsciously to accept the reports prepared for the Benefits Agency by other EMPs.

This decision confirms that an expert may be required to perform different functions in his professional capacity and the mere fact that the expert may on occasion be asked to assess the work of colleagues does not automatically render the tribunal on which the expert sits biased.

K v Secretary of State for the Home Department [2005] EWCA Civ 1627

It was held in this case that an expert could be perfectly well qualified to give evidence in asylum appeals even about a territory he has not visited. Although the Immigration Appeal Tribunal could reject such evidence, it still had to consider it.

The appellant, a native of the Ivory Coast, claimed asylum after escaping from rebels in his home country. Expert evidence was given as to the risks faced by him if he was returned. Both the initial adjudicator and the Immigration Tribunal were unimpressed with the expert's reports because he had no first hand experience of the Ivory Coast, had not lived there and did not appear even to have visited, and the information in the reports derived entirely from media and other reports. The Tribunal also considered that he had failed to give reasons for his opinions. The asylum application was refused, and the appellant appealed on the grounds that the Tribunal had erred in the way it dealt with the expert evidence.

In his judgment, the judge accepted that the Tribunal had not properly answered the point that the expert was, on the face of it, properly qualified and indeed had a number of academic qualifications, notwithstanding that he had not visited the territory about which he wished to speak. In the judge's view, an expert could be perfectly well qualified to speak about a territory without himself having been there.

The judge also disagreed with the Tribunal on the point of the expert's failure to identify his sources or explain the reasons for his views, and in fact, complimented the structure of his reports.

The judge felt that although it was open to the Tribunal to decide that there were reasons for rejecting the expert's conclusions, since it is the function of the Tribunal to decide what risk the appellant would face if returned to the Ivory Coast, it could not simply dismiss the reports. For this reason, the Tribunal's decision was set aside and the case remitted to it.

Riyad Bank & ors v AHLI United Bank (UK) Plc [2005] EWCA Civ 1419

It was held in this case that, on an application to put in fresh evidence on appeal, the court should be particularly cautious where what was intended was to put in further cross-examination of an expert (or a witness of fact) when that expert had already been examined at trial.

The claimant purchased a number of equipment leases in relation to which the defendant advised on the appropriate value. A dispute arose and one of the issues for the court to decide was what the correct basis of the valuation should be for the purposes of establishing quantum.

The experts called by the claimants were of the opinion

that, where there was not enough market data to provide a satisfactory basis for estimating the residual value of leasing equipment, matrices could be used to estimate the value. The defendant appealed on the basis that the claimant's experts made use of matrices in circumstances where there was in fact sufficient market information available.

The defendant sought to put fresh evidence before the Court of Appeal in the form of correspondence with the claimant's solicitors which effectively amounted to further cross-examination of one of the experts. Was it entitled to do so?

Waller LJ, giving the lead judgment, made it clear that the court should be wary of admitting evidence which effectively aimed to reverse a judge's assessment of a witness' credibility or reliability. The court should test such fresh evidence by reference to the pre-CPR principles set out in *Ladd v Marshall*. These principles are that the evidence (1) could not have been obtained with reasonable diligence for use at the trial; (2) if given, the evidence would probably have an important influence on the result of the case, though it need not be decisive; (3) the evidence must be such as is presumably to be believed i.e it must be apparently credible though it need not be incontrovertible.

Ultimately the question for the court was: "*Does fairness in the circumstances of this case require the principle of finality in litigation to be overridden and if so to what extent?*"

The judge held that, in this case, the evidence should not be permitted to go before the Court of Appeal, in particular because the claimant had made some concessions about the methodology behind the expert's report. Furthermore, he did not feel that the evidence of the expert had been decisive at the first hearing. The facts of this case are complex, but the net result seems to be that parties should be wary of trying to submit fresh evidence of this type unless they feel sure that principles of fairness require it.

Contributed by: Brian Thompson

R v Thomas Bowman [2006] EWCA Crim 417

This case concerned the death of the wife of the accused, which was initially given as being caused by alcohol and valium poisoning, but, following an exhumation and a second autopsy, was then given as a result of manual strangulation. The husband, Thomas Bowman was

convicted of murder but appealed. The appeal was unsuccessful but the case is of interest because in giving judgment Lord Justice Gage felt it appropriate to comment at some length on expert evidence in criminal trials and in particular the way in which expert reports should be prepared and presented especially as some of the experts had expressed opinions to the court which had not featured in their reports. He emphasized that the duties of an expert witness in a criminal trial, whether instructed by the prosecution or defence, are owed to the court and override any obligation to the person from whom the expert has received instructions of by whom the expert is paid. Experts should maintain professional objectivity and impartiality at all times. He referred to the specific factors listed by Cresswell J in the *Ikarian Reefer* judgment and added the following matters which he regarded as necessary inclusions in an expert report:

1. Details of the expert's academic and professional qualifications, experience and accreditation relevant to the opinions expressed in the report and the range and extent of the expertise and any limitations upon the expertise.
2. A statement setting out the substance of all the instructions received (whether written or oral), questions upon which an opinion is sought, the materials provided and considered, and the documents, statements, evidence, information or assumptions which are material to the opinions expressed or upon which those opinions are based.
3. Information relating to who has carried out measurements, examinations, tests etc and the methodology used, and whether or not such measurements etc were carried out under the expert's supervision.
4. Where there is a range of opinion in the matters dealt with in the report, a summary of the range of opinion and the reasons for the opinion given. In this connection any material facts or matters which detract from the expert's opinions and any points which should fairly be made against any opinions expressed should be set out.
5. Relevant extracts of literature or any other material which might assist the court.
6. A statement to the effect that the expert has complied with his/her duty to the court to provide independent assistance by way of objective unbiased opinion in relation to matters within his or her expertise and an acknowledgement that the expert will inform all parties and where appropriate the court in the event that his/her opinion changes on any material issues.
7. Where on an exchange of experts' report matters arise which require a further or supplemental report the above guidelines should, of course, be complied with.

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