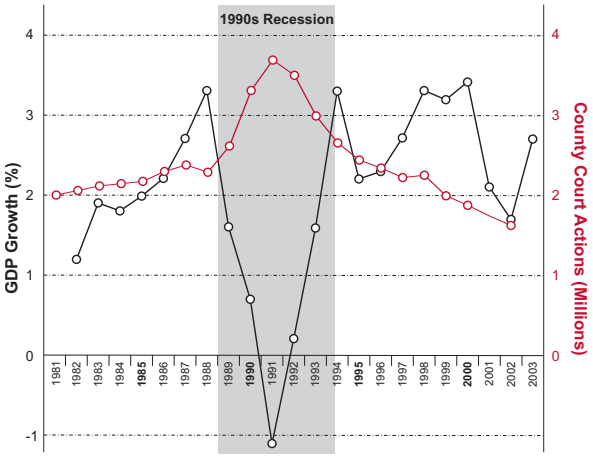
Your Witness

Newsletter of the UK Register of Expert Witnesses, published by J S Publications

Recessions are great news for litigation!

The state of the economy will doubtless be playing across the mind of many readers. In listening to the doom and gloom trotted out by the Media, one could be forgiven for thinking that it's time to pack up and start growing carrots. But as history has shown (see graph opposite), a recession offers real opportunities for expert witnesses. It's plain to see that during the tough economic times of the late eighties and early nineties, the volume of litigation in the UK actually grew. Far from being the time to draw in your horns and ride out the storm, now is the ideal opportunity to let forensic work take up some of the financial slack that may be being felt in other aspects of your professional life.

Why not take the time now to revisit your entry in the *UK Register of Expert Witnesses* and refine it before drafts are issued in December?



Inverse correlation between economic growth and volume of civil litigation 1981–2003. Source: Office for National Statistics

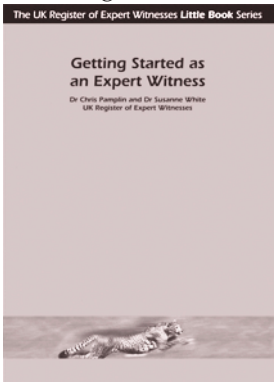
New Little Book

Hot off the press is a new title in our *Little Books for Experts* series. *Getting Started as an Expert Witness* is designed as a practical guide to building an expert witness business. Its chapters will help experts analyse their motives, explore the different roles and duties of an expert witness and decide whether this really is a good career move. From business basics to marketing, deskwork to court work, and expert discussions to getting paid, it's all covered!

If you know of an expert who is contemplating becoming an expert witness, or one who has just started out in the role, *Getting Started as an Expert Witness* will make excellent reading for them.

The *Little Books* do not offer an academic treatise on the subjects. Instead, they provide highly readable, down-to-earth practical guidance on the issues that really matter to practising expert witnesses.

To learn more about this *Little Book* – or its siblings, *Expert Witness Fees* and *Expert Witness Practice in the Civil Arena* – surf to our website (at *www.jspubs.com* and follow the *Little Books* link on the right-hand side of the screen).



Each *Little Book* costs £35.00 + P&P, with bundle discounts. All members of the *Register* receive an additional discount. Books can be ordered through our secure on-line ordering facility, by calling us on (01638) 561590 or by writing to us at the address on page 8.

New edition of the Register

Preparations for edition 22 of the *UK Register of Expert Witnesses* have begun. A draft of your entry for the new edition will be sent over the New Year for you to check, sign and return. If you will be away during the first half of January you may wish to contact us now so that we can make appropriate alternative arrangements.

Extend your entry coverage

In response to demand, we have redesigned our systems to enable us to assign more than 98 index terms to each expert entry. While the expertise of most experts can be adequately covered within the 98-term limit, there are many whose expertise is much more wide-ranging. If you currently have close to 98 index terms assigned to your entry, it may well be worth your time taking a look at this new on-line tool.

Remember that maximising the number of index terms will increase the likelihood of your entry appearing on the results pages of the CD-ROM and on-line search engines.

To take a look, please visit *www.jspubs.com* and follow the link on the right-hand side of the home page to the *Subject Index Controller*. Through our website you can assign sets of 50 additional terms for just £25 + VAT each, with no upper limit – much cheaper than taking additional entries to gain the required coverage.

Season's greetings!

Everyone here at J S Publications sends their best wishes to you for a Happy Christmas and, with the help of your expert witness practice, a more recession-proof New Year!

Chris Pamplin

Inside

Issue 54

December 2008

Debt recovery in Scotland

Complain to the Law Society of Scotland and it will act

We have reported previously in *Your Witness* on the difficulty experienced by many experts in obtaining assistance from the Law Society of England and Wales (or the Solicitors Regulation Authority) in recovering fees from non-paying firms of solicitors. The experience of many has been that the Law Society of England and Wales views such matters as contractual, between the instructing solicitor and the expert, and not a matter of professional misconduct. In the majority of cases, the Law Society of England and Wales expects an affected expert to first pursue his civil remedies in contract; it is not until a judgment has been obtained against a solicitor that the regulatory body will act against defaulting payers.

Law Society of Scotland takes action

We were therefore very interested to hear that one of our readers has received significantly greater help and assistance from the Law Society of Scotland. In the case in question, the expert had agreed with her instructing solicitors that she would be paid her fee within 12 months, or upon settlement of the case, whichever was the sooner. However, on expiry of 12 months, the solicitor responded to a request for payment by saying that the expert would 'be paid when I do', adding ominously that 'these cases can run on for years'. Upon receipt of a complaint, the Law Society of Scotland said that they viewed this as a serious matter and that non-payment of fees by a solicitor amounted to professional misconduct, upon which they could take action. How refreshing!

The expert was advised to make a formal complaint. Following this, the Law Society of Scotland wrote to the solicitor concerned. A fulsome apology was received from the firm, together with a cheque in full settlement of the expert's three outstanding invoices.

Non-payment of expert fees by a solicitor regulated by the Law Society of Scotland amounts to professional misconduct

Scottish case law to the rescue

It seems that this difference in attitude between the Law Society of England and Wales and its equivalent in Scotland arises out of the way in which non-payment of third-party fees (such as the fees of experts) is viewed. This difference appears to arise from a case, specific to Scottish law, stating that non-payment of expert fees by a solicitor amounts to professional misconduct. Consequently, it is not necessary for the expert to first obtain judgment against the solicitor.

The case concerned was an appeal to the Scottish Court of Sessions in the *Petition of Deryck De Maine Beaumont (2006) CSIH 27 P2412/05.* This was a review of a decision of the Scottish Solicitors' Discipline Tribunal dated 28 September 2005, which had found a solicitor guilty of professional misconduct in delaying payment of fees due to an expert who had prepared a child welfare report. The solicitor had appealed against the decision on the basis that the report had been ordered at the direction of the court. He relied on Regulation (10) in the Schedule to the Act of Sederunt (Fees of Solicitors in the Sheriff Court (Amendment and Further Provisions) 1993; SI 1993 No.3080), which states that:

> *'when a remit is made by the court regarding matters in the Record between the parties to an accountant, engineer or other reporter the solicitor shall not without special agreement, be personally responsible to the reporter for his remuneration, the parties alone being liable therefor.'*

Delivering his judgment on the appeal, Lord Johnston said that for many years the court has recognised the distinction between the appointment of a commissioner or, in more modern times, a reporter to enquire into matters of fact and report on the one hand, and on the other a remit to a man of skill to determine finally issues of fact, which the court must be obliged to accept. He was satisfied that the word 'remit' contained in the Regulation applied to the latter situation, not the former. On the simple issue of construction, he therefore considered that the Regulation did not apply in relation to the appointment by the court of a reporter, as happened in the present case. He considered that the general rule, whereby a solicitor is liable for the fees of an expert whom he instructs, plainly applied in this case, both generally because the reporter was instructed by the appellant in that capacity, and second, the reporter was simply instructed by letter which created the obligation on the part of the solicitor to meet the fee.

Either of these two reasons were sufficient to defeat the appeal. There was an obligation, he said, on the part of the solicitor to meet the fees. Whatever his motivation, failing to do so amounted to professional misconduct. If there was any question of lack of intent or a *bona fide* reason for not meeting the fees, then that went to mitigation, in his opinion, not to the issue of professional misconduct.

So far as we can establish, there has been no similar ruling by the courts in England and Wales. This may go some way towards explaining why the Law Society of Scotland has been more proactive in helping experts to obtain payment from recalcitrant solicitors.

How to complain in Scotland

Those with complaints against solicitors regulated by the Law Society of Scotland should note that from 1 October 2008 a new system is in place. All complaints against solicitors must be made in the first instance to the Scottish Legal

Law Society of Scotland

26 Drumsheugh Gardens,
Edinburgh
EH3 7YR
Tel: 0131 226 7411

Scottish Legal Complaints Commission

The Stamp Office
10–14 Waterloo Place
Edinburgh
EH1 3EG
Tel: 0131 528 5111

Complaints Commission (SLCC). The SLCC will deal with complaints about the service provided by solicitors. Complaints about conduct will be passed to the Law Society of Scotland for investigation. However, the SLCC will decide whether a complaint relates to service or conduct. The SLCC will also have the power to deal with complaints about the way the Law Society handles investigations. These 'handling' complaints were dealt with previously by the Scottish Legal Services Ombudsman, whose office has now been abolished.

A matter of conduct

Non-payment of expert fees will almost certainly be regarded as a conduct issue rather than a 'service' issue. The Law Society of Scotland defines 'conduct issues' as those relating to a solicitor's behaviour, including breaches of professional rules. The new complaints procedure is not restricted to the clients of solicitors but can be used by anyone who 'has been directly affected by a solicitor's actions'.

There are some transitional arrangements for the investigation of complaints about service matters, which will probably not be of concern to experts. So far as conduct matters are concerned, the SLCC has said that all such complaints will be referred to the Law Society of Scotland for investigation and will fall into two categories.

1. **Unsatisfactory professional conduct** – sanctions will include censure, a fine, payment of compensation and an order to undergo training.
2. **Professional misconduct** – such cases may be referred for prosecution before the Scottish Solicitors' Discipline Tribunal and can lead to a solicitor being suspended or struck off.

In both cases there will be fairly rigorously applied time limits for the lodging of a complaint. The Law Society and the Commission will investigate complaints made within a year of the business being completed or the matter coming to the complainer's attention. The Law Society's time limit is only relaxed in very exceptional circumstances.

It will be self-evident that the judgment in *De Maine Beaumont* has given the Law Society of Scotland some real teeth in investigating cases of non-payment by solicitors. The fact that the Scottish courts have specifically identified this as an act of professional misconduct has, indeed, given the Law Society of Scotland a duty to take complaints of non-payment of expert witnesses very seriously indeed.

It is regrettable, then, that expert witnesses with similar claims against solicitors regulated by the Law Society of England and Wales continue to receive very little in the way of assistance from the regulatory body or the Solicitors Regulation Authority (SRA).

Tax and fees

A recent call to the *UK Register of Expert Witnesses* Helpline raised the question of whether deferred payment terms were 'conditional fees' (which are, of course, banned for experts) and what was their effect on income tax.

The Urgent Issues Task Force (UITF) is the part of the Accounting Standards Board that steps in when unsatisfactory or conflicting interpretations have developed about a requirement of an accounting standard or the Companies Act 1985. The UITF seeks to arrive at a consensus on the accounting treatment that should be adopted in such cases.

It must be a matter of concern for us all that by 2005 the UITF had already managed to find 39 *urgent* accounting matters upon which to opine. But, for expert witnesses, it is the content of UITF abstract 40 that is of particular note.

UITF 40 is about the recognition of turnover from contracts for professional services which span an accounting year-end. In summary, the 'old' treatment of such work tended towards accounting for any administrative costs associated with such contract work on a year-by-year basis, but waiting until the contract was complete before accounting for the professional service itself. UITF 40 changes this. It requires the tax payer to estimate the proportion of the contract that has been completed and to pay tax on that fraction of the full contract value, regardless of whether any payment has been made under the contract.

Of course, this does not alter the total amount of tax that has to be paid, but it does bring forward the timing of the tax payment.

Now, for the vast bulk of expert witness work, where the instruction lasts a few months and the expert stipulates payment terms of a month or two, this is not a matter of any great concern. But for any expert who routinely agrees to deferred payment terms, e.g. deferring to the end of the case, UITF 40 will have more serious cashflow consequences.

We have long advocated that expert witnesses adopt a properly commercial approach to the contractual side of their forensic work. In this respect, expert witnesses ought not to allow any element of conditionality to creep in. Indeed, it is expressly forbidden for experts to build any conditionality into their fee structures. However, the courts have stopped short of an absolute ban on conditionality in that it is still acceptable for an expert to allow the timing of payment to be dependent on when the case ends. Allowing this is, in our view, plainly wrong because surely it can raise the prospect of an expert altering his opinion to ensure early settlement.

Still, in case you doubted it, law makers are mostly lawyers. If the value of a fee itself is conditional (i.e. the solicitor's fee when working under a CFA), UITF 40 does not apply!

Lending your cash to a lawyer has never been a good idea ...

... and now you have to pay tax on it as well!

Court reports

Reliability of ear prints

In Your Witness 52 we referred to R -v- Kempster and the Court's continuing determination to permit ear print evidence. The following is a report of this case.

Court of Appeal lends an ear to the arguments...

Forensic identification evidence from ear prints has been with us for some time. Although such evidence has been adduced in a number of cases, it is an area that retains a measure of uncertainty over the accuracy of the techniques used and the probative value of the findings. Although ear print comparison is able to provide information that could identify a person who leaves an ear print on a surface, can this provide a reliable match where the print is of such quality that only the gross detail of the ear structure is visible?

In *R -v- Mark Kempster*[1] the Court of Appeal was asked to consider the probative value of such evidence. The facts of the case were briefly as follows. Mr Kempster had been arrested on suspicion of a burglary at the house of an elderly woman. In the course of investigations, forensic scenes of crime officers had recovered an ear print that had been left on a pane of glass in the window that had been forced to gain entry. Expert evidence was subsequently adduced at trial that no two ears left the same mark and that the ear print found on the window pane matched ear prints subsequently taken from Mr Kempster. He was convicted and sentenced to 10 years' imprisonment.

A subsequent appeal against conviction failed. However, a further expert report proposed that the ear prints used in this case were not of sufficient quality to conclude safely that there was a match, and that the gross anatomical features of the ear visible at the crime scene did not accord with the reference prints provided by the defendant. Relying on the later report, Mr Kempster referred the matter to the Criminal Cases Review Commission (CCRC). It concurred that there was a real possibility that the conviction might be overturned. On the grounds of fresh evidence, the case was referred to the Court of Appeal.

Pressure distorts the ear print

The Court of Appeal was asked to consider the difference between an ear print where only the gross detail was present and an ear print that contained more detailed structural information.

... and still thinks ear print evidence is acceptable

The expert report that had been before the CCRC had been produced by Dr Ingleby in June 2006. He was a mathematician who had been closely involved in a European research project known as FearID. This project had been set up to evaluate the use of ear print evidence which was in widespread use, particularly in Holland, and to attempt to produce a protocol or protocols to standardise procedures and reports. Dr Ingleby's conclusion was that the prints used in the appellant's case were of insufficient quality to conclude safely that there was a match. On the contrary, the gross anatomical features of the ear, visible in the crime scene mark, did not accord with the reference prints provided by the appellant. Dr Ingleby accepted that there may be circumstances in which a comparison of ear prints will permit a positive identification to be made of the person who left the print in question. Indeed, the purpose of the work he had carried out was to make comparisons more reliable. He pointed out, however, that ear prints present a different and more difficult problem than fingerprints. Ears are cartilaginous structures that are flexible and will deform when subjected to pressure. Furthermore, ear prints are usually left by those who are listening for something by pressing their ear against a surface. They will not necessarily remain motionless but may adjust their position, thereby further distorting the shape of the ear and the mark it leaves.

The police forensic expert, Miss McGowan, agreed with Dr Ingleby's findings in relation to difficulties posed by the ear's flexibility, but she adhered to her view that the two prints showed a match justifying her conclusion that the print at the scene had been made by the appellant. She pointed out that the shape and size of the ears that made the prints were so closely matched that any small difference could be explained by a variation in pressure. The apparent mismatches pointed out by Dr Ingleby were, she said, again entirely explicable by differences in pressure, and differences in the way in which the two ear print transparencies were overlaid.

Court of Appeal rules ear prints acceptable

Upon a careful consideration of the expert evidence, the Court of Appeal held that, where the print was of such quality that only gross detail was visible and could be compared, there was less confidence in such a match due to the flexibility of the ear and the uncertainty of the pressure that would have been applied at the relevant time. Therefore, gross features were capable of providing a reliable match, but only where they truly provided a precise match. It was clear that ear print comparison was capable of providing information that could identify a person who had left an ear print on a surface, but this could only be done with certainty where the minutiae of the ear structure could be identified and matched. Although a comparison of the print on the window pane with that taken from Mr Kempster was similar in shape and size, it did not provide a precise match. The extent of the mismatch led to the conclusion that it could not be relied upon by itself as justifying a guilty verdict. The appeal was allowed.

Court rules expert isn't expert

In Your Witness 53 we looked briefly at what happened when a court ruled that an expert was not expert enough. Here is the full case report.

Where an expert's expertise is called into question in criminal proceedings, what are the grounds upon which a magistrate can refuse to allow such evidence? This was the question considered by the Queen's Bench on an application for judicial review of a decision of Ely Magistrates' Court in *R (on the application of Doughty) -v- Ely Magistrates' Court*[2].

Mr Doughty was a former transport officer in the Metropolitan Police. He had previously been in the Royal Engineers and, amongst his other qualifications, he also had a master's degree in transport law. After leaving the police force, he set up a company specialising in giving expert opinion in road traffic cases. In the course of his business as an expert witness, Mr Doughty was asked to produce a report for a client who had been charged with a serious speeding offence. His report concluded that the speed camera evidence, upon which the charge was based, was unreliable. The Crown Prosecution Service (CPS) instructed their own expert, who produced a report which, amongst other things, called into question the extent of Mr Doughty's expertise.

Insufficient knowledge to be an expert

The magistrates considered the relative expertise and experience of the two experts and concluded that Mr Doughty did not have sufficient knowledge to give expert evidence at the trial. This decision was based on the facts that Mr Doughty had retired from the police force 9 years earlier and had not, whilst a policeman, operated the specific speed detection device in question – a type of hand-held laser speed measuring device. They were also mindful that he had not attended any course of training in relation to the device, whereas the CPS expert had undergone training in the use of the equipment. At trial, Mr Doughty had admitted these facts but had argued that these did not amount to valid grounds for refusing his evidence. He submitted that these were merely relevant to the weight that could be attached to his evidence and not to its admissibility. The CPS witness, on the other hand, argued that it was reasonably open to the magistrates to refuse the evidence upon the grounds stated, and pointed to an error in Mr Doughty's report which, he said, was illustrative of the fact that the expert's knowledge of the device had lapsed. The magistrates accepted the submissions of the CPS expert and held that Mr Doughty's evidence should be disallowed.

Expert seeks judicial review

Mr Doughty subsequently applied for judicial review of the magistrates' decision. He claimed that the decision to exclude his evidence had been wrong in law. He took the view that the magistrates, in reaching this decision, had seriously harmed his professional reputation and that of his company.

The application was heard by Lord Justice Richard and Mrs Justice Swift. Richard LJ, citing the judgment in *R -v- Bonython* (1984) 38 *SASR* 45, identified the two questions a judge must ask when deciding whether a witness is competent to give expert evidence, namely:

- **whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible**. This may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court.
- **whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value** in resolving the issues before the court.

An investigation of the methods used by the witness in arriving at his opinion may be pertinent, in certain circumstances, to the answers to both the above questions. Where the witness possesses the relevant formal qualifications to express an opinion on the subject, an investigation on the *voir dire* of his methods will rarely be permissible on the issue of his qualifications. There may be greater scope for such examination where the alleged qualifications depended upon experience or informal studies. Generally speaking, once the qualifications are established, the methodology will be relevant to the weight of the evidence and not to the competence of the witness.

Weight -v- admissibility

In the present case, it was clear that the magistrates had not approached the assessment of Mr Doughty's evidence in this way. Instead, they had relied on matters that went to the weight of his evidence and had believed this to be a reason for preventing him from giving his evidence at all. Their finding that he did not have an equivalent expertise to that of the CPS expert was the clearest of indications that the magistrates were relying on matters that went to comparative weight in considering the issue of admissibility. The CPS's point in respect of the error in Mr Doughty's report was another such indication. A difference in view ought to be the subject of competing evidence from the individuals concerned, which could then be evaluated by the court. It was not something that was properly resolved by ruling a defence

Court ruling would have damaged an expert's practice...

... but judicial review puts its weight behind the expert

No shadow experts in family cases concerning children

witness out of court. Whether he was a good witness or whether his report was accurate was irrelevant. Those matters were not a sufficient basis for ruling that he was not competent. Having regard to Mr Doughty's qualifications and experience, it was unreasonable of the magistrates to conclude that his opinion could be of no value in resolving the issues at trial.

Accordingly, Mr Doughty's application for judicial review was granted.

Judicial reasoning

When preferring the evidence of one expert witness over another, a judge is required to state his material reasons for so doing. He cannot express a preference simply based on the confidence with which an expert has presented his arguments or the eloquence of his evidence.

In *St George -v- Home Office*[3], the Home Office appealed against a decision of the lower court that a breach of duty by the Home Office had resulted in the brain damage of a former prisoner.

The prisoner concerned had informed prison officers when he arrived at prison that he was an habitual drug user with a dependency on heroin and that he had also abused alcohol since the age of 16. He informed them that he had previously suffered from withdrawal seizures. The prisoner had been allocated to a top bunk bed, from which he had subsequently fallen during an alleged episode when he had suffered a withdrawal seizure. The seizure developed into 'status epilepticus' and he suffered a severe brain injury. The trial judge accepted the applicant's evidence on causation, namely that the seizure would not have developed into status epilepticus but for the head injury caused by the fall, but it was held that the applicant had 15% contributory negligence due to his addiction and the 'lifestyle decisions' that had led to it.

The Home Office had appealed on the ground that the judge had preferred the evidence of the applicant's medical expert, despite the absence of any authority in the medical literature to support his opinion that the head injury had triggered the status epilepticus. The expert involved had stated that he was 'confident' in his opinion, and the trial judge appears to have accepted and preferred his evidence on the strength of the confidence with which it was delivered.

The Court of Appeal held that where there was difference between experts on a fundamental point, the Court is required to justify its preference for one over the other by an examination of the underlying material and the reasoning of the experts. An expert's assertion that he is 'confident' in his opinion, and the force with which he presents his argument, is not sufficient reason for a judge to resolve a difficult question upon which two distinguished experts have disagreed.

Shadow experts and disclosure

In *Re J (Application for a Shadow Expert)*[4], the applicant father in care proceedings had sought permission from the court to instruct a shadow expert. The local authority had applied for care orders in respect of the child due to injuries it believed had been caused by the father. The evidence from a range of medical authorities indicated that there were a number of possible causes of the child's injuries.

Against the wishes of the other parties, the father sought to instruct a paediatric neuroradiologist as a shadow expert to help his legal team consider the existing medical evidence and frame questions for cross-examination. The shadow expert was to remain anonymous and would not be called to give oral evidence in court. It was argued by the father's legal advisers that, as the shadow expert would not be called to give evidence, he could not be considered to be an 'expert' within the meaning of the *Protocol for Judicial Case Management in Public Law Children Act Cases*. The local authority objected to this, saying that the instruction of the shadow expert would conflict with the expert's overriding duty to the court and with the legal advisor's duty to disclose relevant material. It was also argued that the instruction of a shadow expert was not required for the purposes of determining the issues or to ensure fairness.

In refusing the application, the court held that the instruction of a shadow expert would involve the instructing of an expert within the meaning of the protocols and that it would be incompatible with his overriding duties to withhold his opinions from the other parties and from the court. The court further pointed out that, were it to allow the appointment of a shadow expert, it would have no way of knowing whether questions put by the father's legal advisors to other experts in cross-examination carried the support of the shadow expert, and there would be no way of evaluating the weight that should be given either to the questions or the responses thereto.

Commentary

It may seem odd that a party wishing to instruct a shadow expert would seek the permission of the court in the first place. Surely the point of a shadow expert is that he will not be an expert 'who has been instructed to give or prepare evidence for the purpose of court proceedings' (CPR 35.2). So, why ask the court? Well, the Family Court is different. Section 1.5 of the *Practice Direction - Experts in Family Proceedings relating to Children* (covered in *Your Witness* 52 and which supercedes the Judicial *Protocol* noted above) makes it very clear that the release of any information about a case to any expert without the court's permission would likely be a contempt of court. So, there will be no shadow experts in family cases relating to children then!

References

[1] *R -v- Mark Kempster* (2008) *EWCA Crim* 975.

[2] *R (on the application of Doughty) -v- Ely Magistrates' Court* (2008) *EWHC* 522 *(Admin).*

[3] *St George -v- Home Office* (2008) *EWCA Civ* 1068.

[4] *Re J (Application for a Shadow Expert)* (2008) 1 *FLR* 1501.

LSC targets expert fees

On 31 October 2008 the Civil Policy section of the Legal Services Commission (LSC) published a consultation on the *Civil Bid Rounds for 2010 Contracts*. This is to help the LSC understand the reaction to proposals it has made relating to the contracts it puts in place with law firms to supply legal services. The proposals specify:

- the types of service the LSC buys in
- where services are delivered
- how the tendering process for the new contracts would work
- proposed changes to the scope of funding
- amendments to the contractual terms the LSC would impose.

Clearly, this is of only passing interest to the busy expert witness. However, the LSC includes at sections 7.5–7.8 proposals that will interest any expert who regularly works in those few areas of civil case work that still attract public funding.

Taking control of expert fees

Under a section entitled '*Cancellation, administration and travel and waiting costs of experts*' the LSC says:

'7.5. Many respondents to previous consultations on legal aid reforms made the point that in seeking to control expenditure of the budget, all aspects should be looked at, i.e. solicitor costs, counsel costs and experts' costs, and that the cost of experts was an area of expenditure over which there was little control.

7.6. We are proposing that a number of costs currently treated as disbursements are removed from scope in order to ensure that our limited resources are focused on areas that support the provision of specialist legal advice.

7.7. We therefore do not consider it appropriate to continue to fund as we currently do the cancellation, administration and travel and waiting costs of experts. We are proposing to:

- *Remove experts' cancellation fees from scope, as experts can undertake other work in the event of cancellation. Increasingly, listing of cases is likely to become more informed reducing cancellation and minimising the time spent at court by experts. In addition, the use of modern technology (video conferencing) is being encouraged*
- *Remove experts' administration costs from the scope of public funding as we consider that such costs are their responsibility and should be treated as an overhead*
- *Cap the remuneration rates for travel and waiting time for experts to a maximum of one half of the preparation rate applied. Mileage rates will also be capped in line with current guidance for solicitor travel, currently 45p per mile.*

7.8. We shall define the extent of these changes but our current view is that these changes would extend to any person or team instructed to express an opinion, prepare or give evidence in proceedings or proposed proceedings and treated as an expert by those instructing them and/or by the court. These proposals would apply to all civil publicly funded cases.'

LSC proposes to cut expert fees...

Many readers will remember that the LSC tried, back in November 2004, to 'control expenditure' on experts. At that time, the LSC had to confess that despite claiming the costs of experts were too high, it did not gather data about what it paid them. There is no evidence in the current consultation that this has changed. The proposals appear to simply assert that more control is needed, and that the type of control required is simply to ban payment of certain costs without any examination of the propriety of those costs.

Cancellation fees

To simply assert that '*experts can undertake other work in the event of cancellation*' is to ignore the reality that this is not always true. Indeed, some experts will have incurred expenses (e.g. a doctor arranging for a locum) that should be a recoverable cost. The *UK Register of Expert Witnesses* has always advised experts to create a right to cancellation fees in their Terms of Engagement. But this contractual right should only be used to cover time that is truly left unused by the cancellation. If the expert can fill some of his time with other paid work then, of course, where public funds are involved, it would be public spirited to waive some or all of the cancellation costs.

Administration costs

We interpret this as meaning that some experts are specifying costs relating to the running of their business. This should not happen. Expert witnesses should charge an hourly rate that includes all their operating costs. No expert should invoice a lawyer for, let's say, researching the latest literature. This is something the expert should be doing to be offering his services as an expert, and it should be incorporated into his hourly rate.

Travel and waiting time

What logic dictates that an expert worth, say, £100 an hour when giving his opinion from the witness box is worth only £50 per hour while the court makes him sit in a draughty corridor? The sheer arbitrariness of this, and the other, proposals is what some will find so objectionable.

... but proposals defy logical analysis

Why can't the LSC treat professional experts as the intelligent and well-meaning people they are? Surely everyone understands the need for the LSC to spend its limited funding as wisely as possible, but plucking seemingly random cuts out of the ether is not what is needed.

To respond to the consultation you should visit *www.legalservices.gov.uk* and go to the Civil consultation page of the Community Legal Service section.

Services for registered experts

Terminator

Go to *www.jspubs.com* and follow the link to *Terminator* (look under *Resources for experts* on the right of the home page) and you will find our tool to help you create a personalised set of terms of engagement.

Little Books

Go to *www.jspubs.com* and follow the link to *Little Books* to read more about the titles in our series dedicated to providing practical guidance to busy expert witnesses.

Expert witnesses listed in the *UK Register of Expert Witnesses* have access to a range of services, the majority of which are free. Here's a quick run down on the opportunities you may be missing.

Factsheets – FREE

Unique to the *UK Register of Expert Witnesses* is our range of factsheets (currently 61). You can read them all on-line or through our *Factsheet Viewer* software. Topics covered include expert evidence, terms and conditions, getting paid, training, disclosure and fees.

Court reports – FREE

Accessible freely on-line are details of many leading cases that touch upon expert evidence.

LawyerLists

Based on the litigation lawyers on the *Register*'s Controlled Distribution List, *LawyerLists* enables you to purchase top-quality, recently validated mailing lists of litigators based across the UK. Getting your own marketing material directly onto the desks of key litigators has never been this simple!

Register logo – FREE to download

All experts vetted and currently listed may use our undated logo to advertise their inclusion. A dated version is also available. So, successful re-vetting in 2008 will enable you to download the 2008 logo.

General helpline – FREE

We operate a general helpline for experts seeking assistance in any aspect of their work as expert witnesses. Call 01638 561590 for assistance, or e-mail helpline@jspubs.com.

Re-vetting

You can choose to submit yourself to regular scrutiny by instructing lawyers in a number of key areas. This would both enhance your expert profile and give you access to the 2008 dated logo. The results of the re-vetting process are published in summary form in the printed *Register*, and in detail in the software and on-line versions of the *Register*.

Profiles and CVs – FREE

As part of our service to members of the legal profession, we provide free access to more detailed information on our listed expert witnesses. At no charge, experts may submit:

- a **profile sheet** – a one-page A4 synopsis of additional information
- a **CV**.

Extended entry

At a cost of 2p + VAT per character, an extended entry offers experts the opportunity to provide lawyers with a more detailed summary of expertise, a brief career history, training, etc.

Photographs – FREE

Why not enhance your on-line and CD-ROM entries with a head-and-shoulders portrait photograph?

Company logo

If corporate branding is important to you, for a one-off fee you can badge your on-line and CD-ROM entries with your business logo.

Multiple entries

Use multiple entries to offer improved geographical and expertise coverage. If your company has several offices combined with a wide range of expertise, call us to discuss.

Web integration – FREE

The on-line *Register* is also integrated into other legal websites, effectively placing your details on other sites that lawyers habitually visit.

Surveys and consultations – FREE

Since 1995, we have tapped into the expert witness community to build up a body of statistics that reveal changes over time and to gather data on areas of topical interest. If you want a say in how systems develop, take part in the surveys and consultations.

Professional advice helpline – FREE

Experts who opt for the Professional service level can use our independently operated professional advice helpline. It provides access to reliable and underwritten professional advice on matters relating to tax, VAT, employment, etc.

Software

Drawing on over 20 years' experience of working with the expert witness community, we have designed a suite of task-specific software modules to help keep experts informed.

Discounts – FREE

We represent the largest community of expert witnesses in the UK. As such, we have been able to negotiate with publishers and training providers to obtain discounts on books, conferences and training courses.

NEW! Expert Messaging Service

Just launched is our new Expert Messaging Service for the busy expert witness. If you'd like to give the appearance of a manned office but do not wish to have the associated costs of a building and dedicated staff, then contact us to discuss your requirements. We can tailor a service to suit your needs. Choose from:

- occasional telephone answering service
- full telephone answering service
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