

Your Witness

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Expert witness immunity

For many expert witnesses, the decision at the Supreme Court in *Jones -v- Kaney* (to remove a huge swath of immunity from expert witnesses) will make little immediate difference. Most expert witnesses, being conscientious professionals, will feel themselves unlikely to be found negligent and will carry professional indemnity insurance just in case. Indeed, they will view existing professional disciplinary risks as a greater concern! But the decision has some potentially serious consequences, is based upon some very dodgy assumptions and requires expert witnesses to consider some important issues. We look at all of these aspects in the following pages.

I am very much in the camp of the dissenting judges who found *'The lack of a secure principled basis for removing the immunity from expert witnesses, the lack of a clear dividing line between what is to be affected by the removal and what is not, the uncertainties that this would cause and the lack of reliable evidence to indicate what the effects might be suggest that the wiser course would be to leave matters as they stand.'* I agree.

Having worked with the Law Commission on their careful deliberations on the admissibility of expert evidence in criminal proceedings, I am perhaps predisposed to see value in that body's approach to tackling difficult questions. If this unprincipled decision from the Supreme Court does, in practice, result in a serious chilling effect on the availability of expert witnesses, we may end up in another decade with the Law Commission looking at how to change the law to encourage a ready supply of expert witnesses back into court. How much better if we had instead asked the Law Commission today how best to provide a remedy for the rare wrong perpetrated by a negligent expert witness.

UKREW insurance scheme and retrospection

As we note in our coverage of *Kaney*, it now makes sense for every expert witness to have in place appropriate professional indemnity insurance. We expect many experts will already carry some form of professional indemnity insurance, and it may be that their forensic work can be added easily. But we have heard from some experts that they struggle to obtain cover for their forensic work at a reasonable rate.

With this in mind, the *UK Register of Expert Witnesses* is currently negotiating a bespoke policy that deals specifically with forensic work and seeks to use the buying power of the 1,000s of expert witnesses we list to drive down the cost. We are in the final stages of our

negotiations and expect the policy to offer great value, a simple application form for those with a forensic turnover below £100,000 and, crucially, automatic retrospective cover for all the cases an expert has worked on. That is important because it is likely that the effect of the Supreme Court decision will be interpreted as meaning immunity was lost on the day Kaney put her signature to the joint statement in November 2005. So, in principle at least, the disgruntled and disaffected from the last 6 years may start to pursue their expert witnesses!

We will write to experts listed in the *UK Register of Expert Witnesses* once the scheme has been finalised. However, if in the meantime you're keen to learn more about this new service, please let Linda know by calling (01638) 561590 or e-mailing her on linda@jspubs.com and she will ensure you are among the first to receive details.

Hitting the mark(et)

The latest in our LittleBook series has just been published. LittleBook 4: *Practical Marketing for the Expert Witness* is not a book about marketing theory. It's been written as an easy-to-read practical guide to the expert witness market, full of insights into managing your marketing data and prioritising your strategies. All examples are drawn from the expert witness arena, focusing on how best to get in touch with instructing lawyers. Visit www.jspubs.com and follow the link to *LittleBooks* for more information and our secure ordering facility.

Survey 2011

What is it that expert witnesses most want to know about their colleagues? Well, how much they charge comes close to the top of the list! It is also the question we are most frequently asked by experts new to litigation work.

In my mind, there is no more useful way to satisfy this demand for information than to conduct regular surveys among our readers and to publish the results in *Your Witness*. I make no apology, then, for enclosing with this issue a questionnaire on your work as an expert witness, your terms, conditions and charging rates, and the trends in your volume of work.

I would be grateful if you can find a little time to complete the short questionnaire, anonymously if you prefer, and to return it to me in the next few days. Alternatively, you can **complete the survey on line**. Simply point your web browser to www.jspubs.com and click on the *Survey 2011* link. I will report back in a future issue of *Your Witness*.

Chris Pamplin

Inside

Expert witness
immunity

Statements of Truth

Family court guidance

Services for experts

Issue 64

Immunity: surveying the Karnage

The decision of the Supreme Court in *Jones -v- Kaney* [2011] UKSC 13 was split, with a majority of five judges favouring the removal of expert witness immunity to civil suit from those who instruct them and two judges dissenting. There are a number of potential consequences of this disturbing decision that should be considered by all expert witnesses, and some clear actions that may be necessary.

Consequences

The majority in the Supreme Court is dismissive of the risk that their decision will have a ‘chilling effect’ on the supply of willing experts. But opening expert witnesses to the potential distractions of vexatious suits from disgruntled litigants is never likely to *encourage* involvement in forensic work. It is the unquantifiable nature of this risk that so concerned Lord Hope and Lady Hale, as it should trouble anyone interested in the proper administration of justice.

A chill wind

For all the effort put into drawing an analogy between expert witnesses and advocates, and into seeking to learn from the experience of the removal of advocate immunity a decade ago, the majority in the Supreme Court completely ignored the fundamental difference between these two players. Experts have busy professional lives away from the legal system and can readily choose *not* to take on forensic work, but advocates have no such easy choice.

Lord Phillips asks: ‘*Why should the risk of being sued in relation to forensic services constitute a greater disincentive to the provision of such services than does the risk of being sued in relation to any other form of professional service?*’⁵³ Well, the answer lies in the irrationality of failed litigants.

The experience of advocates is no guide because a failed litigant will be more wary of suing a lawyer than he will be of suing an expert. Disgruntled litigants could well pursue their expert witness on the basis that, being unaccustomed to such attacks, the expert may view the onslaught with sufficient distaste as to settle quickly unmeritorious claims.

Lord Phillips says ‘*It is easy enough for the unsuccessful litigant to allege, if permitted, that a witness of fact who has given evidence against him was guilty of defamatory mendacity. It is far less easy for a lay litigant to mount a credible case that his expert witness has been negligent.*’⁵⁸ But it is easy enough to vex the expert in their attempts.

In short, an advocate faced with the removal of immunity has always been much less likely to leave legal practice, or be put off by the threat of being sued, than will be, say, a surveyor or a paediatrician to abandon their forensic work.

So how will experts view the risk? Only time will tell. But taken together with the current efforts at the Ministry of Justice to cap expert witness fees and the potentially serious

consequences to an expert’s livelihood of a professional disciplinary hearing arising from his occasional forensic work, loss of immunity can only act as a pressure to reduce the supply of expert witnesses as experts seek to use their time for better paid and less contentious work.

Accepting the analogous position of advocates and expert witnesses led the majority to draw incorrect conclusions from the removal of immunity for advocates. For example, ‘*The danger of undesirable multiplicity of proceedings has been belied by the practical experience of the removal of immunity for barristers*’⁸⁵. That’s not a safe conclusion. The inhibition against a disgruntled litigant suing his lawyer (a man quite at home in the law) is entirely different in force and nature from when it is an expert who is the target.

Expert and advocate also have different duties. As Lord Hope says, ‘*The duties that the advocate owes to the court are not as far reaching as the overriding duty to the court that rests on the expert.*’¹⁶² The advocate is paid to be a partisan player who has to put as strong a case as he can for his client. The expert witness is most definitely not that!

We’ll have to wait and see if this ‘*experimental*’¹⁹⁰ decision is as benign on the supply of expert witnesses as their lordships suppose. But the supply issue is not the only concern.

Professional class of expert witness

Another unfortunate consequence of this decision lies in the impetus it gives to the further development of a professional class of expert witness. With a few notable exceptions, such as forensic science and forensic accountancy, the vast majority of expert witnesses come to court from a busy professional practice. By restricting the scope for an expert to offer just occasional assistance to the court, the decision will concentrate instructions upon those experts who have made a commercial choice to build a forensic practice. This is a double-edged sword. Whilst the greater understanding of their role and duties should ensure the ‘professional’ expert witness will create fewer procedural problems, by excluding the occasional expert witness the freshness and challenge to dogma that comes with diversity will be lost.

Slippery slope

The majority set the issue before them in the context of what to do with a negligent expert witness. This is a myopic view of witness immunity. In putting a single expert witness centre stage, it strongly encourages the creation of a remedy for a wrong done. But witness immunity has never been about protecting the negligent but protecting the public. In focusing so intently on what to do about the rare example of an expert witness who has been negligent, the court has handed down a decision that threatens the very foundation of witness immunity.

*Supreme Court
removes immunity
from experts*

*Flawed analogy
between experts
and advocates*

There have always been exceptions to the immunity rule: perjury and contempt have a long lineage; wasted costs orders and professional disciplinary actions are recent additions. As Lady Hale pointed out, these exceptions are there to oblige the witness to perform his duty to the court. But the Supreme Court decision is a radical departure from these existing exceptions – it has been made to protect the interests of the client. To do this on no ‘*secure principled basis*’¹⁷³ is all the more troubling.

When the Court of Appeal removed immunity from advocates a decade ago, it could not have foreseen its actions being used to justify the removal of immunity from expert witnesses today. As Lord Hope has said, ‘... *one thing leads to another. Removing just one brick from the wall that sustains the witness immunity may have unforeseen consequences*’.¹⁶³

By way of exploring this concern further, Lord Hope said: ‘*Lord Phillips does not see why an expert should be concerned that performance of his duty to the court will result in his being sued for breach of duty to his client: para 56. But this assumption contradicts the justification for the immunity that is extended to witnesses generally, which is that there are grounds from time to time for believing that the fear of suit exists. If he is right, there are seeds here for challenging the whole concept of witness immunity.*’¹⁵⁷

On a final note, I find Lord Dyson’s assertion extraordinary: that if an expert ‘... *gives an independent and unbiased opinion which is outside the range of reasonable expert opinions, he will not be in breach of his duty to the court, because he will have provided independent and unbiased assistance to the court!*’¹⁹⁹ How can it possibly be acceptable for an expert witness to give an unreasonable opinion to the court?

Decidedly disturbing decision

The decision is disturbing for the lack of challenge from the majority of the views expressed by the minority, and for having the President and his Deputy split over the issue. But the way in which the majority arrived at its decision is the most troubling aspect of all.

As Lord Hope put it: ‘*The lack of a secure principled basis for removing the immunity from expert witnesses, the lack of a clear dividing line between what is to be affected by the removal and what is not, the uncertainties that this would cause and the lack of reliable evidence to indicate what the effects might be suggest that the wiser course would be to leave matters as they stand.*’¹⁷³ He highlights serious flaws indeed.

So what has led the court to behave in this way? One element may be the rather anachronistic view of expert witness practice revealed by the President of the Supreme Court. But there are others, including whose client is whose, fuzziness at the edges and the conflation of duties.

Anachronistic view of expert witness practice

Lord Phillips’ judgment is notable for his pre-Woolf characterisation of the conduct of expert witnesses. He clearly views expert witnesses as being partisan creatures of those who instruct them, almost as if the Civil Procedure Rules (CPR) had never been written.

When he says ‘*an expert’s initial advice is likely to be for the benefit of his client alone*’⁵⁶, he is not describing an expert witness, but an expert advisor (who has never had the protection of witness immunity). No expert witness instructed under CPR 35 could ever write a report that was ‘*for the benefit of his client alone*’. To say ‘*the expert witness must give his evidence honestly, even if this involves concessions that are contrary to his client’s interests*’⁵⁰ seems to portray experts as being bound in loyalty to the party paying them and observing only reluctantly their duty to the court. This is not a description of expert witnesses in 2011.

It feels as if Lord Phillips thinks the world of the hired gun is alive and well 10 years after Lord Woolf rode them out of town. Does a decade or more in the rarefied air at the very top of the judicial ladder put one out of touch with the reality on the ground?

Whose client is it anyway?

The use of the word ‘*client*’ was also notable. In the world of the expert witness under CPR, very few expert witnesses will view the solicitor’s client as being his client as well. The Supreme Court’s continuous assertion that the party who instructs the expert is the expert’s client is very revealing, and very wrong. To an expert instructed under CPR, there can be only one ‘*client*’, and that is the court. It should matter not one jot if the expert is instructed by the claimant or defendant. His duty to independence and objectivity would result, if given the same instructions by either party, to the same opinion: an opinion ‘*uninfluenced as to the form or content by the exigencies of litigation*’.

Fuzziness

One complaint made by the majority in the Supreme Court was that the boundary of immunity was fuzzy. Presumably, then, the majority judges would be keen to ensure that the new position created by their decision would give us more clear-cut demarcation. But, as Lord Hope shows, having removed immunity the borders are still fuzzy. ‘*The different ways in which Lord Phillips, Lord Brown and Lord Dyson describe the extent to which the immunity is to be removed suggest that the boundaries are, and are likely to remain, unclear.*’¹⁷²

The Supreme Court is clear that the removal of immunity does not extend to claims of defamation. But why is defamation different from a breach of care? Lord Hope asks why preserve immunity in this area alone? ‘*If it is*

Decision lacks a secure, principled basis

The client of the lawyer is not the expert’s client

Why does CPR impose an overriding duty?

necessary to give the protection against some claims to enable witnesses to speak freely, why should it not be given to them all? Why should a claim for a breach of duty be treated differently from a claim for defamation? If the claim is well founded, a wrong was done in either case which ought to be remedied.¹⁶⁰

Indeed, why does the judgment only remove immunity from expert witnesses from the party that instructs them? If an expert can face a claim of negligence founded not in contract but in tort from the party who instructed him, why deny the same remedy to the other party if it is they who have suffered a wrong by the expert's negligent act? What is the legal logic behind this distinction?

By excluding the opportunity to sue the other side's expert, this decision creates a further imbalance in criminal cases. Lord Hope notes that: *'The expert for the prosecution would continue to enjoy the immunity from proceedings at the instance of the defendant. The expert for the defence would have it removed from him. One cannot discount the fact that exposure to the risk of incurring the expense and distress of a harassing litigation at the client's instance should the defence fail, however unlikely, will colour his evidence. The public interest surely demands that experts who give evidence on either side in criminal proceedings are free from pressures of that kind.'*¹⁶⁹

Conflation of duties

Much is made in the Supreme Court judgment of the duty an expert witness owes the court, the duty he owes those who instruct him and how these are incapable of being in conflict. Surely the fact that the CPR places an 'overriding' duty on the expert witness implies that on occasion these duties will conflict, and the duty to the instructing party is therefore subordinate.

Lord Phillips says *'It is paradoxical to postulate that in order to persuade an expert to perform the duty that he has undertaken to his client it is necessary to give him immunity from liability for breach of that duty.'*¹⁵⁶ But it is the conflation of the expert's duty to the court with his duty to the solicitor's client that creates the paradox. By recognising that these duties can conflict, then the value of the immunity is clearer.

Lord Hope is firm in his opinion that there is *'... an obvious conflict between the duties that the expert owes to his client and those that, in the public interest, he owes to the court.'*¹⁵⁶ This is because *'when it comes to the content of that evidence his overriding duty is to the court, not to the party for whom he appears. His duty is to give his own unbiased opinion on matters within his expertise.'*

Turning to the words of Cresswell J in the *Ikarian Reefer*, Lord Hope reminds us that the expert's opinion *'should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation, and that an expert witness should provide independent assistance to the court by*

way of objective unbiased opinion in relation to matters within his expertise'.

Naturally enough, if you convince yourself that an expert witness is incapable of being presented with a situation in which his duty to the court can conflict with his duty to others, then you will see little benefit in an immunity that facilitates his dealing with that situation in a frank and fearless manner. Sadly, that happy situation is not always what is found on the ground.

What's an expert to do?

Regardless of how the decision was made, what its consequences may be and whether it is a correct decision, a number of issues should now be written at the top of an expert witness's list of things to contemplate.

1. **Get comprehensive professional indemnity insurance in place.** Don't expect to limit your liability by contract – it is unlikely to work.

2. **Be more circumspective with initial opinions,** ensuring that you don't box yourself into a corner that would require backtracking and may lead to a claim.

3. **Think very carefully about acting as an SJE,** where all parties can take a swipe at your professional performance.

Professional indemnity insurance

First, and most importantly, expert witnesses should obtain appropriate professional indemnity insurance, or check with their existing professional indemnity insurer to see if it can provide cover that extends to forensic work. There are already some schemes being targeted specifically at expert witnesses, and more will be coming along soon.

However, note that a court decision sets out what the relevant law is and was. So, in theory at least, disgruntled litigants from, say, 3 years ago could try to start proceedings. But this element of retrospection has limited application because of the competing principle of legal certainty. (This is a principle of jurisprudence which holds that legal rules must be clear and precise so that legal subjects can be sure of the demands the law makes of them.)

'It would be contrary to the principle of legal certainty to allow past transactions to be re-opened and limitation periods to be circumvented because the existing law at the relevant time had not yet been explained or had not been fully understood.' per Neill L.J. in *Biggs -v- Somerset County Council* [1996] IRL 203, CA

Every time there is an important judicial decision, there will be those who could say they would have had a cause of action, or their case would have succeeded, if only they'd known that the law would be interpreted in a particular way in the future. The system could not function if that in itself was grounds for re-opening proceedings, or for bringing stale complaints.

Ensure PI insurance is in place

So, without getting matters out of perspective, experts should check that their professional indemnity insurer will cover this retrospective risk.

Limiting liability by contract

Lord Collins said: *'There is no basis for suggesting that experts will be discouraged from testifying if immunity were removed – most are professional people who are insured or can obtain insurance readily, and those who are not insured can limit their liability by contract.'*⁸¹

The notion that an expert witness can successfully limit liability through contract is an odd one for a Supreme Court judge to suggest. Court reports are littered with examples of failed attempts to achieve such limitation. To be effective, any attempt to use the contract to limit exposure to claims in negligence would need to comply with the relevant legislation on contractual fairness – and the overwhelming impression given by how the courts have dealt with such clauses previously is that if they greatly disadvantage one party they will be deemed unfair. Needless to say, what self-respecting lawyer would agree to a limitation of liability clause in an expert's contract?

It may be that where there is limited expert availability – for example, family work – limitation of liability clauses may be more likely to be accepted by a party struggling to find an expert to instruct, and the clause may be more likely to be upheld by the courts. But it's certainly not the panacea suggested by Lord Collins.

While on the issue of contracts, it is worth exploring the fact that almost all experts contract with the instructing lawyer and not with the lawyer's client. Under the *Jones -v- Kaney* decision, expert witnesses could face civil claims based on either a negligent breach of a contractual duty or through the tort of negligence (a tort is a wrong that involves a breach of a civil duty, other than a contractual duty, owed to someone else). Because few experts contract directly with the party, then unless there is an argument that the solicitor was acting as an agent for the instructing party, it is likely that any cause of action will lie in tort. Either way, though, a negligent act will give rise to a cause of action, as set out by Lord Phillips:

'The question was raised, but not explored in depth, of whether an expert is normally in direct contractual relationship with his client, or whether his contract is with the solicitor who engages him on behalf of the client. I do not think that this is significant. In either event there is a marked difference between holding the expert witness immune from liability for breach of the duty that he has undertaken to the claimant and granting immunity to a witness of fact from liability against a claim for defamation, or some other tortious

*claim, where the witness may not have volunteered to give evidence and where he owes no duty to the claimant.'*¹⁸

Circumspection

The Supreme Court heard arguments put that the purpose of immunity was to protect the ready supply of expert witnesses and to give them the confidence to give their full and frank opinions. I would add that immunity was a strong support of an expert's independence, as required under CPR and its ilk.

Immunity also made it easier for an expert to resile from an earlier held position. Without the protection of immunity, expert witnesses may well become more circumspect in their opinions. As Lord Brown puts it: *'... the most likely broad consequence of denying expert witnesses the immunity accorded to them... will be a sharpened awareness of the risks of pitching their initial views of the merits of their client's case too high or too inflexibly lest these views come to expose and embarrass them at a later date.'*⁶⁷

Expert witnesses should ensure that they give accurate opinions at all stages of proceedings, and that their earlier opinions are consistent with their later ones. So in this respect the impact of the removal of immunity should be for the good. But expert witnesses will need to be strong in their determination to give only those opinions that are based absolutely on the evidence they have been asked to consider. If a change of opinion is justified by a change in the evidence, there will be precious little for anyone to complain about. But if there are any other reasons for changing one's mind, the expert will come under far greater scrutiny.

Whither the SJE

According to the decision, the removal of immunity applies only to claims from those who have instructed the expert witness. So, what of the Single Joint Expert (SJE)? The notion that this role opens an SJE to suit from all parties may cause a moment's reflection in future! Inevitably, perhaps, one party or other will feel disappointed by the SJE's opinion. Since courts are now hard to persuade that another expert should be permitted, it may be more straightforward to find an expert who is prepared to support a negligence claim against the SJE. For sure, it is not likely that we shall see the flood gates opened, but it is the fear of vexatious claims that will do damage, not the claims themselves.

Conclusion

In my view this is a wrong decision, but it is one with which we will just have to live. Make sure you have insurance in place, be careful in the way you express your opinions and continue to be a diligent expert. Then you will be little troubled by this troubling decision.

Chris Pamplin

*Be extra cautious
when acting as a
joint expert*

*Don't panic ...
the diligent expert
has little to fear*

Statements of Truth

Experts still have different Statements of Truth for the Family, Civil and Criminal courts. We offer some brief guidance on what is required where.

With three versions to pick from...

Following the recent publication of the Family Procedure Rules and the Practice Direction to Part 25 thereof (see next article), we have yet another change to the Statements of Truth! While this latest amendment acts to unify the wording of the mandatory Statement of Truth across the whole of the civil court system, the ancillary statements remain distinct. So we still find ourselves in the unhappy position of having to use different Statements of Truth in reports directed at the civil, criminal and family courts. To help you get the wording correct every time, we list *exactly* what is required below.

Civil

Reports written for cases covered by the Civil Procedure Rules (CPR).

- Statement of Truth wording set on 1 October 2009 (CPR Update 50)
- Relevant rules: CPR 35 PD 3.2.9, CPR 35 PD 3.3

All that the CPR require is a statement embodying the declarations in CPR PD 3.2.9 and the mandatory wording of the Statement of Truth in CPR PD 3.3. The following two paragraphs achieve this (the second paragraph being the mandatory one).

I understand that my overriding duty is to the court and I have complied with that duty. I am aware of the requirements of CPR Part 35, its practice direction and the Protocol for the Instruction of Experts to give Evidence in Civil Claims.

I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

Family

Reports written for cases covered by the Family Procedure Rules (FPR).

- Statement of Truth wording set on 6 April 2011
- Relevant rules: FPR PD25A 3.3h and 3.3i

The FPR PD25A requires five declarations (PD25A 3.3h(i)-(v)) and the mandatory wording of a Statement of Truth (which is now the same as the CPR). The following two paragraphs achieve this (again, the second paragraph being the mandatory one).

I have no conflict of interest of any kind (other than any conflict disclosed in this report, which does not affect my suitability as an expert witness on the issues on which I give evidence) and I confirm that I will advise my instructing party if that changes at any time. I understand that my overriding duty

is to the court and I have complied with that duty. I am aware of the requirements of Family Procedure Rules Part 25 and its Practice Direction.

I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

Obviously, if you do not have a conflict of interest you could, if you wish, drop the bit in parenthesis in the first paragraph.

Crime

Reports written for cases covered by the Criminal Procedure Rules (CrimPR).

- Statement of Truth wording set on 5 October 2009 (CrimPR Update 9)
- Relevant rules: CrimPR 33.3, CrimPR 27.2

CrimPr 33.3(i) and (j) require that expert reports contain:

- a statement that the expert understands his duty to the court, and has complied and will continue to comply with that duty, and
- the same declaration of truth as a witness statement.

However, in the criminal arena, unlike the civil arena, statute itself prescribes the equivalent of a Statement of Truth. So the CrimPR do not offer a mandatory wording. Instead, what the expert needs to do is to declare that:

- any fact contained in the report is true, whether a fact within the expert's own knowledge or the fact that something relied upon by the expert as fact came from the source the expert identifies, and
- the expert's opinions are all true, to the best of the expert's knowledge and belief.

The following should achieve that end.

I understand that my overriding duty is to the court and I have complied with, and will continue to comply with, that duty.

This report is true to the best of my knowledge and belief, and I know that if it is introduced in evidence then it would be an offence wilfully to have stated in it anything that I knew to be false or did not believe to be true.

Take your pick!

Whilst we understand that at times the different court systems can justifiably impose distinct duties on expert witnesses, in this case we think the variation is unnecessary and unhelpful. Mind you, we've always been a bit sceptical of the whole business of mandatory statements in expert reports. It seems unlikely that the system will be rationalised any time soon, so hopefully this ready reference will help you to get the wording right.

... it is important to be clear what is required!

FPR Part 25 Practice Direction

Hot on the heels of the Family Procedure Rules 2010 (FPR, see *Your Witness* 63) we have *Practice Direction 25A: Experts and Assessors in Family Proceedings* (the 'PD') which supplements Part 25 of the FPR. It incorporates and supersedes the Practice Direction on Experts in Family Proceedings relating to Children (1 April 2008).

As we noted in our last issue, the clarity and concision of the FPR are compromised because they try to encompass a substantial array of procedural, jurisdictional, case management and evidential elements to diverse sets of family proceedings in at least three court systems. The same applies to the Practice Direction, as evidenced by the need to split it into no less than 10 sections: introduction, general matters, the duties of experts, proceedings relating to children, proceedings other than those relating to children, the court's control of expert evidence:

consequential issues, positions of the parties, arrangements for experts to give evidence, action after the final hearing and appointment of assessors in family proceedings.

The aim of the guidance is to:

- provide the court with early information to determine whether expert evidence will help the court
- help the court and the parties to identify and narrow the issues in the case and encourage agreement where possible
- enable the court and the parties to obtain an expert opinion about a question that is not within the skill and experience of the court
- encourage the early identification of questions that need answering by an expert, and
- encourage disclosure of full and frank information between the parties, the court and any expert instructed.

The guidance does not aim to cover all possible eventualities. Thus it should be complied with in so far as is consistent in all the circumstances with the just disposal of the matter in accordance with the rules and guidance applying to the procedure in question.

In so far as the new PD incorporates the April 2008 practice direction, the analysis we gave in *Your Witness* 52 still applies. But there are within the PD some provisions that are, potentially at least, so helpful to experts that they bear being highlighted here.

Written instructions

Paragraph 2.3 sets out the duty of instructing solicitors to provide *written* instructions that conform to the principles set out in the PD. These include (see Paragraph 4.5):

- setting out the context of the instructions
- defining the specific questions the expert is to address
- listing the indexed and paginated documentation (which should include the PD)

- identifying any other material supplied
- identifying all requests to third parties for disclosure (and their responses)
- naming those concerned with the proceedings (with whom the expert may talk provided an accurate record is made of any discussions)
- identifying any other experts in the case, and
- defining the contractual details underlying the instruction.

So, should you ever find that your instructions contain unfocused questions, are sparse in the information they give, come with files of poorly copied and disorganised paperwork and are 'vague' about who is going to pay you what and when, you can use PD25A Paragraph 2.3 to send it all back together with a short note asking for compliance with their duties under the FPR!

Court orders

Paragraph 2.5 requires the party instructing an expert to serve a copy of any order that affects the expert 'forthwith upon receiving it'. This is helpfully stronger wording than the CPR because it avoids any doubt about when the order should be given to the expert. So always take a moment to check the dates on any court orders you have received. If, as seems only too common, the lawyer has kept hold of the order, thereby eating into your time to comply with it, you can help the court to understand the true source of any delay in complying with its directions!

Quality control and feedback

Whatever else is involved in assessing the quality of the service provided by an expert witness, feedback from instructing solicitors and the courts is vital. Yet most experts rarely receive feedback. The PD is very helpful in placing a duty upon the instructing solicitor to:

- inform the expert in writing of the outcome of the case
- at the court's direction, forward any transcript of the hearing, and
- after the final hearing in the Family Proceedings Court, send the expert a copy of the court's written reasons for its decision

all within 10 days of the final hearing.

Of course, unless you know the date of the final hearing it will be hard to remind those who instruct you of their duties. But at least we now have official backing for the obviously desirable position that experts need feedback if they are to measure their performance and maintain, or improve, the quality of their forensic work.

Summary

Overall, the PD is a helpful document that will give experts working in family cases practical help in getting the job done, and authority to challenge some of the 'relaxed' habits into which some lawyers seem to have fallen. You can download the full text of the PD by visiting

*Consolidated
guidance for all
family proceedings*

*Work smarter by
insisting lawyers
follow the
guidance*

Services for registered experts

Using the web site

If you ever have trouble finding what you are looking for on the *Register* web site, just use the Google site search. Go to www.jspubs.com and look under shortcuts at the top-right of our home page for the *Search the site* option.

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 62). 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 2011 will enable you to download the 2011 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 help, 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 2011 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 photo?

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.

Terminator – FREE

Terminator enables you to create personalised sets of terms of engagement based on the framework set out in Factsheet 15.

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 – FREE

Experts who opt for the Professional service level can access our suite of task-specific software modules to help keep them 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.

Expert Witness Year Book – FREE

Our *Expert Witness Year Book* contains the current rules of court, practice directions and other guidance for civil, criminal and family courts. It offers ready access to a wealth of practical and background information, including how to address the judiciary, data protection principles, court structures and much more. It also provides contact details for all UK courts, as well as offices of the Crown Prosecution Service and Legal Services Commission. And with a year-to-page and month-to-page calendar too, you'll never be without an appointment planner.

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