

The Little Book on

# Expert Witness Fees

The Little Book on  
**Expert Witness Fees**

Chris Pamplin PhD FGS  
Editor  
UK Register of Expert Witnesses

with contributions from  
Philip Owen, Staff Writer  
J S Publications

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## Preface

Late payment of fees remains one of the most frequently encountered grumbles in correspondence received at the *UK Register of Expert Witnesses*, and it is a subject guaranteed to raise the temperature at any gathering of expert witnesses. This book is designed as a practical guide for expert witnesses on ways in which the risk of late payment can be minimised.

As every lawyer knows, setting out clear terms for any contract, at the outset, is essential if subsequent problems are to be avoided. The contract between expert and instructing lawyer should be no different. Indeed, the need for expert witnesses to be upfront about their terms of engagement is now a requirement of the Civil Procedure Rules.

And yet, according to the series of expert witness surveys conducted by the *UK Register of Expert Witnesses* (beginning in 1997), the number of experts who use a written form of contract when accepting instructions from a solicitor has never exceeded 47%. That leaves over half of all experts claiming not to use any form of written contract.

Why do so many experts fail to use a written contract? The main reason is a lack of knowledge about how to create a suitable set of terms. This book provides lots of background information about terms, and it is my hope that it will give the reader sufficient confidence to tackle the task of drafting a set of terms.

This book shows experts how to set out their contractual stall so as to minimise the opportunities for those who instruct them to delay payment of your fees. But, being a pragmatist, I also set out what needs to be done to sue for them – a task made less fraught by the solid groundwork that is a decent set of terms of engagement!

*Chris Pamplin*

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# 1 Introduction

An expert witness is paid for the time it takes to:

- **form an opinion** and, where necessary,
- **support that opinion** during the course of litigation.

An expert witness is *not* paid for the opinion given, and still less for the assistance that opinion affords the client's case.

## A contractual relationship

The relationship between an expert witness and an instructing solicitor is a contractual one, whether or not it has been reduced to writing. It follows that if, for example, the fee the expert is to be paid (or the basis of its calculation) and the timing of its payment have been agreed, the solicitor is **personally responsible for paying the fee in full and on time**.

This is so even if:

- the solicitor has not at that stage been paid by the client (or whoever else is funding the litigation), or
- the solicitor eventually receives less than the full amount from the funding party.

**An expert is paid for his time – not his opinion**

**Solicitor has personal liability for paying expert's fee**

# 2 Terms of Engagement

According to the series of expert witness surveys<sup>1</sup> conducted by the *UK Register of Expert Witnesses* (from 1997 to 2005; see *Appendix 1: Fee rates – survey data*), the number of experts who use a written form of contract when accepting instructions from a solicitor has never exceeded 47%. That leaves over half of all experts claiming *not* to use a form of written contract.

**More than half of expert witnesses do not use written terms**

As every lawyer knows, setting out clear terms for any contract, at the outset, is essential if subsequent problems are to be avoided. The contract between expert and instructing lawyer should be no different. Indeed, the need for expert witnesses to be upfront about their terms of engagement is now a requirement of the CPR.

**Experts must be upfront about their fees**

The *Experts Protocol*<sup>2</sup> requires experts and lawyers to place their professional relationship on a firmer footing by **ensuring** a contract – ideally written – is in place before any work begins. §7.2 of this *Protocol* states:

**Experts Protocol now requires contract in place**

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<sup>1</sup> See <http://www.jspubs.com/Surveys/feesurveys.cfm> for full survey reports.

<sup>2</sup> *CJC Experts Protocol* [2005], see *Appendix 4: Annotated CJC Experts Protocol* on page 169.

# 3

## Court Procedure Rules

### Civil Procedure Rules

Given the contractual nature of the expert–lawyer relationship, it is perhaps unsurprising that the rules of procedure governing the courts have little to say on the matter. Nonetheless, there are a few references in the rules relating to the fees of experts that should be considered.

#### Party experts

CPR 35.4(4) gives the court the power to ‘limit the amount of the expert’s fees and expenses that the *party* who wishes to rely on the expert may recover from any other *party*’. Notice the emphasis on the word ‘party’. Rule 35.4 limits costs between the parties. **It does not override any contractual obligations to pay some other amount to the expert.** Any difference between what the expert is to be paid under contract by a party and what the court says that party may claim from the other side falls to the party to find from its own pocket.

**Court can limit amount of expert fees recoverable between parties**

Generally, the court will have made a ruling under CPR 35.4 before an expert has been instructed. Therefore the lawyer will know before agreeing to instruct a given expert whether there is likely to be a problem, i.e the expert’s contractual fee outstripping the sum recoverable from the other side.

**Lawyers usually aware of potential shortfall**

# 4 Public Funding

## Civil cases

The Government signalled in 1997 that it wanted to focus public funds on:

- the care of children
- the threat of homelessness
- judicial review, and
- the defence of those accused of crime.

Accordingly, the removal of the restrictions on which cases could be funded by CFAs was accompanied by the removal of public funding for those cases. It is no surprise, then, that between 1997 and 2005 the number of publicly funded civil cases dropped by around 40%.<sup>1</sup> In the civil arena, public funding is now restricted almost entirely to family cases.

**Public funding restricted almost entirely to family cases**

Public funding of cases does not alter the contractual nature of the solicitor–expert relationship, but it can affect the relationship in other ways. In particular, public funding increases the risk that a solicitor may end up not recovering the full cost of instructing an expert on his client’s behalf. And any financial pressure on the solicitor can express itself in payment problems for experts!

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<sup>1</sup> ‘A Fairer Deal for Legal Aid’, July 2005, TSO, Cm 6591.

# 5 Medical Reporting Agencies

Medical reporting organisations (MROs) exist to manage the provision of expert medical reports for solicitors and insurers. The regular flow of questions received on the helpline of the *UK Register of Expert Witnesses* about their role, status and financial security demonstrates the level of curiosity in experts. However, curiosity has been replaced by unease following the succession of high-profile commercial failures, such as of Synapse and Expert Reports Ltd, which have left experts carrying the financial can.

Typically, an agency offers solicitors an inclusive package of services that encompasses:

- finding an expert
- obtaining relevant records
- issuing instructions
- setting up an examination
- chasing the report
- paying the expert.

Unfortunately, problems at each stage arise with monotonous regularity.

There is no restriction on or regulation of the setting up of an agency. And there is no requirement for

**How financially secure are MROs?**

**MROs offer one-stop shops for lawyers, but at a high price**

**MROs unregulated and vary in quality enormously**

# 6

## Oral Evidence in Criminal Courts

Experts giving oral evidence in criminal courts come under some special provisions that are the source of much confusion. As a matter of public policy, all witnesses in such cases are entitled to be compensated out of central funds for their loss of time and the incidental expenses incurred in attending court. Furthermore, the Prosecution of Offences Act 1985 assigned to the Lord Chancellor the responsibility for making the necessary arrangements. This was duly done by implementation of the Costs in Criminal Cases (General) Regulations 1986, Part V of which is headed 'Allowances to Witnesses'. It contains detailed provisions for calculation of the compensation due.

**All witnesses entitled to compensation from central funds**

These provisions apply to witnesses for both the prosecution and the defence. Moreover, with regards the latter, they apply whether or not the defendant is legally aided. Indeed, the very existence of the Act that gave rise to the 1986 Regulations deprives defendants of the possibility that their witnesses might be paid for under a Legal Aid Order. This much is clear from Section 25(3) of the Legal Aid Act 1988. It lays down that in criminal cases the costs of representation payable from the legal aid fund:

**Compensation applies to prosecution and defence witnesses**

# 7

## Common Concerns

### CFAs and contingent fees

One of the main underlying causes of problems with the payment of expert fees comes from the far wider use of CFAs as a funding mechanism for civil litigation.

Before the scope of CFAs was hugely widened by the CPR, solicitors conducted litigation on behalf of clients who funded the action. When an expert's report was commissioned, it was usual for the lawyer to have funds 'on account' to cover the disbursement. However, in the world of 'litigation on the never-never', disbursements have become a real problem for lawyers. Indeed, this has been a key factor in the growth of the MRO<sup>1</sup> and a source of confusion for experts.

It is permissible for lawyers to undertake work on a conditional fee basis. However, it is **never** acceptable for an expert to take on such a financial stake in a case. The *CJC Experts Protocol*, at §7.6, states it thus:

*'Payments contingent upon the nature of the expert evidence given in legal proceedings, or upon the outcome of a case, must not be*

**Experts must never have a financial stake in the outcome of a case**

**An expert's duty of independence would be compromised**

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<sup>1</sup> See the chapter on MROs starting on page 71.

# 8 VAT for Expert Witnesses

Value Added Tax (VAT) is a tax on the final consumption of many goods and services in the UK.

The supply of some goods and services is exempt from VAT. These include:

- the sale and letting of land
- financial and insurance services
- postal services
- education
- sport, and
- burial and cremation services.

If in doubt, the liability of supplies can be checked in HMRC Office Notice 701/39: *VAT Liability Law*.<sup>1</sup>

There are currently three rates of VAT in the UK:

- 'standard' rate at 17.5%
- 'reduced' rate at 5%, and
- 'zero' rate at 0%.

It is important to bear in mind that zero-rated goods and services are not the same as exempt goods and services. A zero rating means merely that, for the moment, no tax is being collected on those goods.

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<sup>1</sup> All VAT notices are available from the HMRC website at [www.hmrc.gov.uk](http://www.hmrc.gov.uk)

# 9

## Getting Paid

A survey carried out by the *UK Register of Expert Witnesses* in 2003<sup>1</sup> revealed that only 41% of expert respondents were paid on time in even half of the cases on which they had worked. Furthermore, 30% of the experts reported that they had sued for their fees at some stage in the preceding 5 years. Some 2 years later there had been a general improvement in the numbers reporting late payment. It was still apparent, though, that only 47% could claim that they were paid on time in even half of their cases. Conversely, the proportion of those who had sued for recovery had risen to 34%.

**Less than 50% of experts are paid on time in even half of their cases!**

### Steps to avoid late payment

The expert witness business as a whole has a very poor payment record for two reasons.

- Experts are generally not good businessmen. They prefer to concentrate on completing assignments, leaving the somewhat embarrassing subject of terms of engagement, fees and timing of payment to one side. Invoices are sent late, and the thought of chasing a lawyer for payment

**Most experts find talk of payment distasteful**

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<sup>1</sup> See <http://www.jspubs.com/Surveys/feesurveys.cfm> for full survey reports.

# Appendices

## **Appendix 1: Fee rates – survey data**

Since 1997, J S Publications has carried out a general expert witness survey once every 2 years. These snapshots of the expert witness landscape provide the most in-depth intelligence on expert witnesses, the work they do and their charging rates within the UK.

Presented on the following pages are the fee data for the surveys conducted between 1997 and 2005, broken down by broad discipline. For a more detailed discussion of the surveys and their data, see <http://www.jspubs.com/Surveys/feesurveys.cfm>.

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