

# Your Witness

Newsletter of the  
UK Register of  
Expert Witnesses,  
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## A code too many?

Against all expectations, the *Code of Guidance for Experts and those instructing them* has had new life breathed into it. It seems likely, moreover, that a final version will be published later this month by the Head of Civil Justice (and Master of the Rolls), Lord Phillips of Worth Matravers.

As readers with long memories will recall, the Code started life almost before the ink on Lord Woolf's report was dry. The original intention had been that it should be appended to the new Civil Procedure Rules as one of the many pre-action protocols then planned. It was soon realised, though, that that would be inappropriate, not least because the Code purported to offer guidance on experts' duties and responsibilities at all stages of litigation, not just before proceedings were issued.

The first draft of the Code was prepared by a Working Party convened by Sir Louis Blom-Cooper QC. Sir Louis was, and still is, Chairman of the Expert Witness Institute, and it was some while before any other expert witness organisation was represented on the Working Party. When the draft was released for consultation in the spring of 1999, it provoked many suggestions for amendment, although in the event few of them were accepted by the Working Party. By this stage the Academy of Experts had become so unhappy with the Working Party's efforts that it decided to produce a code of its own, and this rival version has been available on the Academy's web site since the beginning of last year. Meanwhile, all went quiet in the other camp.

It was recognised, of course, that it was most undesirable that two codes should be in circulation, but by the time Lord Phillips took over the reins from Sir Richard a year ago, all efforts to agree on one alone had failed. He then decided to invite a recently retired Lord Justice of Appeal, Sir Anthony Evans, to review the two codes and produce a revised version of the Working Party's one that took account of the other. It was this version that Lord Phillips unveiled at last month's Bond Solon Conference and announced that he intended to publish before Christmas.

How far does the new version of the Working Party's code differ from its predecessor? Well, by quite a lot, though mostly in matters of organisation. Phrases have been reworded, sections rearranged and paragraphs transposed, all to good effect. There is also a fair amount of new text, although much of it is merely explanatory and adds little of moment to the

original. There are, however, a number of instances where the redrafting of the original text has weakened its force as, for example, in the section on Attendance at Trial. Overall, though, the effect of the revision is modest and the Working Party should be quite pleased with the outcome. Whether the Academy will be is another matter.

While welcoming the fact that there may soon be one, officially approved Code, I cannot help regretting that Lord Phillips did not send the Working Party back to its drawing board with an altogether different brief. The principal fault of all the existing versions, or so it seems to me, is that they attempt too much in offering guidance both to experts *and to those instructing them*. Remove the guidance aimed at solicitors and you would be left with an altogether simpler Code specifically for expert witnesses that all experts could comprehend and most would find no difficulty in observing.

## Engineers and the Courts

This is the title of a day-long seminar taking place on 19 March 2002. It is being organised by the Automobile Division of the Institution of Mechanical Engineers, but should appeal to engineers in other fields as well. The morning sessions provide an overview of the legal system and the ways in which it is changing, while those in the afternoon cover the role and duties of the expert witness and provide advice on giving evidence in court. The fee for non-members is £190 + VAT, and this includes lunch and tea. For further details contact Karen Sotnick at IMechE Headquarters (telephone 020 7973 1316).

## Draft time ahoy!

This is just to let you all know, if anyone should need reminding, that January is the month in which we send out draft *Register* entry forms for checking. As usual, your co-operation in ensuring that your draft form is checked, authorised and returned to us by the due date will be much appreciated.

We have added a valuable new benefit to the Professional service level this year. The Business Support Helpline provides free and unlimited access to qualified solicitors, accountants and allied professionals. The Helpline offers professional advice you can rely upon for commercial legal matters, tax, VAT, intellectual property issues and much more.

Meanwhile, everyone here at J S Publications sends their best wishes for a happy Christmas and prosperous New Year.

*Chris Pamplin*

## Inside

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Copyright

Issue 26

# Expert witness survey 2001

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*Fewer reports  
being written  
all round...*

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There was an excellent response to the questionnaire we enclosed with the September issue of *Your Witness*. Almost 500 forms were returned, and we extend our grateful thanks to all those readers who took the trouble to complete them.

It was the fourth survey of the kind that we had conducted in 6 years. To facilitate comparison, we included many of the questions we had asked in previous years. In addition, we asked a few new ones to probe the effect on experts of changing practices in the conduct of litigation. This article summarises the answers received.

## The experts

### Profession

Of the experts who returned questionnaires, 200 were medical practitioners, which in itself is a sufficiently large total to justify more detailed analysis of the information they provided. We plan to publish a further report on this in the next issue of *Your Witness*.

Of the remaining 282 experts, 63 were engineers, 53 had scientific, veterinary or agricultural qualifications, 39 were in professions ancillary to medicine, 36 were surveyors or valuers, 24 were accountants or bankers, and 17 were architects or builders. The substantial 'others' category totalled 50, of whom 23 were psychologists.

### Work status and workload

Of the respondents, 330 (68% of the total) work full time, and another 117 (24%) work part time. Only 7% described themselves as retired. Overall, expert witness work accounted, on average, for just 37% of their workload. Clearly, we are dealing here with a body of people much involved in expert witness work but with an even more extensive commitment to their professions – which is, of course, exactly as it should be.

### Extent of experience

We also asked respondents to say for how long they had been doing expert witness work. From their answers it is apparent that they are a very experienced lot indeed. Of those who replied, 90% had been practising as expert witnesses for at least 5 years, and 63% had been undertaking this sort of work for more than 10 years.

## Their work

### Reports

In all four of our surveys we have asked those taking part to estimate the number of expert reports they have written during the preceding 12 months, and this latest survey is the first to show a fall in output. Furthermore, it has happened for both reports prepared for use in court and those written solely for the advice of the instructing solicitor and the client. The

experts who took part in our 1999 survey were averaging per year 48 of the former and 19 of the latter. Now these average annual totals have dropped to 41 and 12 respectively.

The reasons for this downturn in business are not far to seek. Even before the Woolf reforms took effect there had been a fall off in the number of writs issued in both the county courts and the High Court, and since April 1999 there has been a dramatic decline in the number of cases going to trial. In part, of course, this is because more disputes are being settled before they reach court, but there are other factors in play as well.

### Conditional fee agreements

Some 2 years ago we reckoned that the growing use of conditional fee agreements (CFAs) as a means of funding litigation would result in an increased demand for reports of the advisory kind, but so far this has not happened to any great extent. Indeed, it would appear from our latest survey that the great majority of experts has yet to be instructed for a CFA case in any capacity at all. In answer to a question about the number of CFA cases they had been involved in during the past year, 82% replied that they had not been instructed in any. This shows little change from the 88% who said as much 2 years previously.

### Legal aid cases

Another change we predicted 2 years ago that *has* come about is the sharp fall in the number of legal aid cases for which experts are being instructed. Although 69% of those taking part in our latest survey had acted in at least one such case during the preceding 12 months, the total number of their legal aid cases was much reduced. In 1999, 19% of respondents reported that they had acted in more than 25 such cases over the previous year, but in 2001 only 10% could say the same. Here again the reason is obvious: since April last year public funding has not been available for the conduct of most personal injury claims, and they account for a substantial part of the workload of the civil courts.

### Single joint experts

However, the biggest change of all over the past 2 years is the increased use being made of single joint experts (SJE). Although 30% of the experts who took part in our 1999 survey said that they had already acted as an SJE, very few had been instructed in that capacity on more than three occasions in the preceding 12 months.

As things have turned out, the growth in SJE work has been greater than anyone could have anticipated. Our latest survey reveals that fully 80% of the experts taking part in it had acted as an SJE during the previous 12 months and that, on average, experts are being instructed in that capacity at least 12 times a year. And, of course, every case where one expert is instructed in

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*... strong growth  
in SJE work  
a major factor*

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place of two contributes to the overall reduction in demand for expert witness services.

### Court appearances

Another change over the years that many experts will find more welcome is the reduction in the number of cases for which they are required to give their evidence in court. It is now altogether exceptional for experts to have to appear in court in 'fast track' cases, and it is becoming less and less likely in those on the 'multi-track'. In 1997 we recorded that the average frequency of court appearances was 5 times a year; some 2 years later this had dropped to 3.8 times a year; it now stands at 2.5 times a year.

### Their fees

Which brings us to the details in which everyone is interested: how much their fellow experts are charging for expert witness services. For convenience, we summarise this information in tabular form.

For each professional group the table gives average hourly rates for writing reports and full-day rates for attendance in court. In each instance the rate is followed by the corresponding amount taken from the survey conducted in June 1999.

In view of the small size of some of the groups, it would be unwise to read too much into the changes these pairs of figures reveal. It is apparent, though, that for most professions the rates for both activities have increased by far more than the prevailing rate of inflation. On average, those for report writing have gone up by 8.5% per year and those for court appearances by 5.6% per year. Intriguingly, the one group that would appear to have bucked both trends is that of accountants and bankers. Have they found that they were pricing themselves out of their market?

Once again, the figures in the final column demonstrate the extent to which officially determined allowances fall short of the fees experts are free to negotiate for themselves. For example, the most that consultant medical practitioners can count on being paid for giving evidence at a criminal trial is £415 a day, which is well under half the average fee they charge for appearing in civil courts. They, like all other experts, must now be hoping that the Lord Chancellor heeds the comments Lord Justice Auld has made on this grossly unsatisfactory state of affairs (see page 6).

### Speed of payment

Here there is at least some improvement to report, although the general situation remains grim. In our latest survey, 68% of respondents said that their invoices were being settled more promptly than 2 years ago, as against 9% who reckoned that they were being settled more slowly. On the other hand, only 32% could claim

that they were being paid on time in even half of the cases on which they worked, a statistic that has changed little over the years.

Against this background, it is encouraging to be able to report an increase in the number of experts who use a written form of contract when accepting instructions from a solicitor. The proportion of those who now do so stands at 47%, as against 38% 2 years ago and 32% back in 1995. Furthermore, more experts are now stipulating in their terms of engagement how soon after invoice they expect to be paid, up 8 percentage points to 65%. Doing this cannot guarantee prompt payment, but it is at least a move in the right direction towards securing it.

If all else fails, experts can, of course, sue for their fees – or at least threaten to do so. Obviously, this should be the option of last resort, if only because it is likely to lose the expert a client, but experts are increasingly finding it necessary to take such action.

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*Increase in fee rates outstrips inflation*

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Professional group	n*	Average rate per hour (£)			
		Writing reports		Court appearances	
		2001	1999	2001	1999
Medicine	200	149	136	927	850
Paramedical	39	100	68	718	512
Engineering	63	85	71	663	567
Accountancy, banking	24	133	135	895	987
Science, agriculture	53	78	79	648	577
Surveying, valuing	36	104	83	787	642
Architecture, building	17	84	77	712	612
Others	50	127	71	622	521
Totals	482	119	100	798	708

\* n is the total number of respondents in each professional group in the 2001 survey.

Of those who took part in our 1999 survey, 24% said that they had had to sue for their fees on at least one occasion in their career as an expert witness, but now that figure has risen to 31%. Furthermore, no fewer than 27% of the respondents to our latest survey reported having had to sue an instructing solicitor during the preceding 12 months. This is a frightening indication of just how bad the relationship between experts and many solicitors has become.

There is, however, another method of getting clients to pay up sooner, and that is to offer them discounts for prompt payment. Our latest survey reveals that some experts already do this. More to the point, though, many others – almost 30% of the total – indicated that they might be prepared to do so. Is this, perhaps, a way forward for all experts who are concerned about the speed at which they are paid?

John Lord

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*More experts are having to sue for their fees*

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# The eCast explained

## The problem with indexing

We believe, and many experts tell us they agree, that the indexing of the *UK Register of Expert Witnesses* is the best in the business. It has developed over many years, and is both flexible and efficient. However, it is not perfectly suited to the needs of everyone who uses the *Register*.

One problem arises from the limit of 98 index terms per entry in the *Register*. Whilst this limit far exceeds that of any of our competitors, the fact remains that it is not always possible for experts to cover every aspect of their professional competence.

In turn, we find some lawyers know they need an expert versed in, say, a very specific technique used in vascular surgery, and they fail to locate a suitable expert even though a number of experts in the *Register* have the skills and experience necessary to deal with the enquiry.

## Improving the Register's performance

In such cases, the lawyer concerned may turn to the free *Register* helpline for assistance, and we can then make a few telephone calls to identify a suitable expert. But what if they don't? It was to help improve the *Register's* performance in this situation that J S Publications created the eCast system.

As well as offering the ability to search for vetted experts in the *Web Register* by keyword and by browsing the subject index, we also allow lawyers to use the eCast system to locate experts by broadcasting their requests to hundreds of potentially capable experts... instantly.

## Two types of eCast

There are two types of eCast: narrowband (which are sent to a relatively small number of highly targeted experts) and broadband (which are sent to large numbers of experts based on broad selection criteria).

### Narrowband eCasts

When a subscribing lawyer has retrieved a list of experts by browsing through the subject index, an opportunity is given to send an eCast to that set of experts. This is a highly targeted form of eCast that is appropriate when lawyers are able to focus in on particular specialisms.

### Broadband eCasts

If lawyers are not sure what sort of experts to choose, the broadband eCast is the better option. Broadband eCasts use sectors to define very broad areas of interest, e.g. personal injury. Experts listed on the *Register* go on-line and select one or more sectors. When lawyers send broadband eCasts they choose which sectors they want to target (i.e. those sectors most likely to contain experts who might be able to help).

### How eCast works

Whether the eCast is narrowband or broadband, the sender writes a short description of his or her

requirements. Then J S Publications sends an e-mail to all the relevant experts giving details of the request. Experts signal their interest on the eCast page of the *Register* web site, and the lawyer who broadcast the search can see who has responded.

### What is a sector?

To target broadband eCasts to those experts most likely to be able to help, J S Publications has defined broad areas of interest. These have been chosen to reflect the types of case requiring expert evidence commonly dealt with by the legal profession. The sectors are, currently:

Accountancy • Agriculture • Building • Civil matters • Criminal matters • Engineering • Family matters • Marine • Medical • Negligence • Personal injury • Quantum • Science • Surveying

### Getting started with eCasts

There are three steps experts listed in the *Register* need to take to get started with eCasts:

- 1) Create a member's account.
- 2) Set up a filter for broadband eCasts.
- 3) Choose the frequency of delivery of eCasts.

See page 5 for detailed instructions on how to accomplish these three steps.

### Who can send eCasts?

Only lawyers who have subscribed to the *Register* will be able to create and send eCasts. This should ensure experts will not be troubled by 'junk' eCasts. If the eCast system is abused, J S Publications will act quickly to protect the integrity of the system.

### What about the risk of e-mail viruses?

Because the only e-mail experts receive will be sent by J S Publications, there is virtually no risk of an eCast containing a virus. In effect, J S Publications is acting as the 'trusted middleman' between the lawyers and the experts.

### Which e-mail address will be used?

With the creation of the member's account on the *Register* web site, the expert gains access to an account profile. If an e-mail address is specified in the account profile, that address will be used in preference to any other in the published entry. This allows experts the flexibility to set up a special e-mail account to receive all eCast traffic. (See page 5 for more information on how to specify this alternative e-mail address.)

### Can all eCast e-mails be stopped?

Yes, but that will be limiting the opportunity for work to be generated from inclusion on the *Register*. To prevent eCasts being sent, experts simply ensure they have chosen not to receive eCasts in their account profiles.

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*A unique new way to locate vetted experts*

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*Three simple steps get you started with eCasts*

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# Getting started with eCasts

## Step 1: Creating your account

When you first visit *www.jspubs.com* a box on the left of the screen invites you to 'Log in now' (see Figure 1). Click on this text to go to the log in introduction screen where you should click on the *Member* button (see Figure 2).



Figure 1

and without a log in process we wouldn't be able to identify you as a visitor, member or premium account holder.



The log in process recognises:

Figure 2

Once at the member log in screen (see Figure 3), enter your username and password (see the covering letter that came with this issue of *Your Witness*), leave the *Remember me* option ticked, and click the *Member Log In* button.

gin • Premium login • Public login

### Member Log In

If you are listed with J S Publications, you will have been given a member username and password. Please enter them here. If you don't have this information to hand you can [have it sent](#) to you by e-mail.

Username:  Member Log In  
Password:   Remember me

Figure 3

This will create your account. Once created, your account allows the *Register* web site to remember you (if you left that option ticked), so that in future you should not have to go through the log in procedure.

## Step 2: Filtering broadband eCasts

Once you have completed step 1 and created your account, choose the sectors from which you would like to receive broadband eCasts. To do this, click the 'Setup eCast' option which is now displayed to the left of any screen on the web site and you will see the screen shown in Figure 4.

You can opt to receive eCasts as soon as they are issued, or you can choose to receive a daily digest of any eCasts.

**Available eCast sectors**

<input type="checkbox"/> Accountancy	<input type="checkbox"/> Agriculture	<input type="checkbox"/> Building
<input checked="" type="checkbox"/> Civil matters	<input type="checkbox"/> Criminal matters	<input type="checkbox"/> Engineering
<input type="checkbox"/> Family matters	<input type="checkbox"/> Marine	<input checked="" type="checkbox"/> Medical - negligence
<input checked="" type="checkbox"/> Medical - personal injury	<input checked="" type="checkbox"/> Quantum	<input checked="" type="checkbox"/> Science
<input type="checkbox"/> Surveying		

**Frequency of delivery**

Send eCast to me as soon as they are issued  
 Send me a daily digest of eCasts

Figure 4

It is important to remember that the sectors have been chosen for their relevance to the legal professional who is in the position of not knowing what sort of expert is needed! In most cases, lawyers will choose to send a narrowband eCast using the subject index to select highly targeted sets of experts.

Simply tick the sectors relevant to you. Tick every sector if you wish to see all broadband eCasts, or be selective if you want to see just

those likely to be relevant to you. You may change your selection at any time.

## Step 3: Choosing when to receive eCasts

Below the list of sectors you can set the frequency of delivery of eCasts (see Figure 5). Choose between receiving eCasts as soon as they are sent by the lawyer, or a single digest e-mail each day summarising eCast activity.

Figure 5

## Setting your preferences

The *Register* web site can also remember a number of user-specific preferences for viewing lists of experts returned by searches (see Figure 6). These preference settings are always accessible when you are logged in. Simply click the *profile* link shown on the bottom right of any page.

Use this screen to set the e-mail address to which you would like eCasts sent. Initially, the e-mail address shown here, if any, will be that published by us in the *Register*. However, you may store any e-mail address you wish here, and it will be used as the destination of all eCasts to you.

## New Register web site

This page has taken you through the simple steps necessary to get started with eCasts. In following them, you may have noticed the new look to our web site. The changes are not just skin deep. The overhaul has enabled us to add many new and useful features. For example, the collection of back issues of this newsletter, and the complete collection of Factsheets, can now be searched on-line.

## New turn2experts resource launched

As well as improving the *Register* web site, we have recently launched *turn2experts*. This new expert location web site, aimed at the PR and media industries, allows us to promote experts in the *Register* who are willing to work in these arenas.

Working with the media is not just being grilled by Paxman on Newsnight! There are plenty of opportunities for experts to work with the media, both in the 'limelight' and behind the scenes, helping the press and broadcast media to get their facts right!

The PR world is also a major user of expert opinion, in situations such as product launches and crisis management.

All experts in the *Register* are eligible for a free listing on *turn2experts*, and you can find out more by reading the enclosed information sheet.

Create your account on-line

• Premium login • Public login

### Your personal account profile

This is your personal account profile. You can make any necessary alterations and save the changes.

**Your details:**

Title (*Mr, Mrs, etc*)   
First name\*   
Last name\*   
Company name (*if applicable*)   
E-mail\*

**Member options**

Notify me when new factsheets are published  
 Notify me when a new survey is started

**Results page options**

Show all the search results in one page  
 Sort by the experts' professional descriptions  
 Sort by experts' names  
 Sort by number of 'hits'  
 Sort by town

**eCast options**

Send me a daily digest of eCasts  
 Send eCasts as soon as they are issued

Items marked with \* are required

Figure 6

Benefit from member-only features

# Experts and the Auld Report

The long awaited report of Lord Justice Auld's review of the criminal courts was published on 8 October. He had been given wide terms of reference, but even so his report exceeded every expectation. It covers in 685 pages pretty well every aspect of criminal justice, apart from sentencing, and provides a blueprint for what a modern system of criminal justice should be.

Almost inevitably, some of Sir Robin's proposals have sparked controversy, especially those relating to mode of trial and the abolition of the choice a defendant has to elect trial by jury in so-called 'either-way' cases. It would be a great pity, though, if argument over these recommendations should divert attention from the many worthwhile proposals Sir Robin makes on other topics.

The general thrust of the Report is that the criminal courts need streamlining, the criminal law requires codification, and there ought to be a set of Rules governing criminal procedure along the lines of those adopted recently for the civil courts. Such a framework should help ensure that criminal cases are dealt with more predictably, with less delay and with greater efficiency all round.

Although the Government has welcomed the Report, we must now wait for the White Paper it has promised for next spring to find out to what extent it is prepared to will the means to realise Sir Robin's vision. In the meantime, those of our readers who are interested may like to know that the entire Report is available on the review website, [www.criminal-courts-review.org.uk](http://www.criminal-courts-review.org.uk).

## Expert evidence

Many of the representations Lord Justice Auld received during the course of his review concerned expert evidence. Issues were raised about:

- the objectivity of those who put themselves forward as experts
- the way in which their evidence was presented
- the effect that delay in obtaining expert evidence was having on the conduct of cases, and
- the poor pay on offer to experts.

Although these matters impinge on various topics covered elsewhere in the Report, they are in fact all dealt with in one place, Chapter 11.

As all readers will recognise from even a cursory read of the recommendations we reproduce here, the intention behind them is to establish a regime for expert evidence equivalent to that governing its provision in the civil courts. For example, criminal courts should be encouraged to exercise greater control over the expert evidence they receive and have the power, among other things, to order experts to meet with a view to establishing those matters on which they can agree and those on which they cannot.

It is worth noting, though, that Sir Robin does *not* envisage criminal courts being granted the power to require that expert evidence be provided by a single expert, as this would risk denying the defendant the right to a fair trial guaranteed under the Human Rights Act 1998. In circumstances where both the prosecution and the defence are happy for an issue to be dealt with by a single expert, they are to be encouraged to appoint one, but not otherwise.

A number of those contributing to the review even suggested that criminal courts should have the power to appoint their own experts to give evidence to the exclusion of any provided by the parties. (This, it may be recalled, was also suggested for the civil courts by Lord Woolf in the interim report of his Inquiry. However, it aroused such opposition that he did not pursue the idea in his final report.) In Lord Justice Auld's view, a criminal court should definitely *not* have that power. Neither does he see any advantage in a criminal court being allowed to appoint an expert of its own *in addition* to those called by the parties. His stated reason was that the manner of such an appointment might suggest to the jury that the court-appointed expert had greater authority than the other experts in the case.

Another recommendation that will be as welcome to experts as it is to the lawyers who instruct them is the one proposing that, in cases where the defence is being publicly funded, if the court accepts that it needs to hear expert evidence, the appointment of someone to provide it should not be subject to further authorisation by the Legal Services Commission. At present, the LSC can – and sometimes does – effectively block the court's decision by refusing the means. However, as the Report stresses, it is difficult to see on what possible basis the LSC is entitled to do that.

Although he makes no recommendation about the level of payment that defence experts should receive in publicly funded cases, Lord Justice Auld does have some forthright comments to make on that vexed subject that deserve reprinting here. He writes, at paragraph 150:

'I have had a look at the current scales, and without going into detail on the figures, they are meagre for professional men in any discipline. I am not surprised that solicitors complain that they have often had difficulty in finding experts of good calibre who are prepared to accept instructions for such poor return. The best expert witness in most cases is likely to be one who practices, as well as giving expert evidence, in his discipline, rather than the "professional" expert witness who does little else. Justice is best served by attracting persons of a high level of competence and experience to this work. If we expect them to acknowledge an

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*A masterly survey  
of the criminal  
justice system...*

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*... that proposes  
rules for experts  
akin to CPR Pt 35*

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overriding duty to the court and to develop and maintain high standards of accreditation, they should be properly paid for the job. I hope that the Legal Services Commission will take an early opportunity to review and raise appropriately the levels of their publicly funded remuneration.'

To which we can only add that it is a pity that Sir Robin did not bracket the Lord Chancellor's Department (LCD) with the LSC in this long overdue call for action, since it is, of course, the LCD, not the LSC, that funds the payments made to experts for attending court in criminal cases.

We have left to last the recommendation that stands at the head of those made in Chapter 11, partly because it bears so little relation to the others but also because it was the least expected. The Council for the Registration of Forensic Practitioners (CRFP) has every reason to be pleased that Lord Justice Auld should have endorsed its scheme, especially as it was only in

August of this year that the first names were entered on its Register. But even the Council must have been surprised by his suggestion that other expert witness bodies should consider amalgamating with it. The Academy of Experts, the Expert Witness Institute and the Society of Expert Witnesses all fulfil additional functions (the Society exclusively so), and as the Council's chief executive, Alan Kershaw, was quick to point out, the CRFP does not aspire to any role other than that of a regulatory body.

On the face of it, it does appear rather unlikely that amalgamation with the CRFP could ever come about. And in his speech at last month's Bond Solon Conference, the Master of the Rolls expressed the view that this particular idea of Lord Justice Auld's was 'over-ambitious'. However, Lord Phillips did go on to say that he himself would welcome a reduction in the number of expert witness organisations. It would seem that this is only likely to be achieved by a merger of the Academy and the Institute.

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*Amalgamation  
with the CRFP  
'over-ambitious'*

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### **Lord Justice Auld's recommendations on expert evidence**

#### **Competence**

- 1) Consideration should be given to concentrating in one self-governing professional body within England and Wales the role of setting, or overseeing the setting, of standards of conduct for forensic scientists of all disciplines, the maintenance of a register of accreditation for them and the regulation of their compliance with its conditions of accreditation; and
- 2) For those purposes, the several existing expert witness bodies providing for all or most forensic science disciplines should consider amalgamation with, or concentration of their resources in, the Council for the Registration of Forensic Practitioners.

#### **Objectivity**

- 1) The new Criminal Procedure Rules should contain a rule ... that an expert witness's overriding duty is to the court; and
- 2) Any witness statement or report prepared by an expert witness for the assistance of the court should contain ... a signed declaration to that effect.

#### **Suitability of expert evidence**

- 1) Criminal courts' power to control the admission of experts' evidence should be formalised in the new Criminal Procedure Rules and put on a similar footing to that for the Civil Courts ..., namely by imposing upon them a duty, and declaring their power, to restrict expert evidence to that which is reasonably required to resolve any issue of importance in the proceedings;
- 2) Judges and magistrates should rigorously apply the test governing that power and duty, and the Court of Appeal should support them; and
- 3) In publicly funded defence cases, where a judge or magistrates' court has directed that it would be justifiable to call a defence expert, that direction should constitute authorisation for the expenditure of public money on an expert at a specified rate.

#### **Manner of presentation of expert evidence**

- 1) Where there is an issue on a matter of importance on which expert evidence is required, the court should not have a power to appoint or select an expert, whether or not it excludes either party from calling its own expert evidence; and
- 2) Where there is no issue, or there is one in which the parties are content that the matter should be resolved by a single expert, they should be encouraged to deal with it in that way, agreeing his report or a summary of it as part of the evidence in the case.
- 3) The prosecution and defence should normally arrange for their experts to discuss and jointly to identify at the earliest possible stage before the trial those issues on which they agree and those on which they do not agree, and to prepare a joint statement for use in evidence indicating the measure of their agreement and [summarising] the reasons for their disagreement; and
- 4) Failing such [an] arrangement, the court should have [the] power to direct such a discussion and identification of issues and preparation of a joint statement ... and to make any consequential directions as may be appropriate in each case.
- 5) Close attention [should be paid] in any further and general review of the rule against hearsay to the increasing reliance of forensic science laboratories and of many experts in certain disciplines on electronic recording, analysis and transmission of data;
- 6) Greater use [should be made] by legal practitioners of video conferencing and other developing new technology for communicating and conferring with experts in preparation for trial; and
- 7) [There should be] development of the law and the provision of national facilities to enable experts to give evidence by video-link or other new technologies in appropriate cases.

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*Expert evidence to  
be put on same  
footing as CPR*

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# Experts' use of copyright material

## Factsheet Update

The following new factsheets are now available:

### ID Factsheet title

- 40 The EWI Conference 2001
- 46 The Auld Report and experts

We have also revised the following factsheets to take account of new case law:

### ID Factsheet title

- 23 Meetings of experts
- 28 Expert witness immunity from suit

You can access factsheets through our web site, or by using our *Factsheet Viewer* software. Call us on (01638) 561590 for details.

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We have received a number of enquiries lately from experts concerned about the use they make of copyright material. One correspondent had been sufficiently worried by it to seek clarification of the legal position from the Lord Chancellor's Department (LCD). The particular issues he raised with the LCD were:

- (i) Was he infringing copyright by attaching to his reports photocopies of articles and scientific papers on which he had relied when preparing the reports?
- (ii) Would his instructing solicitors be in breach of copyright if they copied the paperwork to counsel, other experts and the solicitors for the other parties?

### LCD ignore the reality...

The reply this enquiry elicited was not especially helpful. It was up to experts and those instructing them, it said, to satisfy themselves that they were not in breach of copyright when copying supporting documentation in this way. Neither the Civil Procedure Rules nor the Part 35 Practice Direction require experts to append such documentation to their reports, and, in any case, the Rules cannot override the substantive law of copyright, any more than can the LCD.

In our view this response, while strictly correct, ignored the reality of the situation – that many solicitors nowadays ask the experts they instruct to supply supporting documentation with their reports in the expectation that they themselves will want to copy it on. After all, one of the main objectives of the CPR regime is to encourage greater openness between litigants in the initial stages of their dispute, while another is to persuade the parties to co-operate as far as possible in bringing the case before the court. It is good practice, then, for parties to provide each other with copies of the published materials on which their experts have relied, even though the Rules do not specifically require them to do so.

### ... and fail to mention the key statute

What was really surprising about the LCD's reply, though, was that it failed to mention a statutory provision governing the use of copyright material in exactly the circumstances outlined above. Section 41(1) of the Copyright Designs and Patents Act 1988 states quite unequivocally: 'Copyright is not infringed by anything done for the purposes of parliamentary or judicial proceedings'.

It follows that an expert instructed to prepare a report for use in court may append photocopies of any articles, etc., on which he or she has relied without in any way breaching their authors' or publishers' copyright. This is so whether the expert is supplying one copy of the report or several – as would arise if he or she were acting as a single expert jointly appointed by two or

more parties. It would also be entirely in order for the expert to retain a further copy of each article for personal files, since without the copies he or she might well be unable to deal with questions raised in the course of the proceedings, whether by the parties direct or in cross-examination.

In reality, of course, most of the copying of experts' reports that takes place is done in solicitors' offices, but here again the same exemption applies. Providing the copied reports are to be used in judicial proceedings, the issue of copyright infringement with regard to their supporting documentation does not arise.

It would be a different matter, of course, if the solicitor was having the report photocopied for other reasons, e.g. for the information of colleagues not involved directly in the case. In

this connection, though, it is worth noting that many solicitor firms hold licences from the Copyright Licensing Agency to photocopy published materials. Within appropriate limits, a firm mandated in this way would be entitled to copy any documentation accompanying an expert's report without infringing copyright.

### No exemptions for advisory reports

As readers of *Your Witness* will appreciate, none of the foregoing applies to reports prepared by experts for the *advice* of solicitors or their clients, i.e. to help them decide whether or not to litigate. Since, however, it can never be the intention of those requesting such reports that they should be exchanged with a potential opponent, there is hardly ever a need for the experts who supply them to attach the articles, etc., on which they have relied when formulating their advice.

### Special measures for the British Library

Those readers who have occasion to order from the British Library the research papers they need to prepare reports for use in court may like to know that they can obtain these without having to pay the usual copyright fee. When ordering such 'Privilege Library' copies, though, they will need to make clear the exact purpose for which the documents are required, i.e. to prepare a report for use in judicial proceedings. Thereafter, the expert or the instructing solicitor(s) can take such further copies as are needed for the purposes of the proceedings without having to seek permission to do so or pay any fee.

Experts ordering documents from the British Library that are required for other purposes, including the preparation of reports of an advisory nature, must use the Copyright Fee Paid Service. Should the need arise for more than one copy, either the copyright owner's express permission to photocopy must be sought or extra copies should be ordered and a further fee paid.

*John Lord*

*'Copyright is not infringed by anything done for the purposes of... judicial proceedings'*