Your Witness

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BMA Terms of Engagement

I have long been a champion for the use of written Terms of Engagement by expert witnesses. Yet so many of the calls to the *Register* helpline still concern problems with fees that arise, in large part, because the expert has failed to build his working relationship on a firm contractual footing.

Our efforts were given a healthy fillip when the Civil Justice Council's Experts Protocol was inculcated into the Practice Direction to Part 35 of the Civil Procedure Rules (CPR). This made the use of terms a requirement under the CPR.

All experts listed in the *Register* have free access to our Terminator service to create their own personalised terms (see page 8 for details). But now medics have a further option: the BMA's Expert Witness Terms and Conditions.

Published in April 2009, they have been crafted by lawyers within the BMA specifically to guide doctors working as expert witnesses in the creation of a basic set of terms. The document provides a draft letter from the expert witness to instructing solicitors (or agencies) setting out the terms of appointment. It then offers alternative wordings for fixed fee and hourly charging models. It also contains sections covering matters such as the obligations of the solicitor, duty to the court, liability, termination, intellectual property, confidentiality and joint instructions. Surf to *www.bma.org.uk* for full details.

Keran Henderson jury foreman

In our discussions with the Law Commission about whether their proposals on the pre-trial assessment of expert evidence in criminal trials go far enough (see pages 2–5), we cited the *Keran Henderson* case. Henderson was a childminder who was accused of the manslaughter of a child in her care. Her trial, like that of *Cannings*, was dominated by conflicting expert medical evidence. For example, in its article of 14 November 2007, *The Times* reported 'Medical experts told the court that the child's fatal brain injuries could only have been caused by a shaking so violent that it caused her neck to snap back and forth', whilst 'experts for the defence argued that the injuries could have been months old.'

The *Henderson* case is another centred on the triad of intracranial injuries that have come to be seen by many doctors as proof of non-accidental injury. But, as we report on page 5, in the case of *Harris*, this theory has been found to be based on a very low quality database. Now, the court's view is that the triad of injuries does not, in itself, prove non-accidental injury.

My point to the Law Commission is that to allow a jury to convict on a majority of 10–2 cannot be right when the trial is already marked out as being potentially 'unsafe', in that it is one depending (almost) exclusively on a serious disagreement between distinguished and reputable experts. Isn't a 10–2 verdict the very definition of reasonable doubt?

When the foreman of that jury ends up on the wrong side of a contempt of court hearing for an interview he gave to Frances Gibb at *The Times*, you know things are getting serious!

Disclosure Manual ignored

Some time ago I had a call to the Helpline from Richard Emery, an expert in the *Register*. He was at court in a significant retail fraud case when he became aware that the prosecution expert knew of a serious deficiency in a database that was central to the case against the defendants.

After the trial, Mr Emery made a statement detailing the conversation he'd had with the prosecution expert. In this, Mr Emery had expressed surprise at finding that in certain crucial aspects the database was incorrect. The prosecution expert's response was that he had already identified this failing in the database but hadn't included it in his expert report. When subsequently questioned, the prosecution expert said that after completing his report he had been asked to review 16 entries in the database. It was at that point he found the errors. But, he said:

> *'Although I informed the prosecution of this minor difference, I did not consider that it was significant or relevant enough to be disclosed in an amending report.'*

Let's not forget that this database was central to the case against the defendants. As the Court of Appeal puts it:

> *'this important piece of evidence was in fact valueless and should have played no part in the deliberations of the jury'.*

The prosecution expert's action seems to fly in the face of the requirements of the Disclosure Manual published by the Crown Prosecution Service (CPS) following the *Sally Clark* case. Indeed, the Court of Appeal 'invited' the CPS to forward the papers to the expert's professional body for possible action against their member.

If you wish to avoid such a situation, the rule is simple. **If you have considered some evidence and concluded that it's irrelevant, that opinion must be included in your report. And if your report has already been written, write a supplementary report!**

Dr Chris Pamplin

Pre-trial testing: the problem

Law Commission to improve court control over expert evidence

The steady stream of criminal appeals over recent years featuring the criticism of expert evidence has led many commentators to call for 'something to be done'. Well, now the Law Commission is doing something.

The need for change

The criminal courts in England and Wales adopt a liberal approach to the admission of expert evidence. In effect, providing the court believes the proposed expert evidence is relevant to some issue in the case, it will allow the evidence to be adduced. It is then for the parties to test the expert evidence through the adversarial process, and finally for the court to determine what evidential weight ought to be applied.

Expert evidence is unique in that it can be, and often is, opinion evidence. We believe that the unique nature of expert evidence requires special treatment if it is to inform, rather than mislead, the court. The practical effect of the liberal approach is that it is fairly easy for a party to get speculative opinion evidence into a trial: it just has to be relevant and potentially useful. But, in the current procedural framework, it is not until the trial itself arrives that the competing expert evidence is tested.

When testing factual evidence at trial it is unlikely that the court will be drawn into philosophical considerations – all that is to be tested is whether the witness is honest and truthful. But, when testing conflicting opinion evidence, it is likely that the court will be drawn into consideration of the methodological underpinnings of the science and whether the opinion being offered is logically consistent with the results of the analytical methods adopted. Such matters can become complex, and those involved deserve the opportunity for quiet reflection on the importance of the evidence. The trial is not, we think, that well suited to this task.

It seems clear that there is scope to improve the way the criminal court handles expert evidence.

Admissibility of expert evidence

The Law Commission highlights four factors that control the admissibility of expert evidence in common law in England and Wales. These are:

- the subject matter requires expertise to understand
- the subject matter is drawn from a body of work that is sufficiently well developed as to be 'reliable'
- the person giving the evidence is an expert in the subject matter, and
- the expert must be capable of giving an impartial opinion.

The Law Commission's proposals for change relate only to the second of these factors.

The Law Commission starts by explaining why it believes the present approach to determining the evidentiary reliability of expert evidence (by reference to whether or not it comes from a reliable body of knowledge) is proving problematic. It then looks at four possible options for change:

1. Reformulate in statute the current common law discretion a judge has to exclude expert evidence found to be 'irrelevant' but give no guidance on how to determine irrelevance.
2. Reformulate in statute the current common law discretion a judge has to exclude expert evidence found to be 'irrelevant' but provide structured guidance on how to decide evidentiary reliability.
3. Defer to the consensus of experts on whether any given evidence should be admissible.
4. Introduce a test that requires the trial judge to address the reliability of the evidence in question. The court is therefore accountable for its decision to admit or exclude any expert evidence tendered before it.

Daubert-style pre-trial test proposed

Ultimately, the Law Commission chooses option 4 and proposes a new statutory test for determining the admissibility of expert evidence in criminal proceedings. This test would provide that expert evidence is admissible **only if the court is satisfied the evidence is sufficiently reliable to be admitted**. In determining if the test is satisfied, the court would have to refer to statutory guidelines. In effect, the Law Commission proposes creating a 'gate-keeper' function for the court that would apply equally to the prosecution and the defence.

Types of gate-keeping

There are two main gate-keeper tests commonly discussed: the *Frye* test and the *Daubert* test. Both are based on decisions of the US Supreme Court.

The *Frye* test is one that admits only evidence based upon theory that is sufficiently established to have gained general acceptance in the particular field in which it belongs. This kind of test excludes novel science. In effect, it is the deference test in option 3 above.

The *Daubert* test entails an early assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. In making an assessment, the courts can consider factors such as whether the theory has been tested or peer-reviewed, or has known error rates, and how widespread is its acceptance in the scientific community.

The *Daubert* approach is not without its detractors. There are concerns about what is meant by 'scientific method' because clearly not all expert evidence is scientific. There is also criticism about the use of peer review as a measure of evidentiary reliability. And there are those who believe that the judiciary (who are generally not scientists) do **not** have the ability to apply the test in practice.

The Law Commission test is a form of the *Daubert* test.

Pre-trial testing: the proposals

The Law Commission Consultation on introducing a pre-trial assessment of expert evidence contains two formal proposals and offers thoughts on three allied issues. These are summarised here.

Proposal 1: A gate-keeper role

The Law Commission's key proposal is that there should be an explicit 'gate-keeping' role for the trial judge with a clearly defined test for determining whether proffered expert evidence is sufficiently reliable to be admitted. Application of this test would determine whether the tendered evidence is *admissible* as a matter of law.

After first determining that the proposed expert evidence is logically relevant to the disputed matter, that it would provide the jury with substantial assistance and that the witness is truly expert and able to provide an impartial opinion, the judge would need to address the gate-keeping question: Is the evidence sufficiently reliable to be considered, and ultimately accepted, by a Crown Court jury?

The Law Commission provisionally proposes that there should be a statutory provision along the following lines:

1 The opinion evidence of an expert witness is admissible only if the court is satisfied that it is sufficiently reliable to be admitted.

2 The opinion evidence of an expert witness is sufficiently reliable to be admitted if:–

a) the evidence is predicated on sound principles, techniques and assumptions;

b) those principles, techniques and assumptions have been properly applied to the facts of the case; and

c) the evidence is supported by those principles, techniques and assumptions as applied to the facts of the case.

3 It is for the party wishing to rely on the opinion evidence of an expert witness to show that it is sufficiently reliable to be admitted.

Thus, the trial judge would not only consider the reliability of the expert's hypothesis, methodology and assumptions, but would also examine how the expert has applied them to the case and, if properly applied, whether the expert's conclusion is logically sustainable.

Such a test would put experts on notice that they will be expected to provide the trial judge with evidence about the basis of their expert opinion sufficient to enable the judge to conclude that their evidence would provide the jury with reliable information.

Acknowledge the distinction between scientific and experiential expertise

While much expert evidence is based in science, there is the whole area of expert evidence based on experience (e.g. forensic accountancy or experts in custom and practice for a particular trade). The Law Commission recognises this and proposes two distinct sets of guidelines to cover each type of expert evidence.

Judge to apply pre-trial test of evidential reliability

For **scientific** expert evidence it proposes the following:

In determining whether scientific (or purportedly scientific) expert evidence is sufficiently reliable to be admitted, the court shall consider the following factors and any other factors considered to be relevant:

a) whether the principles, techniques and assumptions relied on have been properly tested, and, if so, the extent to which the results of those tests demonstrate that they are sound;

b) the margin of error associated with the application of, and conclusions drawn from, the principles, techniques and assumptions;

c) whether there is a body of specialised literature relating to the field;

d) the extent to which the principles, techniques and assumptions have been considered by other scientists – for example in peer-reviewed publications – and, if so, the extent to which they are regarded as sound in the scientific community;

e) the expert witness's relevant qualifications, experience and publications and his or her standing in the scientific community;

f) the scientific validity of opposing views (if any) and the relevant qualifications and experience and professional standing in the scientific community of the scientists who hold those views; and

g) whether there is evidence to suggest that the expert witness has failed to act in accordance with his or her overriding duty of impartiality.

It would be for the trial judge to determine whether a field of expertise is to be classified as scientific and assessed in accordance with these guidelines. With regard to factor (a), the expert would need to show that the experimental or observational tests were conducted in an objective, scientifically valid way with appropriate comparators (e.g. control groups) and safeguards (e.g. measures to protect against contamination).

Distinctions acknowledged between scientific and experiential expertise

For **experiential** expert evidence it proposes the following guidance:

In determining whether experience-based expert evidence is sufficiently reliable to be admitted, the court shall consider the following factors (where applicable) and any other factors considered to be relevant:

a) the expert's qualifications, practical experience, training and publications and

Party adducing evidence must prove reliability

his or her standing in the professional or other expert community;

b) the extent to which the basis and validity of the expert's opinion can be explained, with particular reference to:
   i) the extent to which the basis of the opinion (for example, any assumption relied upon) has been verified or discredited;
   ii) the specific instances which support the claim to experience-based expertise;
   iii) the bearing those instances have on the matter(s) in issue; and
   iv) whether the expert's methodology or reasoning has previously resulted in a demonstrably valid or erroneous opinion;
c) whether there is a body of specialised literature relating to the field of expertise and, if so:
   i) the extent to which it supports or undermines the expert's methodology and reasoning; and
   ii) the extent to which the expert's methodology and reasoning are recognised as acceptable amongst his or her peers;
d) whether there is evidence to suggest that the expert has failed to act in accordance with his or her overriding duty of impartiality.

Based on this guidance, the reliability of expert testimony on forensic document examination would be determined on the basis of, amongst other things, the witness's experience, the number of standard points of comparison used and a detailed description of the process by which the expert reached the given opinion.

In the areas of professional, non-scientific expertise where there are well-accepted practices and methodologies, e.g. accountancy, it should be sufficient that the expert followed accepted practices and has provided a thorough explanation of what was done.

Proposal 2: The onus of persuasion

The Law Commission proposes that any party to an action, or the judge, should be able to raise the question of evidential reliability as a preliminary issue. If raised:

- the judge could take 'judicial notice' of the evidentiary reliability of the proposed evidence if reliability has already been clearly established (and no new developments have arisen), or
- if the expert evidence is patently unreliable (e.g. a party wished to adduce expert evidence from an astrologer), the judge could hold that it is inadmissible without the need for detailed investigation, or
- the judge would investigate the evidentiary reliability of the proffered expert evidence in accordance with the three-stage test. The party tendering the evidence would need to demonstrate that the expert's hypothesis and methodology comprise a reliable basis for the expert testimony. In accordance with the Criminal Procedure Rules, the expert would have a duty to provide details of any research findings that undermine the validity of his hypothesis or reasoning.

Importantly, at no stage of this inquiry into the reliability of the underpinning body of knowledge is it incumbent on the judge, the parties or the experts to show or determine if the opinion given by the expert is actually correct. The test is only whether the opinion is grounded in a body of knowledge that is itself deemed reliable.

Further issues

Court-appointed assessor

It would be for the trial judge to provide a reasoned decision on admissibility with reference to the criteria for assessing evidentiary reliability. Nevertheless, in determining whether expert scientific evidence is sufficiently reliable to be admitted, the Law Commission sees merit in an argument that the judge should exceptionally (that is, in cases where the evidence or field is particularly difficult) be permitted to call upon an independent assessor to provide assistance and guidance.

Education

The Law Commission believes that judges (and criminal practitioners) should receive practical training on the methodology of science, the standards for determining the statistical significance of research findings and how to determine the reliability of experience-based expertise.

Accreditation

The Law Commission believes that if a general system of non-compulsory accreditation of expert as expert witnesses is encouraged, and the process of accreditation were to provide a further hallmark of reliability, there is no reason why the judge should not take into account, as an additional relevant consideration, the fact that an expert witness is, or is not, accredited when addressing the evidentiary reliability of his expert evidence. This suggestion, it seems to us, must have been drafted before the Forensic Science Regulator's recent move away from the accreditation of individuals (see *Your Witness* 55).

Law Commission out of step on accreditation of expert witnesses?

Responding to the consultation

The consultation is open until 7 July 2009. Visit *www.jspubs.com* and follow the link to the **LC Consultation** under the *Current issues* section on the right-hand side of the home page

- to **access further material** on this consultation, and
- to **download** the full consultation paper.

Pre-trial testing: testing the test

In building its case for reform, the Law Commission cites four criminal cases that it thinks exemplify the ongoing problems: *Dallagher*, *Clark*, *Cannings* and *Harris*. It is natural to consider these four cases to see if the Commission's proposals would have prevented the problems identified in those cases.

Dallagher

This was the case involving an ear print left on a window at the scene of a burglary and murder (see *Your Witness* 37). Despite the novelty of ear print evidence as used in *Dallagher*, the Court of Appeal has been adamant that such evidence can be adduced. However, it warned that the court should pay due notice to the inherent unreliability of such novel techniques. It seems to us that ear print evidence is little different from fingerprint evidence, albeit ears are more 'squashy' and so the distance between key features will not be static but vary with changes in pressure.

In its consultation, the Law Commission says:

> *'Ear-print evidence tendered by the prosecution would be admissible in criminal proceedings under the test we are proposing only if the prosecution is in a position to demonstrate, with reference to our proposed guidelines, that it is sufficiently reliable to be considered and relied on by a criminal jury.'*

Despite this, if the Law Commission's proposals are not to introduce a *Frye*-type test, it seems to us that ear print evidence will continue to be admissible under the proposed rules.

Clark

Few readers of *Your Witness* will be unaware of the *Sally Clark* case. The Law Commission focuses on the second Court of Appeal hearing to call into question the statistical evidence given in court by Meadow. The second appeal heard no evidence on statistics and little argument, but Kay LJ still felt able to offer the following dicta:

> *'Thus it seems likely that if this matter had been fully argued before us we would, in all probability, have considered that the statistical evidence provided a quite distinct basis upon which the appeal had to be allowed.'*

In our view this is a most unfortunate dicta. In contrast, the first Court of Appeal **did** hear evidence on the statistical evidence and it found that in the context of the trial it had '*minimal significance*'.

Let us not forget that (i) Meadow was quoting published data, (ii) Professor Berry, one of the editors of the book cited, also gave evidence and pointed out the implicit danger of simply multiplying the probabilities, and (iii) limited time was spent on these statistics because they related to sudden infant death syndrome (SIDS), and no-one maintained the deaths were SIDS.

However, despite misgivings about the way the Law Commission makes its case here, we do agree. If the court had been able to explore this evidence ahead of the trial, it is likely that it would have been excluded as irrelevant – the statistics related to SIDS, and no-one maintained the deaths were related to SIDS.

Ultimately it was held that a miscarriage of justice had resulted in this case from the actions of a pathologist in not saying in his report that a laboratory result was irrelevant. These proposals do not deal with that, but the *CPS Disclosure Manual* does!

Four cases cited in support of the proposals

Cannings

The *Cannings* case is more persuasive because the initial convictions where based almost entirely on conflicting opinion evidence. And as noted by the Court of Appeal, in such cases it is unwise to proceed. But at what point under the current rules can the court decide to halt proceedings?

Our concern is that these proposals deal with testing the underpinning body of knowledge rather than the actual evidence. If the expert evidence at the *Cannings* trial was found to be based on science that met the methodological reliability test, the trial would have proceeded anyway and these proposals would not have prevented it. Is it not the case that unless the court can look at the particular evidence in a case, and not just the reliability of the underpinning methodologies, a *Cannings*-type case will not be prevented by these proposals?

What is needed to prevent another *Cannings* is a power for the judge to prevent a trial being put to the jury that '*depends exclusively, or almost exclusively, on a serious disagreement between distinguished and reputable experts*'. That could happen after the evidence has been put to the jury or, perhaps better, after a pre-trial hearing of the expert evidence.

Harris and others

In *Harris and others* it was found on appeal that new evidence undermined the generally accepted medical view that a non-accidental head injury to an infant child could confidently (in effect, always) be inferred from nothing more than the presence of a particular triad of intra-cranial injuries (acute encephalopathy, bleeding around the brain and retinal bleeding).

This case is very persuasive because the source of the problem was the poor quality of the database underpinning the triad of intracranial injuries. The Law Commission's proposals would have ensured this flaw was discovered before the evidence was placed before the jury.

Only one holds water – but proposals are still worthy

Conclusion

So, in respect of the first three cases we do not believe these proposals would have made a real difference. In *Harris and others*, though, they could well have. But this does not mean we reject the proposals. We just don't think justifying them on these grounds was necessary or effective.

Data protection and the expert

Most expert witnesses should be DPA registered. What about you?

In recent months, several solicitors have been prosecuted and fined under the provisions of the Data Protection Act (DPA) 1998 (the 'Act'). No doubt, this came as something of a surprise to them. The simple fact is that many people who process personal data in the course of their work still do not appreciate that they have duties under the Act – and we suspect that includes a fair few expert witnesses too!

Experts and personal data

The Act identifies personal data as being data related 'to a living individual who can be identified from that data, or from that data and other information in the possession of or likely to come into the possession of the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual'.

In the course of your work, you may hold and process data for a number of reasons. You might:

- collect and store information about individual solicitors for the purposes of case management
- hold information about individuals in connection with your instruction, e.g. social services case notes, pension records, medical histories, criminal records, education records
- hold records relating to individuals employed by you
- collect and hold information and data relevant to research into your particular field.

In short, **if recording, storing or using information about people in some form of database, you need to ask yourself whether the Act applies to you**.

Processing

Having established whether the data relate to identifiable individuals, you will next need to consider whether the data is being 'processed'. There is a distinction to be made between the storage and processing of data and the mere receipt and holding of information relating to an individual. The Act applies to the processing of personal data only where such processing is wholly or partly by automatic means, or where the personal data form part of a 'filing system'. Where personal data are concerned, the definition of 'processing' becomes very broad.

Information that is processed automatically will be covered by the Act. Information processed manually (referred to as 'manual records') is not intended to be covered by the Act unless it is held in an organised filing system structured either by reference to individuals or by criteria relating to individuals which allow ready access to specific information about a particular individual. The key consideration is not the time and effort involved in finding a piece of information about a person, but whether there is a system in place that allows the organisation to find that information without searching through every item in a set of information.

Most experts will be processing personal data as part of their forensic practice. So it's likely that you should be registered with the Information Commissioner.

The Act

The Act requires businesses that process personal data to comply with its eight principles of data protection. These state that data must be:

- fairly and lawfully processed
- processed for limited purposes
- adequate, relevant and not excessive
- accurate
- not kept longer than necessary
- processed in accordance with the data subject's rights
- secure, and
- not transferred to countries without adequate protection.

Most businesses processing personal data are also required by law to register with ('notify') the Information Commissioner and to pay a registration fee of, currently, £35 per year (see box below).

Registration is simple and inexpensive

How to register

Notification is a statutory requirement and every organisation that processes personal information must notify the Information Commissioner's Office (ICO), unless the organisation is exempt. **Failure to notify is a criminal offence.**

Notification is the process by which a data controller informs the Information Commissioner of certain details about their processing of personal information. These details are used by the Information Commissioner to make an entry describing the processing in the register of data controllers. This is available to the public for inspection.

The principal purpose of having notification and the public register is transparency and openness. It is a basic principle of data protection that the public should be able to find out who is carrying out the processing of personal information as well as other details about the processing (such as for what reason it is being carried out).

You can complete the notification form online[1], print it out and send it with the notification fee or a direct debit instruction to The Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF. Helpline 01625 545740

[1] visit https://forms.informationcommissioner.gov.uk/cgi-bin/dprproc?page=7.html

The First Principle of the DPA is that **personal data should be processed fairly and lawfully**. In particular, it should not be processed at all unless at least one of the conditions in Schedule 2 is met. In the case of sensitive data, at least one of the conditions in Schedule 3 should also be met.

Schedule 2

- the data subject has given consent
- it is necessary for the performance of a contract with the data subject
- it is necessary to comply with any legal obligation other than a contract
- to protect the vital interest of the data subject, i.e. life or death situation
- to carry out public functions
- to pursue the legitimate interest of the controller unless prejudicial to data subject interests

Schedule 3

- the data subject has given explicit consent
- to comply with legal rights/obligations as an employer
- to protect the vital interests of the data subject or another
- carried out by certain non-profit bodies
- the information has been made public deliberately by the data subject
- in connection with legal proceedings, to obtain legal advice and for exercising legal rights
- to carry out public functions
- for medical purposes undertaken by a health professional or someone with equivalent duty of confidentiality
- for equal opportunities monitoring

For the purposes of the Act, 'sensitive personal data' means personal data as to the subject's racial or ethnic origin, political opinions, religious or other beliefs of a similar nature, membership of a trade union, physical or mental health or condition, sexual life, criminal offences, criminal proceeding and convictions.

Your right to process information will generally be covered by Schedule 2 or, in the case of sensitive personal data, because it is needed in connection with legal proceedings, by Schedule 3. If you hold such information you will have a number of legal responsibilities. These will include:

- processing the personal information in accordance with the eight principles of the Act
- notifying the Information Commissioner that you are processing information
- answering subject access requests from individuals, usually within 40 days.

Access requests

In *Durant -v- Financial Services Association*[1], the meaning of 'personal data' (as defined in the DPA) and the individual's rights to access received consideration from the Court of Appeal. The Court held that the DPA was not designed to assist an applicant in discovering documents that may help him in litigation or the furtherance of complaints against third parties, such as a bank. Nor was it an automatic key to obtaining any information readily accessible elsewhere. An application on this basis would be for a purpose outside his rights under the Act, i.e. an ulterior motive that the DPA did not recognise.

Claimants cannot use the DPA to pump experts for information

In *Durrant*, Mr Justice Auld ruled that 'Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data… the mere fact that a document is retrievable by reference to his name does not entitle him to a copy of it under the Act'. Buxton LJ concurred and added that the information was required to have some biographical quality as to the data subject and to affect his privacy in his professional, business, personal or family life.

GMC guidance

In addition to guidelines issued by the ICO, many professional bodies have published their own guidelines on data storage, confidentiality and access. For example, the GMC's guidelines regarding confidentiality and access to information advise those concerned to ensure that systems are in place to:

- store, use and disclose confidential information in line with the law and professional guidance
- regularly review consent forms and patient information leaflets and make sure that they comply with professional guidance, including guidance from the GMC
- provide data protection and records managers with the training and support they need to carry out their responsibilities
- provide other staff who have access to patient records and other personal information with appropriate training on confidentiality and good record keeping.

Specifically regarding medical records for use in proceedings, solicitors must give a written assurance of their data security before doctors release data (patients' notes). If the doctor fails to obtain such written assurance, the doctor will remain responsible whilst the data is in the possession of the solicitor. It has been suggested that this could be avoided by giving the data direct to patients for forwarding to their solicitor. The patient then becomes responsible.

Further information

The ICO has published guidelines for individuals and organisations who are unsure whether they are affected by the Act. They set out what must be done to comply. If you remain unsure about whether you are affected, contact the ICO Helpline on 08456 306060.

References

[1]*Durant -v- Financial Services Association* [2003] *EWCA Civ* 1746.

Services for registered experts

Terminator

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

Little Books

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

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

Factsheets – FREE

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

Court reports – FREE

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

LawyerLists

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

Register logo – FREE to download

All experts vetted and currently listed may use our undated logo to advertise their inclusion. A dated version is also available. So, successful re-vetting in 2009 will enable you to download the 2009 logo.

General helpline – FREE

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

Re-vetting

You can choose to submit yourself to regular scrutiny by instructing lawyers in a number of key areas. This would both enhance your expert profile and give you access to the 2009 dated logo. The results of the re-vetting process are published in summary form in the printed *Register*, and in detail in the software and on-line versions of the *Register*.

Profiles and CVs – FREE

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

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

Extended entry

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

Photographs – FREE

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

Company logo

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

Multiple entries

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

Web integration – FREE

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

Surveys and consultations – FREE

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