Your Witness

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BBC Panorama

You may have watched the BBC *Panorama* report aired on 9 June: it was billed as an undercover investigation into expert witnesses. It featured a number of experts who were filmed covertly by a BBC reporter with the message that these experts were 'guns for hire'. Doubtless it would have made uncomfortable viewing for the experts caught up in it, but for me it revealed a couple of important misunderstandings.

The first is the idea that a person who walks into an expert's office and says 'I'm guilty' is, in fact, guilty. I know no lawyer who would accept that claim from a potential client without considering all the facts and, indeed, the formal charge made. In the legal sense, guilt is a matter of law, and it is for the court to determine.

Second, there is a clear distinction between the role of expert advisor and that of expert witness. The former is an expert who is contracted with a lay client for the purposes of providing expert advice. In that situation the expert is working outside the court system and has no duty above a professional duty to the client. When it comes to legal work, such an expert is generally being asked to advise on what would be the strongest defence and the approaches most likely to be encountered from the opposing team. This role is, by definition, partisan.

An expert witness is instructed in accordance with court rules, and the role is entirely different. The expert's overriding duty is to the court, and the opinions given must be entirely non-partisan.

Leaving the behaviour of the experts filmed by the BBC to one side, the lessons I take from the programme are that experts would be wise to:

1. be clear with clients that **matters of guilt are for the court**, not the expert
2. take care to **differentiate clearly between the roles of expert advisor and expert witness**, both in their own heads and to those around them
3. recognise that **moving from the role of partisan expert advisor to independent expert witness is often very difficult**.

Finally, if the problems associated with working direct with litigants in person (see *Your Witness* 71) are not enough to put experts off such work, maybe regarding every lay client as a potential undercover BBC reporter will!

Answering questions

We had an enquiry recently on the *Register* helpline seeking guidance on written questions. Over a month after completing a report for a claimant solicitor, the expert received a list of 26 questions. The expert noted that these would obviously take some time to answer because they required quite detailed responses. The expert asked us who would be responsible for paying for this extra work. It is a reasonably common situation so it seemed worth dealing with here.

On the assumption that this was a civil case and so covered by the Civil Procedure Rules (CPR) Part 35, the quick answer is that the claimant's solicitor has to pay. The CPR Part 35 Practice Direction says at section 6:

> **Questions to Experts**
>
> 6.1 Where a party sends a written question or questions under rule 35.6 direct to an expert, a copy of the questions must, at the same time, be sent to the other party or parties.
>
> 6.2 The party or parties instructing the expert must pay any fees charged by that expert for answering questions put under rule 35.6. This does not affect any decision of the court as to the party who is ultimately to bear the expert's fees.

Paragraph 6.2 clearly states that the expert needs to seek payment from the solicitor with whom a contractual nexus already exists. It will be the court that will eventually apportion costs between the parties.

And paragraph 6.1 confirms that the expert can discuss such questions with his/her instructing solicitor, who should have received copies of the questions. But why should an expert wish to talk to the instructing solicitor about such questions? CPR 35.6 explains.

> **35.6 Written questions to experts**
>
> 1 A party may put written questions about an expert's report (which must be proportionate) to –
> (a) an expert instructed by another party; or
> (b) a single joint expert appointed under rule 35.7.
>
> 2 Written questions under paragraph (1) –
> (a) may be put once only;
> (b) must be put within 28 days of service of the expert's report; and
> (c) must be for the purpose only of clarification of the report, unless in any case –
> (i) the court gives permission; or
> (ii) the other party agrees.

Whether the questions have been 'properly put' is a legal issue, and so is a matter for lawyers, not experts, to decide. If the expert's instructing solicitor agrees to them being answered, then the expert is covered by paragraph 2(c)(ii), and, of course, there is less likelihood of a payment problem down the road! But if the instructing solicitor does not agree, it is for the lawyers to argue the point before involving the expert further.

Chris Pamplin

Jackson: 1 year on

Woolf Reforms approaching 20 years old!

It seems a long time ago that Lord Woolf published his final report on reforms to civil procedure. Indeed, the Civil Procedure Rules (CPR), revised fast-track procedure, cost capping and pre-action protocols are now approaching 20 years old!

A sheep in Woolf's clothing

Woolf proudly titled his report '*Access to Justice*' and claimed that his reforms would increase said access to justice in key areas of litigation. He stated: '*My primary concern has been to improve access to justice, in particular for individuals and small businesses...*'. He went on to say that his investigations had shown that '*... opposing sides do have a common interest in the creation of an accessible and affordable civil justice system*'.

This, then, was the stated primary aim of Woolf's reforms. But, of course, he was also interested in making the courts cheaper to run, cutting down on court time wasted in convoluted and protracted procedures, and dealing harshly with failures to adhere to timetables and directions.

His report, published in 1996, asserted that the civil justice system should:

(a) be just in the results it delivers
(b) be fair in the way it treats litigants
(c) offer appropriate procedures at a reasonable cost
(d) deal with cases with reasonable speed
(e) be understandable to those who use it
(f) be responsive to the needs of those who use it
(g) provide as much certainty as the nature of particular cases allows, and
(h) be effective, i.e. adequately resourced and organised.

On the whole, Woolf's reforms were perceived to have been successful, or at least to have moved the system in the right direction. Now, though, some 18 years on it all seems be falling down around our ears.

Of the eight requirements of a just civil justice system identified by Lord Woolf, there are many who would argue that not one is currently achieved. Whether it remains just and fair may be debatable, but our civil justice system certainly fails on the requirements of reasonable cost, speed and responsiveness.

Jackson Reforms undermining 'access to justice'

Towering above all these issues, by the monumental size of its failure, is the requirement that the civil justive system be adequately resourced. For the demands placed on it, our civil justice system is hardly resourced at all – so much so that the phrase 'access to justice' might now better be prefixed with the word 'no'!

A wolf in Jackson's clothing

The decline in our civil justic system has been profound and rapid. So what has happened? Well, in a word, Jackson.

Of course, most would argue that our pre-Woolf civil justice system was somewhat unwieldy and expensive. Woolf, himself, commented in 1996 that '*I am particularly concerned about the level of public expenditure on litigation, especially in medical negligence and housing. Substantial amounts of public money which are now absorbed in legal costs could be better spent on enhanced medical care and on improving standards of public housing*'.

There is, however, a world of difference between the sort of economic reform envisaged by Woolf and the reckless, wholesale cutting that has taken place in the name of Jackson. Now, 1 year on from Jackson's reforms, the Civil Justice Council has launched a consultation to seek the opinions of stakeholders. The response from most quarters has been scathing, with the Law Society calling the changes made under Jackson '*inconsistent, time-consuming and costly*'.

One of the most significant reforms that has had a noticeable impact on day-to-day commercial litigation is the strict attitude being taken towards compliance with court rules and orders. There has been a considerable narrowing of the circumstances in which relief from sanctions can be granted (as set out in CPR 3.9). Whether the aim of making litigation more efficient has been achieved here is a moot point because the fear of sanctions means that more parties than ever seek approval from the court, and that in itself has costs implications.

The new budgeting and costs requirements have also been criticised widely. The Law Society noted that budgeting has led to significant front-loading of costs – both the costs of the budgeting process itself and the intentional delay in issuing proceedings so as to avoid costs budgeting kicking in for as long as possible. The Society said:

> *'The climate of litigation has changed. Co-operation between solicitors on opposing sides is breaking down as no one can trust anyone not to take the slightest point.'*

Other causes for concern include:

- the courts now place administration over access to justice
- there's an increased risk of satellite litigation
- the UK's reputation for international dispute resolution is being damaged
- the reforms have created a 'climate of fear' and made cross-party agreements more difficult, and
- lawyers are finding it difficult to explain litigation funding to their clients.

As a final point, the removal of recoverability of 'after-the-event' insurance premiums and success fees from defendants, and the introduction of 'qualified one-way costs shifting', have caused parties on all sides to express reservations about the new regime. There is, indeed, a general feeling of deep dissatisfaction.

Effect on expert witnesses

Changes to the CPR post-Jackson concerning the use of expert witnesses have also been

roundly criticised. In the past, a number of experts may have been called to give an opinion, with some providing overlapping evidence. But the emphasis now is on strictly limiting the role of experts. Constraining the parties to one expert (or giving directions for a joint expert to be appointed) now means that the range of expert opinion in a case is also limited. Obviously this has potentially damaging knock-on consequences for justice, especially in medical and personal injury cases.

Experts have also begun to experience the effects of increased time pressures being placed on their instructing solicitors to comply with court deadlines.

- Experts have been asked to omit the dates of reports and witness statements, or not to refer to source materials, in reports that were being finalised very close to court-imposed deadlines.
- Expert witnesses have reported attempts by solicitors to 'barter for lower fees'.
- Experts are being asked for more detailed costs estimates.

Commentators on expert witness matters have been warning the Ministry of Justice that if expert work is not properly remunerated or becomes too burdensome, experts will simply walk away. Many experts do, after all, have a professional 'day job' to return to, unlike the lawyers who can't find alternative employment quite so easily. We have already had cases collapse because no barrister could be found who would agree to work for the fee rates on offer, and now we've seen cases fold because no expert witness was prepared to work for the paltry fees proffered.

For parties to litigation, funding is the primary cause for concern.

Claimants say they are struggling to locate solicitors who will undertake civil work, particularly lower value non-RTA (road traffic accident) claims. Indeed now, in most cases in which claimants are represented by a solicitor, they face paying out substantial sums in legal costs because of the changes to the costs regime.

On the other hand, defendants report that they are at a disadvantage with the costs budgeting requirements in personal injury claims because of the relatively small chance that they will recover any costs. They also say that claimant solicitors are now more likely to delay the issue of proceedings until they have everything prepared so as to be able to comply with any subsequent timetable. Defendants are then faced with a strict court timetable within which they must prepare documents and statements. Is this fair?

It also appears that a lack of public funding and difficulties with alternative funding arrangements have led to a noticeable decline in expert witness instruction rates in a number of areas of expertise. In particular, it seems that instruction rates have slowed down or dried up completely in family-related, forensic accountancy and personal injury cases.

Court users fear that the increasingly mean and penny-pinching attitudes toward expert witness remuneration will mean that the very best experts will vote with their feet and desert the expert witness field altogether. That obviously leaves the way clear for inexperienced experts or the poorer sort of expert who, for years, the court system has been at pains to weed out. How is that proper access to justice?

Experts feeling the pressure of lawyers under pressure

The diminishing returns for lawyers, the increased risk of negligence claims and the swingeing increases in professional indemnity insurance mean that lawyers, too, are becoming increasingly disillusioned. Some law firms have ceased to undertake specific kinds of work altogether, while other once-established firms have closed their doors for good.

Lawyers with a social conscience (and there are many!) have been wringing their hands over what they now perceive to be a lack of access to justice for the less well-off in Society. It's got so bad that those working in some court circuits have taken, or are contemplating, the unprecedented step of going on strike. One incensed commentator said that the only realistic option now for litigants is to abandon the court system altogether and, instead, to endeavour to arbitrate in a sensible manner. Or is that, in fact, the real aim of Jackson's reforms – to make civil justice in England and Wales so difficult to achieve that we seek other ways of sorting out our problems?

Universal alienation – a remarkable outcome

The real incompetence throughout this process of change has been in the almost complete failure of the authorities to carry the goodwill of court users, lawyers, experts and the press. Aneurin Bevan, when asked how he had overcome the resistance of general practitioners to the National Health Service, said: 'I stuffed their mouths with gold'. Lawyers, experts and others who work in the civil justice system might think their mouths have been stuffed with something far less palatable!

One wonders why Jackson wanted his name associated with this exercise in systemic vandalism. But we only have to look to the seemingly benign Dr Beeching. He, too, believed that his slashing, cutting and closing exercise was in the national interest and for the good of the railways. Today, few would credit him with anything other than the wholesale destruction of a national asset.

Jackson reforms have alienated everyone

Jackson, and those who follow his lead, would do well to remember that once something has been dismantled it may be impossible to put back together again. Once the country has dug itself out of the economic hole it is in, which it will, we'll find ourselves stuck with a second-rate legal system. The perpetrators of this sorry mess will have a great deal to answer.

Experts and the ultimate issue revi

Historically, judges frowned on experts who touched on the ultimate issue

It had long been a general rule of evidence at common law that a witness should not give evidence in relation to what is termed the 'ultimate issue' in a case. The general rule was applied in both civil and criminal law and was based upon the principle that this is a matter for the jury or other arbiter to decide and is a function that should not be usurped.

Sometimes, however, the issues in a case are so narrow and so specialist that the expert's opinion is, effectively, the only significant evidence in the case and it will almost certainly decide the outcome.

A very well-publicised example of such a case was that of *Football Association* (FA) *-v- Anelka*[1]. In this case the experts were asked to give their opinion on the meaning of a gesture made by a football player as part of a goal celebration during a match. Was the gesture abusive, indecent or insulting? This was, broadly speaking, the essential point in the proceedings and the ultimate issue the tribunal was required to decide.

Gradual erosion of the ultimate issue rule

Historically, although experts have been, unlike other witnesses, permitted to express an opinion on the facts, they, too, have been prohibited from expressing an opinion on the ultimate issue. By way of simple example, a fingerprint expert can state with varying degrees of certainty whether fingerprints found on a murder weapon are a match for those of the accused. However, he is not permitted to go beyond this and say that in his opinion the accused was the murderer. Guilt or innocence is a matter for the jury to decide, and the prohibition is designed to prevent trial by jury being supplanted by trial by expert.

This basic premise was outlined in 1999 by Cresswell J in the *Ikarian Reefer*[2] case. An expert should only give evidence in relation to matters within his expertise and on issues not within the ordinary experience of the jury. If the jury is capable of forming an opinion without the assistance of an expert because the matter is within their own experience or knowledge, then expert opinion is not necessary.

Now this rule is being eroded gradually

For some time, however, there has been a steady weakening of the rule against expert opinion on the ultimate issue. The 1972 Civil Evidence Act made expert opinion on the ultimate issue admissible in civil cases, giving effect in section 3 to the 1970 *Report of the Law Reform Committee on Evidence of Opinion and Expert Evidence* that '*a statement by an expert witness... shall not be inadmissible upon the ground only that it expressed his opinion on the issue in the proceedings...*'. In criminal cases, the abolition of the rule was recommended by the Criminal Law Revision Committee in its Eleventh Report (Cmnd 4991 (1972) p. 155), but this recommendation was never put into effect. However, even in civil cases, there remained definite limits on the extent to which opinion on the ultimate issue would be admissible, and the common law rule continued to exert pressure in determining the line between what was and was not acceptable.

In *Pride Valley Foods -v- Hall & Partners*[3], an expert in a construction law case gave an opinion on what he would have done if he had been in a similar position to the defendant. In so doing, he was effectively directly addressing questions in relation to the ultimate issue. Toulmin J said these were not questions for experts but were matters for the court to decide. The expert, he said, purported to make findings of fact on matters that were for the judge to decide, and his report offended against the established basis on which experts should give their evidence.

However, with increasingly complex areas of evidence, and particularly those involving medical malpractice, fraud or forensic science, the boundaries between acceptable expert opinion and opinion that effectively addresses the ultimate issue have become uncertain.

In fraud cases, for example, expert accountants have given opinions stating that, in their view, there can be no rational, honest explanation for the transactions under consideration, thus inferring that the only remaining explanation is one of fraud. In the same year as the *Ikarian Reefer* case, Lord Taylor stated that:

> *'... the rationale behind the supposed prohibition is that the expert should not usurp the functions of the jury. But since counsel can bring the witness so close to opining on the ultimate issue that the inference as to his view is obvious, the rule can only be a matter of form rather than substance.'*

Medical malpractice cases offer another example. A medical expert cannot be asked to state, outright, whether a doctor's behaviour has fallen short of that expected by a professional doctor. However, it is easy to see how a particular line of questioning by an advocate might elicit an inference from an expert that is not too far removed from an opinion on the ultimate issue.

Anelka and the 'quenelle'

In March 2014 a ruling was made by the Football Association Regulatory Commission (the tribunal) in *Football Association -v- Anelka*[1]. It concerned disciplinary proceedings against a professional footballer for misconduct involving a 'quenelle' gesture that was alleged to be abusive, indecent or insulting, and constituted an aggravated breach of the rules because it included reference to ethnic, racial or religious origin. (The quenelle is a gesture usually performed by pointing one arm diagonally downwards, palm down, while touching the shoulder with the opposite hand.)

Nicolas Anelka is a professional footballer who was contracted to play for West Bromwich Albion FC. It was alleged that, during the course of a game with West Ham United in December

2013, he made a gesture that was abusive and/or indecent and/or insulting and/or improper, contrary to Rule E3(1) of the Rules of the FA ('Charge 1'). Further, it was alleged that the misconduct was an 'Aggravated Breach' as defined by Rule E3(2) because it included a reference to ethnic origin and/or race and/or religion or belief ('Charge 2'). Anelka denied both charges.

The approach to such charges had been considered previously by the Regulatory Commission in a case against Luis Suarez. It was agreed that Charge 1 required an objective analysis of the gesture used. Therefore the question for the tribunal on that charge was whether Anelka's use of the quenelle was, objectively speaking, abusive, indecent, insulting and/or improper.

Rule E3(2) provides that in the event of any breach of Rule E3(1), including a reference to, amongst other things, a person's ethnic origin, colour or race, the Commission should consider the imposition of an increased sanction.

The FA's primary argument on Charge 2 was that, as a matter of fact, the player's use of the quenelle included a reference to anti-Semitism. There was disagreement between counsel for both sides as to whether, if the tribunal did not agree, it would then be necessary to consider Anelka's 'state of mind' at the time he used the gesture – in other words, whether he had intended the gesture to have this additional prohibited meaning.

The tribunal considered, however, that the wording of Rule E3(2) is clear. It is a question of fact whether a breach of Rule E3(1) includes a reference to the protected characteristics. Consequently, the tribunal decided that there was no question of subjective intention in relation to Charge 2. But in applying the objective test and asking whether, in the assessment of the tribunal, the words or behaviour were abusive or insulting, it was necessary to view the matter in context, taking account of all relevant facts and circumstances.

How to interpret a gesture – ask an expert!

The difficulty in this case concerned the interpretation of the gesture. It is one that is used commonly in France (Anelka's home country) and, in some contexts, is analogous to the English 'V' sign – it might be said to merely convey the abusive epithet 'up yours'! However, it also has the more sinister interpretation of a kind of inverted Nazi salute with anti-Semite overtones. In this context, it has been associated with the French comedian and political activist Dieudonné M'bala M'bala (Dieudonné), who is said to be a friend of Anelka's. It is claimed the gesture was invented by Dieudonné and is said by him not to be anti-Semite, simply anti-establishment. The quenelle has become so closely associated with Dieudonné that it has become almost akin to his trademark. In this, then, there was a third interpretation of the gesture – Anelka's claim that it was merely a 'special dedication' to his comedian friend. As explained by one of the experts, a Nazi salute is a Nazi salute and there is a universal agreement about its meaning, whereas the quenelle is a totally invented, recent gesture, and even the French public cannot agree on its meaning.

Accordingly, it was not merely the meaning of the gesture but the meaning that was likely, in the particular circumstances, to be ascribed by an observer (in both England and France) that the tribunal had to decide.

To that end, the tribunal received expert evidence on the quenelle. The FA instructed a professor of French Studies at the University of Warwick and Anelka instructed a professor of French and European Politics at University College London. In advance of the hearing the experts met and produced a joint statement. Both gave evidence before the tribunal and were cross-examined.

The evidence given by the experts was extraordinarily comprehensive and went into considerable academic detail concerning the history of the quenelle in France and the understanding of the French people in relation to its interpretation and meaning. So complex was the question of meaning and interpretation that it was effectively a case in which the tribunal was entirely in the hands of the experts. Indeed, the consensus of the evidence would speak to the ultimate issue and, effectively, decide the case.

Following closing submissions from the parties, and after extensive deliberations, the tribunal found both charges proved. On the balance of the expert opinion it was concluded that the quenelle was strongly associated with Dieudonné, that Dieudonné was strongly associated with anti-Semitism, and, as a result, that the quenelle was strongly associated with anti-Semitism. The tribunal agreed with the FA that it is not possible to divorce that association from the gesture. As to the second charge, however, it was not found that Anelka was or is an anti-Semite, or that he intended to express or promote anti-Semitism by his use of the quenelle.

Conclusion

This case follows the trend set by other recent cases on, for example, childhood memory and facial mapping in which experts have been permitted to give an opinion on the ultimate issue. All the leading authorities now agree that, **provided the judge makes it clear to a jury that they are not bound to follow the expert's opinion, he or she should be permitted to opine on the ultimate issue**.

In unusual cases, such as the interpretation of a gesture which, at the time, was almost unknown in the UK, it is easy to see why expert opinion becomes the deciding factor.

Highly technical cases can't avoid experts opining on the ultimate issue

References

[1] *Football Association -v- Anelka* unreported March 3, 2014 *ISLR 2014, 2, SLR21-SLR32.*

[2] *National Justice Compania Naviera SA -v- Prudential Assurance Co Ltd (the Ikarian Reefer) (No 1) [1993] 2 Lloyd's Rep* 68.

[3] *Pride Valley Foods Ltd -v- Hall & Partners* [2000] *ABC LR* 05/04.

Guidance from a debt expert

Solicitor firm closures now more common

Harsh economic times

A few years ago, apart from sole practitioners or two-partner firms, the failure of a law firm was a rare, and usually newsworthy, event. That sort of thing simply didn't happen to solicitors, said Simon Love, a senior associate in the professional risks group of Reynolds Porter Chamberlain LLP (see *New Law Journal* 05 February 2014). However, a number of high-profile failures during the past year has made it clear that the solicitors' profession is not immune to the effects of the prevailing harsh economic conditions.

Any expert seeking proof has only to enter 'solicitors firms in liquidation' into a search engine for the horrific scenario to be displayed. Up comes Follet Stock, Cobbets, Thornleys, Manches, Stefan Cross, Wilson Solicitors LLP and Hacking Ashton LLP. And the latest big firm to give notice that it is considering appointing liquidators is Linder Myers LLP. The list goes on.

A paper entitled *Steering the Course* (Google *SRA steering the course* for more information) published recently by the Solicitors Regulation Authority is well worth a read by any expert who has been waiting patiently for a firm to pay an invoice. A key finding is that **in 82% of cases the most frequently defined indicator of a law firm at risk was the failure to pay debts to, amongst others, instructed experts**.

Professional credit control is key

It is, to coin a phrase, a truth universally acknowledged that expert witnesses involve themselves in litigation mostly to supplement their income. By so doing, experts submit themselves to a complex code of conduct, and open themselves to risks of negligence actions, performing work that is ancillary to their main occupation. Of course, some experts take on such work out of a sense of public duty, but the vast majority of expert instructions are undertaken as paid work.

Yet, perhaps because for many the income from acting as an expert witness is seen as 'pin money', an astonishingly large number of expert witnesses treat collecting their fees in a *laissez faire* manner, taking little or no interest in ensuring that the solicitor pays on time.

Experts must adopt credit control measures

Few expert witnesses appear to relish the prospect of tangling with the lawyer who fails, refuses or neglects to pay on time, or even to pay at all. Having been effectively blocked and diverted by the law firm's administrative staff, many experts simply throw in the towel.

At any meeting of expert witnesses, lunchtime chats quickly turn to examples of a lawyer's persistent failure to pay a bill. Some expert witnesses give up chasing the payment straight away. Many more, though, wrongly think that all that needs to be done is to enter the portals of the small claims court. But gaining a Court Order is one thing – getting paid is quite another!

It was against this background that the author, who some 25 years ago founded the *UK Register of Expert Witnesses*, created in 2012 the start up venture 'Debt Collection for Expert Witnesses' to provide some professional relief for the frustrated expert witness.

The writer's experience in dealing with truculent solicitors over the past 2 years has been most revealing, and there are a few key themes that have emerged. It is hoped that by raising awareness of these amongst experts in the *UK Register of Expert Witnesses*, their impact on payment times can be somewhat neutered.

Make it clear

Experts who fail to set out clearly their terms of payment, and make sure they obtain the solicitor's written agreement, have only themselves to blame when fees don't get paid in a timely fashion. **If the time for payment is not unambiguously set out before undertaking any work, it becomes quite impossible to claim that payment is overdue.** As a result, it is frequently impossible to effectively chase payment.

Mere incompetence?

Experience shows that solicitors who do not pay on time can be divided into two groups:

- those who are simply **incompetent**, having failed to get the monies to pay the expert witness from their private client or from the legal aid fund, and
- those who do obtain the funds but, presumably because of their own **cashflow problems**, they delay or, in some cases, refuse to pay the expert.

It is worth working out with which type of lawyer you are dealing. If the former, then it is likely that some prompting may resolve the matter reasonably quickly. But if you face the latter type of lawyer, you need to move straight to professional debt collection measures.

Don't agree variations

For those expert witnesses who have taken the proper course and made it clear when payment is due – which is done through terms of engagement – a number go on, unwisely, to allow themselves to be persuaded by hard luck stories to vary their terms.

In one case, that began back in 2010, an expert who had a clear agreement for payment within 30 days of delivery of the fee note was persuaded to agree to a request that payment time would be extended to the end of the case, then 'listed for 12 weeks ahead'. To the expert witness, 'the end of the case' meant at the end of the trial. However, when chased for payment, the solicitor maintained that it meant 'at the conclusion of the final determination of the costs by the Court', a process over which the expert has no control.

Three years have elapsed and quarrels between the various solicitors in the costs assessment

process mean that the expert remains unpaid in 2014! So **don't agree to contractual variations**.

Don't fall for extravagant questions

An expert witness who, following the overriding duty to be independent, produces a report the instructing solicitor finds 'unhelpful' – by which the lawyer generally means 'doesn't support the case I'm building' – can sometimes be faced with a barrage of questions.

While Civil Procedure Rule (CPR) Part 35.6 does not cover this situation – that section is about asking questions of either the other side's expert or an SJE – its guidance is worth bearing in mind. CPR 35.6(1) requires that questions are proportionate, and CPR 35.6(3) stipulates that the answers to questions should be treated as part of the expert's report.

Expert witnesses who are on the ball make sure that there is a clear understanding that their **initial costs estimates do not include answering questions**. For that activity, either the agreed hourly rate will be charged or a supplemental arrangement is necessary.

Another common mistake is for expert witnesses to create payment problems by issuing a large invoice without warning. If it will take £2,000 to deal with the questions, then it is far better to make that clear, and get agreement to it, *before* the work is done.

Review the backlog

In the present financial climate, all expert witnesses whose fee notes have not been paid on time should immediately undertake a review to ensure that, unbeknownst to them, the solicitors haven't entered into a company voluntary arrangement.

In England and Wales, these matters are reported in *The Gazette* (see *https://www.thegazette.co.uk*). Few experts read that publication on a regular basis and so do not take avoiding action before 'Notice of Dividends' are published and their debts become irrecoverable. It is well worth a quick check on *The Gazette* website to determine if the firm in question is in trouble.

Asking the court to help

Most expert witnesses are aware that CPR 35.14 provides for them to ask the Court for direction under Part 35.14 if they find themselves in difficulties. However, because there is no guidance on what form a request for direction might take, nor what direction to seek, taking advantage of this power is difficult. That an expert must also 'file written requests and provide copies to all parties' does nothing to ease the practical problems.

The writer has seen examples of expert witnesses writing a letter to the court manager, writing a letter to the judge, and filing a form N244 (and then being astonished to find that they are charged a fee of £80 for their efforts).

There is no simple answer, particularly in county court actions. The county court is a law unto itself, and an approach made successfully to one venue will be rebuffed by another. However, this may improve now that we have only one county court.

Court staff have little idea about how much help they are supposed to provide. They are instructed that they cannot advise on matters of law, but they are given no guidance concerning what that means in practice. The result is that they play safe and suggest that the enquirer should ask their solicitor or their local Citizens Advice Bureau.

Even if the expert witness manages to get a letter explaining the problem put in the judge's work box, the likely response will be that courts do not case manage by correspondence!

So, the advice at present is not to spend too much time on this approach, although a threat that you are about to use it might focus some minds. *[I would be very interested to hear from any reader who has successfully employed this approach – Ed]*

Charge for all you do, and don't be shy in asking for it!

Be brave, be determined

Expert witnesses who, generally speaking, are not trained negotiators sometimes create their own difficulties because they feel guilty asking to be paid.

A common scenario is the expert who has been booked for a trial but, at the last minute, is told not to attend. Despite the fact that fees for late cancellation of trial attendance, the cause of which is entirely out of the expert's hands, are provided for in the terms of engagement, some experts are reluctant to issue a fee note or, if they do, to chase payment with any vigour.

This is a very poor strategy and simply encourages the solicitor to think that, if resisted, no payment will have to be made.

The advice is to be as professional in your debt chasing as in your report writing. **Teach your lawyer that avoiding your fee will be no easy task!**

Claim interest

As a matter of principle, **no solicitor who earns pocket money by getting interest on money he owes to you should be allowed to keep it!**

All experts should include in their agreements a provision for **interest on overdue fees**. Expert witnesses who incorporate into their contracts a term that payment delayed beyond the agreed time will attract interest at 8.0% above the Bank of England base rate will find that the problem of late payment reduces notably. However, trying to make claims for large amounts of interest runs the risk of being attacked under the Unfair Contracts Terms Act 1977 as amended. So, most expert witness terms should keep to the model set out by the Late Payment of Commercial Debt (Interest) Act.

Barry F Pamplin

Charging interest on late debts is normal practice

Services for registered experts

UKREW PI Insurance

Expert witnesses listed in the *UK Register of Expert Witnesses* have exclusive access to our bespoke professional indemnity insurance scheme. Offering cover of, for example, £1 million from around £200, the Scheme aims to provide top-quality cover at highly competitive rates. Point your browser to *www.jspubs.com* and click on the link to *PI Insurance cover* to find out more.

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 65). 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 2014 will enable you to download the 2014 logo.

General helpline – FREE

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

Re-vetting

You can choose to submit yourself to regular scrutiny by instructing lawyers in a number of key areas. This would both enhance your expert profile and give you access to the 2014 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, you 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 you the opportunity to provide lawyers with a more detailed summary of expertise, a brief career history, training, etc.

Photographs – FREE

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

Company logo

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

Multiple entries

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

Web integration – FREE

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

Terminator – FREE

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

Surveys and consultations – FREE

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

Professional advice helpline – FREE

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

Software – FREE

If you opt for our Professional service level you can access our suite of task-specific software modules to help keep you informed.

Discounts – FREE

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

Expert Witness Year Book – FREE

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

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