

# Expert analysis

## Chris Pamplin highlights changes & contrasts in the expert witness market

Expert witnesses have been living through interesting times. They have seen the loss of immunity to damages claims, the inexorable accretion of court rules and guidance, the sometimes over-zealous attention of professional regulators and the squeeze on public finances resulting in some distinctly odd decisions by the Ministry of Justice (MoJ) and the Legal Services Commission (LSC) over what they will pay experts.

As the largest multidisciplinary expert witness community in the UK, the experienced individuals listed in the *UK Register of Expert Witnesses* represent an unrivalled source of information on matters of importance to experts and those who instruct them. Since 1995, the *Register* has regularly conducted surveys of its expert witnesses. “Cross-examining the experts” (NLJ, 26 October 2007, p 1480) looked at the expert witness marketplace in 2007 based on these surveys. Using the 2011 survey, what follows considers how the expert marketplace has changed since then.

### The experts

Of the 452 experts who returned questionnaires by mid-September 2011, 211 were medical practitioners. Of the remaining 241 experts, 58 were engineers, 23 were in professions ancillary to medicine, 17 were accountants or bankers, 36 had scientific, veterinary or agricultural qualifications, 20 were surveyors or valuers and 29 were architects or building experts. The substantial “others” category totalled 59, of whom 14 were psychologists.

### Work status & workload

Of the respondents, 48% work full-time and 43% work part-time. Only 9% describe themselves as retired. Overall, expert witness work accounts, on average, for just 45% of their workload, a figure essentially unchanged since 2001. Clearly, these individuals are much involved in expert witness work but have an even more extensive commitment to their professions—which is, of course, exactly as it should be.

### Experience & outlook

Respondents were also asked 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, 97% had been practising as expert witnesses for at least five years, and 89% had been undertaking this sort of work for more than 10 years. What’s more, half of the respondents saw expert witness work as an expanding part of their workload. But this represents a significant reduction in optimism—back in 2007, nearly 60% of respondents expected their forensic workload to increase.

### Reports

Those taking part in the surveys were asked to estimate the number of expert reports they have written during the preceding 12 months. Three types of report were identified:

- **Advisory:** those written for the benefit of the party alone. In such a report the

expert is not required to abide by the Civil Procedure Rules (CPR). Instead, he can take on the role of the partisan advisor, helping “his side” to build up the strongest case and to develop litigation strategies.

- **Single Party:** those written under CPR where the expert is instructed by just one of the parties.
- **Single Joint Expert (SJE):** those written under CPR 35.8 (Instructions to a single joint expert) where the expert is instructed jointly by all of the parties.

The averages for these three types of report for the last seven surveys are given in Table 1. These data reveal a dip in output in 2001, following the introduction of the Woolf reforms and the CPR. This downturn was quickly reversed, and the numbers have been fairly steady over recent years. But there is something interesting happening with SJE.

### Wither the single joint experts?

Statistics relating to the use of SJE have remained essentially unchanged between 2003 and 2009. Around 73% of experts had been instructed as SJE, and on average each expert had received 14 or 15 such instructions in the year. In the latest survey the numbers have fallen back so we only have two thirds of experts getting any SJE instructions in the preceding 12

	1999	2001	2003	2005	2007	2009	2011
Advisory	19	21	11	13	17	19	15
Single Party	48	41	45	54	54	57	56
SJE	-	12	14	15	14	15	9

**Table 1:** Average annual number of reports, court appearances, advisory reports and SJE instructions by broad specialism (2011 data).

Broad professional group (n = number of respondents)	Report	Court appearances	Advisory report	SJE instructions
Medicine (n = 211)	89.3	2.7	20.7	13.9
Paramedicine (n = 23)	57.7	3.9	10.0	18.6
Engineering (n = 58)	19.5	2.3	13.3	1.7
Accountancy (n = 17)	35.4	4.5	9.2	8.2
Science (n = 36)	31.1	9.4	14.7	1.9
Surveying (n = 20)	17.2	1.2	12.9	3.3
Buildings (n = 29)	9.7	0.6	6.1	1.0
Others (n = 59)	29.5	3.4	7.2	5.4
Aggregate averages	55.8	3.2	15.2	9.0

**Table 2:** Average annual number of reports, court appearances, advisory reports and SJE instructions by broad specialism (2011 data).

months, and the average number of SJE instructions per year falling to just nine.

Whatever the cause of this decline, it seems set to drop further. According to the decision in *Jones v Kaney* [2011] UKSC 13, [2011] 2 All ER 671 the removal of expert immunity applies only to claims from those who have instructed the expert witness. So, the notion that the role of the SJE opens an expert to suit from all parties may cause a moment's reflection in future. This is one metric we will watch closely.

### 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 five times a year; some four years later this had dropped to 3.8; it now stands at 3.2.

### Variation by specialism

However, these averages hide a lot of variation by specialism (see Table 2). For example, the reporting rate for medics is much greater than in all other specialisms. Furthermore, SJE appointments are much more common in medical cases than in the other specialisms, where the average drops to around four SJE instructions per year.

### Expert fees

Which brings us to the detail on fees—how much are the experts charging for their expert witness services? This information is summarised in Table 3.

For each broad professional group, the table gives average hourly rates for writing reports and full-day rates for attendance in court, with the 2007 data for ease of comparison. The average increase in fees is 18% for reports and 21% for court appearances. Over the same period, inflation (as measured by the retail price index) has increased by 28.8%. So, experts are now charging less in real terms than they were in 2007.

### Expert fees & legal aid reform

As part of the legal aid reform programme, the LSC implemented changes to experts' fees on 3 October 2011. The changes introduce maximum

Broad professional group (n = number of respondents)	Average rate (£)			
	Writing reports (per hour)		Court appearances (per day)	
	2011	2007	2011	2007
Medicine (n = 211)	201	170	1,210	1,163
Paramedicine (n = 23)	139	118	1,127	827
Engineering (n = 58)	131	112	1,076	876
Accountancy (n = 17)	220	174	1,476	1,105
Science (n = 36)	143	107	925	720
Surveying (n = 20)	159	142	912	938
Buildings (n = 29)	144	102	1,084	835
Others (n = 59)	119	121	828	811
Totals	169	143	1,102	911

**Table 3:** Average charging rates for report writing and court appearances by specialism (2007 and 2011).

rates for certain types of expert witness working in legally aided cases, with separate rates for London and out of London. The rates were consulted on as part of the MoJ consultation *Proposals for the Reform of Legal Aid in England and Wales*. Needless to say, despite receiving overwhelmingly negative feedback on the concept of capped fees, the rather random categorisation of expert witnesses and the fee rates, the LSC has ploughed on with its plans.

The changes are bizarre. As one consultant neurologist put it: "A London accident and emergency consultant's time is valued more than a London neurologist's, but less than an out of London neurologist, while a neuroradiologist is allowed more than everyone else. That you are able to pay a neurologist outside London £153 per hour, but one in London only £90, is also completely nonsensical and unjustifiable."

All the more so when you consider that our latest survey work shows that consultant neurologists average £235 per hour and consultant neuroradiologists average £223 per hour. If the most vulnerable in society are to continue to have access to appropriate expert evidence in publicly funded cases, this latest piece of ministry muddle will have to be sorted out quickly.

### Cancellation fees

The issue of fees that become due as a result of cancelled trials continues to be a source of friction between expert witnesses and those who instruct them. The average percentage of the normal fee experts charge is generally controlled by the amount of notice they receive of the cancellation. In this survey, the percentages are 5.7%

if notice is given at least 28 days before the trial is due, 15.5% if 14 days, 33.3% if seven days and 69.4% if just one day's notice is given. These figures are essentially unchanged since 2007.

### Speed of payment

In this survey, 87% of experts reported that the promptness with which invoices are paid had not deteriorated—but that really means matters couldn't get much worse. One measure of the problems experts have in securing prompt payment is the number of bills settled on time. In this survey, the number of experts reporting their bills were being paid on time in even half of their cases is only 44% (down from 48% in 2007). Clearly, the situation remains pretty grim.

Against this background, it is depressing to note that while 85% of experts say they stipulate terms, only 50% use a written form of contract. Without a solid contractual basis, experts are making their credit control much more complex than it need be. The CPR *Experts Protocol* requires (at s 7.2) that terms be agreed at the outset. Clearly, the often expressed hope—that the imposition of this official obligation would help to persuade more experts to adopt written terms—is falling on deaf ears.

As every lawyer knows, setting out clear terms for any contract, at the outset, is essential if subsequent problems are to be avoided. The contract between expert and instructing lawyer should be no different.

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