Under the influence?

Chris Pamplin explains why mentoring schemes must be disclosed

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IN BRIEF

- Experts need to be cautious not to hide the use of any mentor or peer-review system.

The duties of an expert witness, as laid down in *The Ikarian Reefer* (*National Justice Cia Naviera SA v Prudential Assurance Co Ltd* [1993] 2 Lloyd's Rep 68, [1993] FSR 563) are well established and all expert witnesses should be familiar with them. Uppermost among these is that the expert owes an overriding duty to the court, before any obligation to the person from whom they had received instructions or payment, or to any commissioning organisation. Protocols dictate that experts must be independent, and their views should be given without outside influence and should be free of witness 'coaching'.

What's required?

In *David Pinkus v Direct Line Group* [2018] EWHC 1671 (QB) we have a recent example of a case in which an expert failed in this duty. As a result, the court gave a useful ruling on what is required.

The case involved two neuropsychologist expert witnesses. The claimant's expert considered that the claimant's symptoms had been triggered by the accident that started the claim. However, the defendant's expert disagreed and criticised the extent of the testing carried out by the claimant's expert.

A joint statement was discussed between the experts. During the course of these exchanges, the defendant's expert received an e-mail from the claimant's expert sent in error. The defendant's expert claimed that this e-mail demonstrated that the claimant's expert was seeking opinion and advice from a colleague. So the defendant applied to the court for disclosure of the e-mail correspondence between the claimant's expert and her colleague.

The claimant argued his expert had not done anything wrong and that it was not unusual for experts to seek 'collegiate advice' or peer review as part of a mentor programme. It was further argued that, in any event, the e-mails were privileged as part of expert joint discussions. The claimant conceded that normally communications between an expert and a third party in relation to matters within an expert report do not attract privilege. However, he argued that, in this case, because a joint discussion was ongoing, the e-mails were covered by privilege.

Dealing with the issue of privilege, Judge Cotter QC said the claimant's assertion was wrong. This was not, he said, a continuing discussion between the experts, but a discussion between one expert and a third party. It was not enough that reference to what had been discussed between the experts was set out in the e-mails. The judge was satisfied that a finding that the e-mails were not privileged would neither offend nor undermine the public policy of permitting the two experts in the case to have a free discussion. However, the nature of the peer supervision should have been disclosed within the expert's report. The failure to do so was not a minor error and was at the root of the difficulties.

Litigation pressures

Civil Procedure Rules Practice Direction 35 (PD 35) says that expert evidence should be the independent product of the expert, uninfluenced by litigation pressures. The word 'independent', said the judge, was important. Independence required that the expert's views should be provided without outside influence or, more particularly, any undisclosed outside influence.

Experts should provide 'objective, unbiased opinion on matters within their expertise', with the emphasis on 'their'. It was important that the courts and any other expert or party knew the limits of that expertise.

PD 35 para 3.2(5) requires that an expert should set out, in relation to any examination, measurement test or experiment used, the qualifications of any person who has undertaken it and whether it was performed under the expert's supervision. In this case, the discussion by the expert with her colleague, even if carried out under some peer review arrangement, was in grave danger of breaching the rules unless it was disclosed in the report. The circumstances in which such a discussion could properly remain undisclosed were extremely limited. The argument that it was no more than relying upon collegiate advice was not accepted.

The judge added that, under PD 35 para 9.8, if an expert alters an opinion, they should include a note or addendum explaining why they have changed that opinion. In his view, that would include an additional note as to whether or not the change comes as a result of information provided by another expert.

The judge identified that there was a key issue regarding the extent to which the claimant's expert had understood the defendant's expert's view, and the extent to which she had then sought assistance from her colleague on the issues raised. The judge considered it very important that the court and the other party should know that the expert's evidence had not been bolstered or added to by a third party. Furthermore, an expert being challenged is entitled to know who else he or she is effectively discussing the case with and the full expertise and knowledge of any 'secondary' experts.

Accordingly, disclosure of the e-mails was ordered, and cross-examination allowed in relation to them.

Transparency, as always, is the key

In setting out the expert's duties, Judge Cotter was at pains to highlight that the expert's overriding duty will prevail over any obligation to the person from whom they have received instructions or by whom they are paid. To this, he specifically added any organisation under whose auspices the report has been commissioned. Accordingly, experts should bear in mind that any assistance or mentoring received concerning the substance and format of the report would likely fall foul of this decision, if undisclosed. If any such arrangement exists, experts need to be extremely cautious if they think they can hide the fact and the extent of that arrangement. **NLJ**

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