Factsheet 39: Expert Witness Survey 1999

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In 1995 J S Publications undertook its first survey[1] of the views, experiences and working practices of expert witnesses. Two years later it conducted a more limited investigation into the fees that expert witnesses were then charging.[2] This has now been followed by a survey, conducted in July 1999, that combines the main features of its predecessors with new topics of enquiry.

The questionnaires were dispatched with issues of *Your Witness*, the quarterly newsletter of experts listed in the *UK Register of Expert Witnesses*. The numbers of forms returned in 1995, 1997 and 1999 were 451, 547 and 671 respectively. This last total is all the more remarkable for having been achieved over a 5-week period in high summer when many readers of the newsletter would have been on holiday. We are much indebted to those who responded on that occasion for providing by far the most comprehensive body of information on fee rates and other matters of concern to expert witnesses that has yet been assembled.

The following summary of the results of the 1999 survey is based on an article that appeared in the September 1999 issue of *Your Witness* but incorporates other material as well.

Breakdown by profession

The questionnaire devised for the 1999 survey was dispatched with the June issue of *Your Witness*. Among the 671 experts who returned forms by 2 August, there were 249 medical practitioners, 94 engineers, 79 experts with scientific, veterinary or agricultural qualifications, 49 surveyors or valuers, 49 accountants or bankers, 36 experts in professions ancillary to medicine and 19 architects or builders. The inevitably large 'others' category totalled 96 experts, of whom the largest subgroups were accident investigators (11) and psychologists (10).

Work status and workload

Of the 671 respondents, 484 (or 72% of the total) were working full time, and a further 134 (20%) were working part time. Only 40 (6%) described themselves as retired, and for none of the professional categories did this proportion exceed 9%.

We also invited those taking part in the survey to state what percentage of their workload was accounted for by expert witness work, and for 55% of them it was less than 20%. This compares well with the 50% of respondents who claimed as much in the survey we conducted in 1995. Furthermore, the involvement in expert witness activities averaged out at 33% of workload, which is exactly as we found it to be in the follow-up exercise carried out in 1997.

Overall, the picture that emerges from all three surveys is of a body of people much involved in expert witness work but with an even more extensive commitment to their professions – which is, of course, exactly as it should be.

Experience

We did not ask respondents to give their age, but we were interested to learn how long they had been doing expert witness work. Here again, the information we gleaned is encouraging: they are clearly a very experienced lot. Of those who took part in the 1999 survey, 83% had been doing expert witness work for at least 5 years, and 50% had been doing it for more than 10 years.

There is some change to report, though. When we asked the same question back in 1995 the corresponding figures were 91 and 60%. A possible explanation for this shift could be that more professionals who are new to expert witness work now see the advantage of having their details listed in a directory such as the *UK Register of Expert Witnesses*. Alternatively, it may mean that professionals are tending to get involved in expert witness work at an earlier stage of their careers.

A further intriguing possibility is that expert witnesses are tending to give up expert witness work sooner, and the answers to another question asked in both 1995 and 1999 lend some support to that notion. It queried whether those replying foresaw their involvement in expert witness work increasing. Whereas 82% did so in 1995, the proportion had dropped to 71% by 1999. Given, though, all the radical changes in litigation practice that have been taking place meanwhile, it is remarkable that even that many should have remained so confident about the future demand for their services.

Single joint experts

Many of the changes stem, of course, from the reform of civil procedure initiated by Lord Woolf[3]. One change of major concern to expert witnesses is the obligation now placed on litigants to agree the joint appointment of a single expert (SJE) wherever possible. Clearly, it was important to establish a benchmark against which we might hope to assess in future years the effect this particular change has had on the demand for expert witness services. Accordingly, one of the new questions asked of the experts taking part in the 1999 survey was how often they had been jointly instructed during the 12 months to June 1999.

In all, 201 respondents (or 30% of the total) replied that they had already acted as an SJE, which might well be thought extraordinary considering that at that stage the new Rules had been in operation for only a couple of months. It should be borne in mind, though, that at least three pre-action protocols were being piloted earlier in the year, and each of them enjoined the use of SJEs. Furthermore, even before the Rules came into force many instructing solicitors deemed it prudent to anticipate their requirements rather than incur the risk of costs sanctions at a later stage. Lastly, a seemingly disproportionate number of the psychiatrists taking part in the 1999 survey (27 out of 47) reported that they had been acting as SJEs. This is probably because psychiatric evidence is often provided by just one expert in the family courts.

What is altogether more significant at this early stage in the reform process is the frequency with which our respondents have been accepting appointments as SJEs. It transpires that the majority of those who had acted as an SJE in the 12 months to June 1999 have been instructed in that capacity on fewer than three occasions. Since they would have averaged at least 40 other instructions during the same period

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(and twice that many if they were medical experts), one can only conclude that it may be some while yet before the practice of appointing SJEs takes firm root. We shall be monitoring the extent to which it does so in our future surveys.

Organisations

One striking difference to emerge from the 1999 survey was that a far higher proportion of those responding to it belonged to an expert witness organisation than had been the case 4 years previously. In itself, though, this is hardly surprising, because there was then only one such body in existence – by 1999 there were three.

Overall, 54% of those returning the 1999 questionnaire were members of at least one expert witness organisation, while 13% of them had joined two and an ultra-keen 4% belonged to all three. One should be wary, though, of concluding from this that a majority of expert witnesses are members of one or more of these bodies – if only because there is no way of knowing how many experts regularly undertake litigation work. There are certainly several thousand expert witnesses, whereas the combined membership of the Academy of Experts, the Expert Witness Institute and the Society of Expert Witnesses is barely 2,500.

Experts' reports

Output

Questions on this topic were asked in both the 1997 and 1999 surveys, and for comparative purposes the answers to them are best set out in tabular form. Unfortunately, the replies concerning report writing were not strictly comparable because in the earlier questionnaire we did not distinguish between reports written for use in court and those prepared solely for the benefit of solicitors and their clients. For this reason, it is only when the averages for the two kinds of report are added together, as they are in column 5 of Table 1, that we arrive at figures for 1999 that can be compared with those for 2 years previously.

As can be seen from the table, the data from the two surveys indicate that there was some increase in the output of reports overall, though not uniformly so across professional categories. The increase was most marked among engineers and surveyors, whereas for accountants and architects output was static, and among medical experts it was marginally down. The one category that clearly bucked the trend, however, was that of nurses and other experts in professions ancillary to medicine. By 1999 they were averaging only half the number of instructions they had been receiving in 1997.

Advisory reports

From the replies to the question asked about advisory reports it is evident that four out of five of the experts responding to our 1999 survey had written at least one of these in the 12 months to June 1999. However, the frequency with which such reports were being sought from different professions varied considerably. Engineers and surveyors were being asked for them as often as they were asked to produce reports for use in court. With other professional groups, however, advisory reports were being requested much less often. It will be interesting to see whether the growing reliance on conditional fee agreements (CFAs) results in more advisory reports being commissioned in future from experts in all professions.

Court appearances

In recent years many experts have found that they are being required to give evidence in court in fewer and fewer of the cases for which they have written reports. The figures in the penultimate column of Table 1 provide further evidence of this trend. They show that whereas the experts who took part in our 1997 survey were averaging 5.0 court appearances a year, for those who responded to the 1999 survey the average had dropped to 3.8 appearances a year.

Following implementation of the Woolf reforms the existing downward trend seems bound to accelerate. In part this will be because the reforms are designed to encourage the settlement of disputes before they come to trial. A still more important factor, though, is that, even among the cases which do reach court, it is – generally speaking – only in those allocated to the multi-track that expert witnesses are nowadays liable to be cross-examined on their evidence.

Table 1. Summary of the results (1997 results in parentheses)

Professional category	No. of replies	Average no. of reports per year			Average hourly rate for reports (£)	Average no. of court appearances per year	Average full-day rate for court appearances (£)
		Advisory	For court	Total			
Medicine	249	30.6	82.8	113 (125)	136 (124)	4.0 (5.2)	890 (870)
Nursing, etc.	36	7.6	22.3	30 (62)	68 (76)	1.4 (7.6)	512 (535)
Engineering	94	17.1	16.2	33 (19)	71 (73)	3.2 (5.7)	567 (560)
Accountancy /Banking	49	6.4	12.6	19 (19)	135 (116)	1.5 (2.2)	987 (821)
Science/ Agriculture	79	12.4	25.1	38 (29)	79 (89)	4.7 (5.9)	577 (543)
Surveying/ Valuing	49	17.5	18.8	36 (16)	83 (77)	3.8 (3.4)	642 (629)
Architecture/ Building	19	3.6	7.8	11 (10)	77 (75)	3.1 (2.1)	612 (612)
Others	96	8.9	27.8	37 (22)	71 (76)	5.2 (4.3)	521 (525)
Overall	**671**	**18.7**	**45.6**	**64 (55)**	**100 (93)**	**3.8 (5.0)**	**708 (669)**

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Legal aid and CFAs

The 1999 survey is almost certainly the last for which we shall be able to record a high level of involvement in legal aid cases. Of the respondents, 78% provided reports for at least one such case during the 12 months to June 1999, and 19% had done so for more than 25 such cases. Furthermore, it was noticeable that medical experts scored more heavily than those in other professions, with 32% of them having written reports for more than 25 legal aid cases in the course of the year. As personal injury actions accounted for close on two-thirds of all money claims then assisted with legal aid, this was only to be expected. It remains to be seen what effect the withdrawal of public funding from such actions will have on future demand for medical reports.

The Government, of course, contends that the gap in funding can be more than adequately filled by means of CFAs, and it is a fact that around 60,000 personal injury actions were launched on that basis between 1995 and 1999. Over the same period, though, at least five times as many were granted legal aid, and it is anyone's guess how many of them could have proceeded under CFAs.

Whether or not the Government's confidence in the efficacy of CFAs proves justified, it is clear that many more civil cases are going to need to be financed in this way if they are to be litigated at all. It follows that as the use of CFAs grows, so too will the involvement of experts in actions funded by that means. Of those taking part in the 1999 survey, only 12% had been instructed in a CFA case during the preceding 12 months, but many more will be once legal aid stops in April 2000. Again, we shall hope to be able to use future surveys to follow the changes in working practices and terms of engagement that these developments seem likely to prompt.

Fees

For reports

Table 1 also sets out the averages of the fee rates charged by respondents in the various professional categories. In each instance the rate recorded in 1997 appears alongside that for 1999. What is immediately apparent from their juxtaposition is that these data lend no support at all to media claims that expert witness costs are spiralling out of control.[4] Indeed, our surveys indicate that for two professional categories – engineering and science – average hourly rates for writing reports have actually gone down. Over all the categories, the increase in hourly rates was just 8.0% in 2 years.

For court appearances

For reasons already outlined, the frequency with which expert witnesses are required to give their evidence in court is set to drop still further from its existing low level. In view of this, some might consider the charging rates in the final column of Table 1 to be of little more than academic interest. Once again, though, they do serve to contradict the alarmist reports of spiralling costs that have appeared in the daily press. In some disciplines the average fees charged by expert witnesses for a day spent in court increased scarcely at all between 1997 and 1999, and in others they actually came down. Overall, they went up by just 5.9 % in those 2 years.

The figures in the final column of Table 1 also illustrate the extent to which the allowances payable to expert witnesses in criminal cases fall short of the fees that the same experts might charge if they were free to negotiate them. Since 1 September 1999 the most that consultant medical practitioners, psychiatrists or pathologists can expect to be paid for giving evidence in a criminal trial is £415 a day, which is less than half the average fee such specialists were then charging for appearing in a civil case. For forensic accountants the discrepancy is even greater: a maximum of £408 a day for criminal trials as against an average of £987 a day for civil cases.

For cancelled hearings

For several years past one of the principal gripes of expert witnesses has been the disruption to their working schedules caused by the sudden cancellation of hearings at which they are due to give evidence. As a result, many of them began incorporating in their terms of engagement a clause reserving the right to charge a proportion of their normal fees in the event of a cancellation, with the actual percentage depending on the amount of notice they were given. Overall, 65% of the experts who took part in the 1999 survey reported that they were making this stipulation, compared with 61% 2 years previously.

For those experts who were levying cancellation fees in 1999, Table 2 sets out the average percentages of normal fees they charged for different periods of notice. It will be apparent from this that there is a broad consensus across the professional categories as to the proportion of normal fees it is appropriate to charge. Moreover, as the bottom two lines show, there was an even greater inclination than 2 years previously to charge a lot more when the notice given was of less than 24 hours. Indeed, by 1999 most of the medical experts who levied cancellation fees were charging full fees in those circumstances.

Table 2. Percentage of normal fee charged for cancelled hearings

Professional	Notice period (in days)		
category	<1	1–7	8–14
Medicine	91%	58%	39%
Nursing, etc.	83%	50%	31%
Engineering	80%	49%	38%
Accountancy/ Banking	54%	49%	40%
Science/ Agriculture	80%	57%	39%
Surveying/ Valuing	73%	52%	40%
Architecture/ Building	72%	46%	33%
Others	78%	58%	51%
Overall	**82%**	**55%**	**40%**
(1997 results)	(73%)	(53%)	(39%)

The practice of charging cancellation fees has never been sanctioned officially. This makes it doubly unpopular with instructing solicitors because of the resulting uncertainty as to whether such fees can be recovered from the losing party on assessment of the costs of the case– and, if so, to what extent. However, one senior taxing master is on record as saying that, in the high court at least, solicitors for the winning party could expect to get back 50% of the fee they had agreed with an expert witness if the hearing had been cancelled less than 1 week beforehand and 25% of it if the notice given had been of between 1 and 4 weeks.

Of course, as already mentioned, one of the hoped benefits of the Woolf reforms is that cases which are going to settle will

do so well before trial. If this comes about, the incidence of cancelled hearings should be reduced sharply. Moreover, it is only in that small proportion of cases allocated to the multi-track that expert witnesses will in future have to attend court at all. For both these reasons, the need for experts to levy cancellation fees ought now to wane.

On the other hand, there is always the possibility of a seemingly straightforward fast-track case having to be transferred to the multi-track on procedural grounds. To safeguard their position, then, expert witnesses would be wise to continue providing for cancellation fees in their terms of engagement, even though they may hope never again to have occasion to charge them.

Terms of engagement

Perhaps the most startling single piece of information to have emerged from the 1999 survey is that the majority of experts responding to it had yet to devise for themselves a standard written form of contract for use when accepting instructions. Only 38% of them reported that they had such a contract, which is little different from the situation 4 years previously when we found that just 32% of experts were using one. Although there was some variation between professions in this regard, in none of them were even the majority of experts using a formal contract for their expert witness work – not even the accountants and bankers!

After this, it was hardly a surprise to find that, when accepting instructions, 43% of the experts taking part in the 1999 survey did not stipulate how soon after invoice their fees were to be paid. It really is quite disconcerting that so many should be so unbusinesslike in a matter of such importance.

Payment

Not that there was much encouragement to be gained from the experience of experts who **did** stipulate a fixed period for payment of their fees. In July 1999 only 35% of them were able to report that their instructing solicitors paid up on time in even the majority of cases, and an alarming 39% said that they never did so. This last figure indicates a marked deterioration in the payment situation since 1995 when the corresponding percentage was 27%.

In these circumstances it is no surprise at all that experts should find it necessary to take legal action to recover unpaid fees. Of those replying to the 1999 questionnaire, 24% reported that they had had to sue for their fees at some stage in their expert witness career. What is astonishing is that no less than 15% of them said that they had done so during the previous 12 months. This, too, can only reflect a further deterioration in the dealings between experts and their instructing solicitors.

Footnotes

[1]For further details see Factsheet 5, ‘Expert Witness Survey 1995’.
[2]For a report on this investigation see Factsheet 24, ‘Fees Survey 1997’.
[3]For an overview of the Woolf Reforms, see Factsheet 34.
[4]See, for example, the news item in the *Daily Telegraph*, November 10, 1999, about a survey that had been carried out by Bond Solon Training Ltd.

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J S Publications can be contacted at:
PO Box 505, Newmarket, Suffolk CB8 7TF
Tel: 01638 561590 • Fax: 01638 560924 • e-mail: ukrew@jspubs.com