

Factsheet 47: Expert Witness Survey 2001

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In 1995, J S Publications undertook a survey of the views, experiences and working practices of experts listed in the *UK Register of Expert Witnesses*.¹ Some 2 years later, the findings of that survey were updated with a more limited investigation into the fees experts were charging.² Then, in 1999, J S Publications conducted a further survey that combined the main features of the predecessors, while adding some new topics of enquiry.³

The questionnaires for these three surveys were all dispatched with issues of *Your Witness*. It seemed, however, from the delayed return of some of the forms distributed in 1999, that this might no longer be the most effective way of achieving a prompt response. Accordingly, when the time came to repeat the exercise in September 2001, we took the decision to conduct it entirely by e-mail.

To ensure the validity of any comparisons made with the results of previous surveys, we were careful to phrase our questions for the new one in the same terms as before. In addition, though, we asked a few extra questions to probe the effect of the major changes in the conduct of litigation that had taken place since April 1999. In the event, around 500 experts responded to the e-mail questionnaire, and we are grateful to all of them for doing so. The following is an analysis of their replies.

The Experts

Profession

As in previous surveys, medical practitioners constituted much the largest group of experts responding to the latest questionnaire: there were 200 of them in all, which is 41% of the total. Of the rest, 63 were engineers, 53 had scientific, veterinary or agricultural qualifications, 39 were in professions ancillary to medicine, 36 were surveyors or valuers, 24 were accountants or bankers, and 17 were architects or builders. The substantial 'others' category totalled 50, of whom 23 were psychologists.

Work status and workload

Of the respondents in 2001, 330 (69% of the total) worked full time, and another 117 (24%) worked part time. Only 6% described themselves as retired. On average, expert witness work accounted for just 37% of their workload, which is

slightly up on the 33% recorded in 1999. These latter percentages would seem to indicate that in both years those replying were, as a body, much involved in expert witness work, but had an even more extensive commitment to their professional duties. They are, however, only average figures, and in 2001 the involvement in expert witness work ranged all the way from 1 to 100%.

Extent of experience

We also asked respondents to say for how long they had been doing expert witness work, and from their answers it is apparent that the respondents are a very experienced lot indeed. Of those who replied in 2001, 90% had been acting as expert witnesses for at least 5 years, and 63% had been doing so for more than 10 years.

Their Work

Reports

In all four of our surveys we have asked those taking part to estimate the number of expert reports they have written during the preceding 12 months. The 2001 survey, however, is the first to record an overall fall in output. Furthermore, this has happened with both reports prepared for use in court and those written solely for the advice of the instructing solicitor and his or her client. The experts who took part in our 1999 survey were averaging 48 court reports and 19 advisory reports per year. By 2001, these average totals had dropped to 41 and 12 respectively.

The reasons for this downturn in business are not far to seek. Even before the Woolf reforms took effect, there had been a fall off in the number of writs issued in both the county courts and the high court, and since April 1999 there has been a dramatic decline in the number of cases going to trial. In part, of course, this is because more disputes are being settled before they reach court, but there are other factors in play too.

Conditional Fee Agreements

In 1999 we forecast that the growing use of conditional fee agreements (CFAs) as a means of funding litigation would result in an increased demand for reports of the advisory kind, but evidently this has not materialised. Indeed, it is

apparent from the replies to the 2001 survey that the great majority of experts had yet to be instructed for a CFA case in any capacity at all. In answer to a question about the number of CFA cases they had had during the past 12 months, 82% replied 'none' – little change from the 88% who gave that answer 2 years previously.

Legal aid cases

Another change predicted in 1999 that did come about was a sharp fall in the number of legal aid cases requiring experts. Although 69% of those taking part in the 2001 survey said that they had acted in at least one such case during the preceding 12 months, the average number of legal aid cases was much reduced. In 1999, 19% of respondents reported that they had acted in more than 25 such cases over the previous year, but in 2001 only 10% could do so. Here again the reason is obvious: since April 2000 public funding has not been available for the conduct of most personal injury claims, and they account for a substantial part of the workload of the civil courts – as well, of course, as that of medical practitioners who prepare expert evidence for those courts.

Single joint experts

However, the biggest change of all between 1999 and 2001 was the increased use being made of single joint experts.

Although 30% of the experts who took part in our 1999 survey said that they had already acted as an SJE, very few had been instructed in that capacity on more than three occasions in the preceding 12 months. We concluded from this that it would be some while before the practice of appointing SJE's took firm root.

As things turned out, the growth in SJE work was greater than anyone anticipated. The 2001 survey reveals that fully 80% of the experts taking part in it had acted as an SJE during the previous 12 months, and that, on average, they were being instructed in that capacity at least 12 times a year. And, of course, every case where one expert is instructed in

place of two contributes to the overall reduction in demand for expert witness services

Court appearances

Another change over the years that many experts find more welcome is the reduction in the number of cases for which they are being required to give evidence in court. It is now altogether exceptional for them to have to do so 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 5 times a year. Just 2 years later this had fallen to 3.8 times a year, and in 2001 it had dropped even further, to 2.5 times a year.

Table 1. Summary of the results (1999 results in parentheses)

Professional category	No. of replies	Average hourly rate for reports (£)		Average full-day rate for court appearances (£)	
Medicine	200	149	(136)	927	(850)
Nursing, etc.	39	100	(68)	718	(512)
Engineering	63	85	(71)	663	(567)
Accountancy/Banking	24	133	(135)	895	(987)
Science/Agriculture	53	78	(79)	648	(577)
Surveying/Valuing	36	104	(83)	787	(642)
Architecture/Building	17	84	(77)	712	(612)
Others	50	127	(71)	622	(521)
Overall	482	119	(100)	798	(708)

Their Fees

Which brings us to the details everyone is interested in: how much their fellow experts are charging for expert witness services. For convenience, we summarise this information in tabular form.

For each of the professional groups the table gives average hourly rates in September 2001 for writing reports and full-day rates for attendance in court. In each instance the rate is followed by the corresponding amount taken from the survey conducted in June 1999.

In view of the small size of some of the groups, it would be unwise to read too much into the changes these pairs of figures reveal. It is apparent, though, that for most professions the rates for both activities increased over those 2.25 years by far more than the prevailing rate of inflation. On average, the fees for report writing went up by 8.5% per year and those for court appearances by 5.6% per year. Intriguingly, the one group that would appear to have bucked both trends is that of accountants and bankers. Had they found that they were pricing themselves out of their market?

Once again, the figures in the final column demonstrate the extent to which officially determined allowances fall short of the fees experts are free to negotiate for themselves. For example, in 2001 the most that consultant medical practitioners could count on being paid for giving evidence at a criminal trial was £415 a day, which is well under half the average fee they were charging for appearing in civil cases. They, like all other experts who from time to time give evidence in the criminal courts, must now be hoping that the Lord Chancellor heeds the comments Lord Justice Auld made on this grossly unsatisfactory state of affairs.⁴

Speed of payment

Here there is at least some improvement to report, although the general situation remains grim. In 2001, 68% of respondents said that their invoices were being settled more promptly than 2 years previously, as against 9% who reckoned that they were being settled more slowly. On the other hand, only 32% could claim that they were being paid on time in even half of the cases on which they worked, a statistic that has changed little over the 6 years we have been conducting these surveys.

Against this background it is encouraging to be able to report a further increase in the proportion of respondents who use a written form of contract when accepting instructions from a solicitor. In 2001, 47% were doing so, as against 38% 2 years previously and 32% back in 1995. Furthermore, more experts are now stipulating in their terms of engagement how soon after invoice they expect to be paid: 65% of respondents in 2001 said they were doing so, as against 57% in 1999. Doing this cannot guarantee prompt payment, but it is at least a move in the right direction towards securing it.

If all else fails, one can, of course, sue for one's fees – or at least threaten to do so. Obviously, this should be the option of last resort, if only because it is bound to lose one a client. But increasingly experts are finding it necessary to resort to such measures. Of those who took part in our 1999 survey, 24% said that they had had to sue for their fees on at least one occasion in their career as an expert witness, but by 2001 that figure had risen to 31%. Furthermore, no fewer than 27% of the respondents to the later survey reported having had to sue an instructing solicitor during the preceding 12 months. This is a frightening indication of just how bad the relationship has become between experts and many solicitors.

There is, however, another method of getting clients to pay up sooner, and that is to offer them discounts for prompt payment. The 2001 survey reveals that some experts already do this. More to the point, though, many others – almost 30%

of the total – indicated that they might be prepared to do so. Is this, perhaps, a way forward for all experts who are concerned about the speed at which they paid?

Footnotes

¹For full details see Factsheet 5, 'Expert Witness Survey 1995'.

²For full details see Factsheet 24, 'Fees Survey 1997'.

³For full details see Factsheet 39, 'Expert Witness Survey 1999'.

⁴For Lord Justice Auld's recommendations regarding expert evidence see Factsheet 46, 'The Auld Report'.

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