Surveying the new landscape

Mark Solon looks at incoming changes, and says the new focus on issues, tight timelines and budget is good news for committed experts

The pips are squeaking for lawyers and experts following the changes to the Civil Procedure Rules which came into effect on 1 April 2013 as a result of Lord Justice Jackson's 2010 report into civil litigation costs. Justice Secretary Chris Grayling is now the man with the mission to reduce costs and implement the shortened time limits of litigation. Expert witnesses must learn to work in the new environment, whether they like it or not.

As Nicholas Yapp, Dispute Resolution partner at Davenport Lyons, points out: "The position of parties wishing to bring expert evidence in many court proceedings has changed because of amendments to Rule 35. The changes will focus parties on the issues which an expert is required to address; previously, the requirement was only to identify the field in which expert evidence was required. Also, the court must now be provided at a very early stage with an estimate of the costs of expert evidence in those proceedings to which its new costs management powers apply. The court will very much have in mind the amended overriding objective to deal with cases not only justly but at proportionate cost."

Yapp continues: "In practical terms, these changes will result in parties to litigation, or contemplating litigation, needing to establish three things from a very early stage: the likely issues upon which expert evidence is required; an appropriate expert who can act in accordance with court-imposed timetables (which will now be far more rigidly enforced by the court under its case management powers); and the expert's fees or (if no expert has been identified) an accurate estimate, not just for preparing a report but for all work to be carried out by that expert, up to and including the trial.

"We have entered a new litigation landscape in which the court will be dictating and actively limiting the amount of evidence which it will permit the parties to adduce in a case – not 'rough justice' but certainly 'proportionate justice'."

To put it another way: 'less is more' is the new black – but the new focus on issues, tight timelines and budget is good news for committed experts. Those who once found a knowledge of the law a mild inconvenience now need to be familiar with relevant rules and protocols, and to understand the significance of court-directed time limits. The new regime should also put an end to the turgid and unintelligible witness report.

With regard to the new requirement for estimating budgets, Philip Collier of Collier Knight Watts, independent consulting forensic engineers, is realistic: "We've always provided estimates anyway. Now we offer fixed and capped fees. Obviously, you're never quite sure what will be required – will we receive one lever-arch file or ten? Will we be dealing with the case as a desktop opinion or will we have to travel for an inspection? How long is a meeting of experts likely to take? It's a case of the best guess so we're anxious for it not to be fixed in stone. Also, if the instructing solicitor settles or the court reduces fees, solicitors may be left trying to reduce costs and so, whatever might be in their contract with the

expert witness, they may offer to pay only a reduced fee. Ultimately, we may be faced with the choice of suing the solicitor for the agreed amount or making a commercial decision to accept a reduced figure. We were hoping agreed budgets might get rid of this problem."

Timing will also be a factor when negotiating contract terms and conditions: the solicitor will not want to pay the expert until paid by the client, whereas the witness will prefer earlier payment. Occasionally clients will allow the expert to report directly to them, but that is the exception.

With the new focus on time limits, expert witnesses have to keep meticulously detailed records of what they do, noting the time spent on each phase of an assignment, including initial assessment, report-writing, meetings, dealing with questions and attending court.

There are various options for recording time (not forgetting interruptions), ranging from dedicated software to time-sheets divided into the five or six-minute units favoured by law firms. The habit of accurate record-keeping will make future budget estimates much easier and more realistic.

Relying on the old chestnut that no-one charges the full amount of time anyway and hoping for the best is counter to the spirit of the revised CPR, which require accurate, businesslike records.

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Safeguard

Another matter concentrating the minds of expert witnesses is the judgment in *Jones v Kaney* [2011] UKSC 13. This removed expert witnesses' immunity from civil action for professional negligence and breach of contract. Experts had previously enjoyed immunity when giving evidence in court and at every other stage in the process, such as report-writing and answering questions.

As a result of this judgment, experts have to be alert to acting reasonably and professionally within the terms of instruction. They should also check that they have appropriate professional indemnity insurance (the cost of such insurance cannot be claimed as an expense arising from being an expert witness). All professionals now carry such insurance. For experts, it is a safeguard and gives comfort to instructing solicitors that, in worst-case scenario (the event of a claim), experts will be able to pay damages.

Philip Collier is sanguine about *Jones v Kaney*: "The nature of litigation is such that you're always going to please one party and upset the other. This doesn't mean the expert has failed in his or her duty and shouldn't lead to the losing party always pursuing the expert.

"As long as experts are aware of CPR and their duties to the court, not trying to be advocates or to do the best for their client's case, and seen to be independent, they are unlikely to be called to account for any professional misconduct."

Overall, the new regime is required to bring about higher standards. For

example, on 16 May the Ministry of Justice announced new national standards to raise the quality of experts used in family courts and to get rid of time-consuming evidence which adds little value in helping judges reach a decision.

Family Justice Minister Lord McNally said: "Poor quality expert evidence can lead to unacceptable delays for children and their families."

There will be a consultation running until 18 July 2013 (further information is on www.gov.uk/government/consultations/standards-for-expert-witnesses-in-the-family-courts-in-england-and-wales).

Hot water

In a further move towards streamlining, at the Commercial Litigation Association annual conference on 14 May, Mr Justice Ramsey (who is responsible for implementing the Jackson civil litigation reforms) called for more 'hot-tubbing' – expert witnesses for both parties giving evidence at the same time. This would trim costs and save time by enabling technicalities and arguments to be compared swiftly.

Ramsey also wants written evidence and disclosure kept to a minimum, saying that "not more than three facts are required to decide any case" as a rule (one might be tempted to say that not more than three opinions are required from any expert).

Experts can get themselves into serious hot water in a hot tub if they aren't fully au fait with the matters in dispute. But Philip Collier welcomes the new clarity: "Instructions will be more focused and reports prepared that concentrate on the main issues (we like to think ours do anyway). It's very helpful to have the issues of the case identified at the beginning. We've previously received cases where issues had been missed or the central ones not spotted.

"The changes may lead some solicitors to contact us early to help with identifying the potential issues before going to court. Also, there may be an increase in dealing with liability at an early stage, prior to medical and quantum matters."

Will there be more court-appointed experts? In 1996, Lord Woolf in Access to Justice described expert witnesses as 'hired guns' and it is true that technical evidence is rarely neutral when it comes to the outcome of a dispute.

But even if solicitors consider that the expert they have instructed is part of their armoury, Philip Collier believes that, although the court may decide whether or not an expert witness should be appointed, the choice of the expert will still generally be left up to the parties. While they each may have their favourites, by agreeing the choice of expert the parties will weed out the more partisan experts.

In response to the new regime, some experts are simply declining to take on any further assignments at all – creating opportunities for others who want to break into the market. Meanwhile, other experts are enjoying an improvement in the overall quality of their work, by choosing only the most complicated – and therefore worthwhile – assignments.

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