

Leave it to the experts

Mark Solon reports on the increasing professional world facing today's expert witnesses

IN BRIEF

- As well as having the relevant qualifications & expertise in their professional field, it is essential that experts, however experienced, undertake recognised expert witness training.

Important changes to the Civil, Criminal and Family Procedure Rules and the recent Supreme Court's decision to abolish expert witnesses' immunity from suit (see *Jones v Kaney* [2011] UKSC 13, [2011] 2 All ER 671) have resulted in solicitors being more careful when assessing the suitability of an expert. It is only fair for a client to expect that in return for the expert's fee, the expert knows how to be an expert and is properly trained.

Solicitors must adhere to the Protocol for the Instruction of Experts and ensure the expert has "training appropriate to the value, complexity and importance of the case." Solicitors now look for experts who can demonstrate that they are able to meet deadlines; produce court compliant reports have credibility in the witness box and have a good understanding of the relevant procedure rules.

Fundamental role

Expert witnesses play a fundamental role within the judicial system by providing opinion-based evidence to assist the courts in reaching decisions. Expert witnesses may be asked to write reports or statements and be called to give evidence in a wide variety of legal fora including: civil, criminal and family courts, tribunals, arbitrations, inquiries and professional conduct hearings. In carrying out this role experts should undertake, as a minimum, training covering report or statement writing, giving oral evidence and relevant law and procedure.

An expert's report must be clear, succinct, independent and well presented. An excellent report is also one of the most effective marketing tools that an expert will have in their career. Reports are seen by

many professionals during litigation and often new instructions are received from opposition lawyers. It is time consuming for an instructing solicitor to have to hand hold an expert so they produce a court compliant report and potentially raises the suggestion of influencing the expert's independent opinion. The judge does not want to hear from the witness box: "that's not what I meant; it's what the solicitor told me to write..." Having proper training at least gives the expert a credible format for a report.

Many experts create their own report writing style or adopt other people's generalised formats, having rarely received constructive feedback from lawyers on what is required from their written evidence. They continue to make the same mistakes, but with greater and greater confidence. Experts need to understand what lawyers and the courts require from a report including identifying the issues to be addressed, having a structured approach to preparation and writing, expressing an independent view and a well argued conclusion, dealing with supporting information and complying with the mandatory formalities.

Standing alone

Should a matter reach a hearing, the witness box is a lonely place for experts. Many feel they are on trial, standing in the dock rather than giving independent testimony to assist the court. Often, experts are unfamiliar with this environment as statistically few cases go to a full hearing. A poor performance can undermine confidence and credibility and reflect badly on the solicitor for choosing a retiring violet. Proper training should examine the theory, practice and procedure of giving

evidence and demystify the process and then give the expert some mock cross examination. Experts should learn how the court system works, their role as an independent educator of the court, the key skills of presenting effective evidence, the techniques lawyers use in cross-examination and how to handle them and how to express an opinion based on a foundation of fact.

Procedure & practice

The Civil Procedure Rules state that all experts' reports must contain a statement that they "are aware of the requirements of Part 35 and Practice Direction 35, this protocol [the Protocol for the Instruction of Experts to Give Evidence in Civil Claims] and the practice direction on pre-action conduct." Similar requirements are contained in the criminal and family courts. Experts must be up to speed with all the relevant rules.

Meetings and discussions between experts are increasingly being required by the courts in an attempt to save court time, reduce legal costs and bring about an agreement between the parties. These meetings may feel more informal than the courtroom, but can be just as important to the outcome of the case. In *Jones v Kaney* 2011, the Supreme Court ruling that removed expert witness immunity, the expert witness was accused of negligence during expert discussions and the preparation of a joint statement. Experts need to ensure that they have the knowledge to attend meetings effectively. They need to know the legal requirements and implications of expert meetings, how to prepare, the agenda of the expert meeting, how to draft the Statement of Agreement and Disagreement and minutes of the meeting, how to respond to a suggestion from the solicitor to avoid reaching agreement and how to work with an expert who is not complying with their duties to the court.

Just as a client expects their solicitor to be trained, they now expect the expert to know what they are doing. NLJ

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