

The Little Book on  
**Expert Witness Fees**

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**Expert Witness Fees**

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UK Register of Expert Witnesses

3rd Edition

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## Guide to abbreviations

<b>ADR</b> .....	alternative dispute resolution
<b>AMRO</b> .....	Association of Medical Reporting Organisations
<b>CCA</b> .....	County Courts Act
<b>CFA</b> .....	contingent fee arrangements
<b>CJC</b> .....	Civil Justice Council
<b>CPR</b> .....	Civil Procedure Rules
<b>CPS</b> .....	Crown Prosecution Service
<b>CrimPR</b> .....	Criminal Procedure Rules
<b>ECJ</b> .....	European Court of Justice
<b>FPR</b> .....	Family Procedure Rules
<b>HMRC</b> .....	Her Majesty's Revenue and Customs
<b>IP</b> .....	intellectual property
<b>JCS</b> .....	Justices' Clerks' Society
<b>LAA</b> .....	Legal Aid Agency
<b>LiP</b> .....	litigant in person
<b>LPCD</b> .....	Late Payment of Commercial Debts (Interest) Act
<b>MCOL</b> .....	Money Claim Online
<b>MedCo</b> .....	the MoJ-sponsored system to facilitate the sourcing of medical reports in soft tissue injury claims brought under the MoJ's Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents
<b>MoJ</b> .....	Ministry of Justice; formerly the Department for Constitutional Affairs, and before that the Lord Chancellor's Department
<b>MRO</b> .....	medical reporting organisation
<b>RoT</b> .....	retention of title
<b>RTA</b> .....	road traffic accident
<b>SJE</b> .....	single joint expert
<b>SRA</b> .....	Solicitors Regulation Authority
<b>VAT</b> .....	Value Added Tax

## Preface to Third Edition

This title is the most popular of our Little Books for expert witnesses. Based on the feedback we have received, its value to the busy expert witness comes from the straightforward language and practical guidance it offers. It is very satisfying when experts tell us that they followed the advice in Chapter 7 (*Getting Paid*) and the long overdue bill that had been a source of frustration and wasted administrative time was paid in a matter of days.

The rationale behind this book has not changed since the first edition, but there have been numerous amendments to the professional rules that impinge on expert witness fees since Edition 2. There have also been many changes in the area of public funding, so much so that we have turned to the Legal Aid Agency's National Taxing Team for some expert guidance of our own (our special thanks to Peter FitzGerald-Morris, Determining Officer with the National Taxing Team, for his input). Somewhat worryingly, even the LAA has agreed that in some areas the regulations are somewhat unclear! In such cases, the text highlights the inconsistency so that the reader can at least proceed with knowledge of the potential for a future problem.

There are no magic bullets when it comes to getting paid on time. Instead, you need to take a little care to understand the 'lay of the land' and then establish a good solid contractual framework. As soon as a debtor defaults, you need to follow established procedures to ensure you keep on top of the payment paperwork. Should your instructing lawyer then drag his heels over payment, you can turn to Chapter 7 with confidence that you've performed all the preliminary steps to ensure that suing the lawyer is fast, simple and, most importantly, successful.

In the current challenging business environment, it has never been more important to be thoroughly businesslike in your dealings with lawyers. Reading *Expert Witness Fees* and employing its advice is a great place to start!

*Chris Pamplin*

*Susanne White*

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**Why put up with late payment after you've offered a first-rate service?**

When you've handed over your expert report on the date requested, answered written questions on time, attended court (if necessary) and generally been a first-class asset to your instructing lawyer, the last thing you want or need is to spend any more of your valuable time chasing up payment that is rightly due. You've offered a top-quality, professional service, so why can't the solicitor pay you on time?

There are many reasons why securing timely payment could be a problem for you. For example:

**So much can go wrong that the key is to minimise the risks**

- Did you **fail to obtain a signed copy of your terms** of engagement?
- Did your contract or covering letter **omit details about your required timing of payment**?
- Did you **forget to issue your invoice** on time, or at all?
- Did you **fail to provide the necessary detail** to support an assessment of the fees you charged?
- Did your instructing solicitor **fail to obtain prior authority** for case funding?
- Has your **invoice simply been lost** in the law firm's accounts department or in the post?
- Does the accounts team, as standard procedure, **wait for a telephone call to chase payment before finally authorising the fee**?

**Look at it from the lawyer's point of view**

Whatever the reason, in this book we'll offer you guidance on how to minimise payment problems and provide you with a better understanding of the difficulties faced by lawyers. After all, if you can develop systems to complement a solicitor's work methods, it can only improve working relationships and promptness of payment.

This first chapter summarises the contractual relationship that exists between you as the expert

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## Terms of engagement

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Terms ease the path to payment

**Written terms do not guarantee that you will be paid on time**, but they do make clear to the solicitor your expectations and requirements and put you in a good position should enforcement action become necessary. This chapter provides lots of background information about terms, and should give you sufficient confidence to tackle the task of drafting a set.

Half of expert witnesses do not use written terms!

According to the series of expert witness surveys<sup>1</sup> conducted by the *UK Register of Expert Witnesses* (from 1997 to 2015; see *Appendix 1*), the number of experts who use a written form of contract when accepting instructions from a solicitor has never exceeded 52%. In 2015, **half of all experts claimed not to use a form of written contract** (although 91% of experts said that they stipulate terms). A failure to define your terms of engagement is a **commercial liability**, leaving you open to payment problems later on and/or assertions that a different set of terms was in fact agreed.

**Writing your standard terms of appointment is a priority** before embarking on a case. You should also ensure that they are checked by a **contract lawyer** who will be able to advise on their legal compliance and hopefully close any previously unnoticed loopholes.

Importantly, though, the **drafting of terms should be seen as an ongoing process**. It is inevitable that as instructions are undertaken, situations will arise that will suggest new or revised terms that will help to avoid similar problems in the future. Always be alert to these opportunities to take something positive out of otherwise irritating situations.

Basic sets of terms can be found and adapted to suit your needs

Templates and precedents for standard terms of business applicable to experts are generally

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<sup>1</sup> See <http://www.jspubs.com/Surveys/feesurveys.cfm> for full survey reports.

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## Court Procedure Rules

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The contractual nature of the expert–lawyer relationship means that little needs defining in the rules of court relating to the payment of experts unless it impacts on the smooth running of the court. But the courts must maintain their cost controlling role. To implement that properly, **cost budgets** need to be provided up front and likely expenditure agreed *before* experts are instructed formally.

It is always important for the expert to understand at the outset who exactly will be paying his fees, when they will be paid and what steps have been taken by the solicitor to ensure payment is trouble free.

The rules of procedure, practice directions and associated guidance governing the UK courts have a few references relating to expert fees, and these are considered below.

### 3.1 Civil Procedure Rules

In the UK, civil procedure in relation to expert witnesses is governed by:

- CPR35 (see *Appendix 2*)
- CPR35 Practice Direction (see *Appendix 3*), and
- CJC’s *Guidance for the instruction of experts in civil claims 2014* (see *Appendix 4*).

#### 3.1.1 Court’s power to limit recoverability

**Court can limit amount of expert fees recoverable between parties**

CPR35.4(4) gives the court the power to ‘... *limit the amount of a party’s expert’s fees and expenses that may be recovered from any other party.*’

Notice our emphasis on the word ‘party’. Rule 35.4(4) limits costs between the parties. **It does not override any contractual obligations to pay some other amount to you.** Any difference between what you are to be paid under contract by a party and what the court says that party may claim from

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## Public funding

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In its broadest sense, public funding includes remuneration from the LAA, the courts (through central funds), the police, the CPS, and so on. All these agencies are public bodies and in essence paid for by government. For the most part, though, when we talk about public funding, we mean legal aid.

*Chapter 4* focuses on legal aid and how it might impact on an expert's ability to get paid in full and on time. For a close look at the payment of experts for court work, read *Chapter 5*.

**Public funding is meant to provide access to justice for all**

Legal aid is meant to perform a crucial role in **providing fair and equal access to justice** for those most at risk of being excluded from our legal system. However, in its desperation to make savings in public funding as part of its wholesale review of public spending, the Government may have gone too far.

**Fee rates now so low that for many it makes no commercial sense to do LAA work**

Amendments to fee rates paid to experts in publicly funded cases have forced many away from helping. **When it costs more to provide the service than you can recoup from public funds, what is the point in accepting such cases?**

In June 2015, barristers and lawyers right across the UK agreed to **boycott new cases paid at the lower legal aid rates**. They argued that legal aid cuts will lead to further **miscarriages of justice** and a **fall in the quality of representation**.

**MoJ believes firms doing LAA work should merge to cut costs**

On 1 July 2015 fees for duty solicitors to attend magistrates' courts and police stations fell by 8.75%, and this followed a similar cut in 2014. The MoJ believes that **falling crime rates have led to overcapacity in the marketplace**, and law firms need to consolidate and make savings. Understandably the lawyers don't agree.

Michael Gove, who became Lord Chancellor and Secretary of State for Justice in May 2015, recognised the problem:

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## Oral evidence in criminal courts

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Experts giving oral evidence in criminal courts come under some special provisions that are the source of much confusion. But that need not be the case. For most expert witnesses attending the criminal court to give evidence, the situation is simple:

- If instructed by the **prosecution** (usually the CPS), you will need to **invoice the CPS following the schedule set out in your contract**.
- If instructed for the **defence**, you will need to **claim your fee yourself from the trial court office**.<sup>1</sup>

## 5.1 Defence experts

Defence witnesses entitled to compensation from central funds

**As a matter of public policy, all defence expert witnesses in criminal cases are entitled to be compensated out of central funds for their loss of time and the incidental expenses incurred in attending court**<sup>2</sup>. Furthermore, the Prosecution of Offences Act 1985 assigned to the Lord Chancellor the responsibility for making the necessary arrangements. This was duly done by

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<sup>1</sup> Note, though, that a special situation may arise where a defendant is acquitted and a defendant's costs order under Section 16 of the Prosecution of Offences Act 1985 is obtained, and the costs order extends to legal costs in accordance with Section 16A of the Prosecution of Offences Act. If that is the case, then if the court attendance fees have not been claimed by the expert witness from the court but responsibility for payment has been accepted by the defendant, these may be claimed by the defendant as part of his claim for legal costs out of central funds. The claim will then be determined under Part III of the Regulations. It is important to note, however, that if the defendant claims a reimbursement of expert witness costs in this way, although his liability to the expert remains the amount agreed between them, the amount reimbursable by the determining officer to the defendant is capped at the amounts allowable under Regulation 16 and Schedule 1 of the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2013 (see *Appendix 11* and *Appendix 13*).

<sup>2</sup> That is, unless the court directs otherwise, as per Regulation 16 of the Costs in Criminal Cases (General) Regulations 1986 (see *Appendix 11*).

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This chapter is populated by sections that answer the questions asked most regularly on our expert witness helpline about expert witness fees and payment problems.

- **Can I take a case under a CFA?**

Answer: Until the autumn of 2014, the answer was ‘Absolutely not!’ But the current incarnation of the CJC’s *Guidance for the instruction of experts in civil claims 2014* now says otherwise. While CFAs remain **strongly discouraged**, they are no longer banned. The option of altering the timing of payment to make life easier for your instructing solicitor remains open – see §6.1 on page 136 for all the relevant information.

- **Can I charge a cancellation fee?**

Answer: In general, yes, but it is a right that arises through your contract (see §6.2 on page 138). In publicly funded cases, though, the LAA will not pay cancellation fees if notice of more than 72 hours is given. If your contract states cancellation terms and is signed by the lawyer, though, then regardless of the court or the funding party, you can justifiably charge a reasonable cancellation fee according to your written terms. If the lawyer can’t reclaim it, he’ll have to pay it himself. For more discussion, see §6.2 on page 138.

**A signed contract is essential to enforce a cancellation fee**

- **Why is my solicitor refusing to pay my cancellation fee?**

Answer: There may be more than one reason (see §6.2 on page 138). Which applies to you?

- (i) Has your solicitor **omitted to negotiate the fee into a settlement agreement?** If so, he will have to pay your fee out of his own pocket, so long as he signed your contract.
- (ii) Is this a **publicly funded case?** If so, is the LAA refusing payment because you were given

**Talk to your solicitor to understand the problem**

# 7

## Getting paid

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**Less than 50% of experts are paid on time in even half of their cases**

A survey carried out by the *UK Register of Expert Witnesses* in 2015<sup>1</sup> revealed that only 48% of expert respondents were paid on time in even half of the cases on which they had worked. Furthermore, 32.4% of the experts reported that they had sued for their fees at some stage in the preceding 5 years.

So how can you minimise payment problems?

## 7.1 Steps to avoid late payment

The expert witness business as a whole has a very poor payment record for two reasons.

**Most experts find talk of payment distasteful**

- **Experts prefer to concentrate on completing assignments**, leaving the subject of terms of engagement, fees and timing of payment to one side, as if they are somehow too embarrassing to raise. Invoices are sent late, and the thought of chasing a lawyer for payment sends shudders of distaste down the spine... and lawyers know this.

**Lawyers prefer to settle up at the end of the case**

- On the other hand, **lawyers can be poorly organised**. While there are mechanisms in place to make the payment of experts on time and in full, they require a degree of forethought and planning. With multiple cases on the go, it can be very difficult for the lawyer and his team to keep track of who has submitted an invoice, who is due payment, who has been granted prior authority, and so on. Lawyers prefer to settle bills at the end of a case because it is then that the expenses are known, all the bills can be collected, and any financial awards made or received. But cases can continue for years!

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<sup>1</sup> See <http://www.jspubs.com/Surveys/feesurveys.cfm> for full survey reports.

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## Appendix 1 Fee rates – survey data

Since 1997, J S Publications has carried out a general expert witness survey once every 2 years. These snapshots of the expert witness landscape provide the most in-depth intelligence on expert witnesses within the UK, focusing on the work they do and their charging rates.

Presented on the following pages are the fee data for the surveys conducted between 1997 and 2015, broken down by broad discipline. For a more detailed discussion of the surveys and their data, see <http://www.jspubs.com/Surveys/feesurveys.cfm>.

### Court appearances

Year	Medicine		Nursing, etc.		Engineering		Accountancy and Banking	
	<i>n</i>	Day rate	<i>n</i>	Day rate	<i>n</i>	Day rate	<i>n</i>	Day rate
1997	166	£870	42	£535	116	£560	34	£821
1999	249	£890	36	£512	94	£567	49	£987
2001	200	£927	39	£718	63	£663	24	£895
2003	230	£1,041	42	£749	79	£694	26	£1,105
2005	264	£984	28	£658	84	£631	34	£1,059
2007	181	£1,163	21	£827	52	£876	21	£1,105
2009	226	£1,252	49	£1,067	65	£836	28	£1,246
2011	211	£1,210	23	£1,127	58	£1,076	17	£1,476
2013	154	£1,554	15	£1,180	48	£1,112	14	£1,652
2015	198	£1,524	51	£1,074	51	£1,142	27	£1,833

Year	Science and Agriculture		Surveying and Valuing		Architecture and Building		Others	
	<i>n</i>	Day rate	<i>n</i>	Day rate	<i>n</i>	Day rate	<i>n</i>	Day rate
1997	68	£543	35	£629	28	£612	58	£525
1999	79	£577	49	£642	19	£612	96	£521
2001	53	£648	36	£787	17	£712	50	£622
2003	37	£690	24	£984	27	£744	78	£802
2005	35	£614	28	£888	33	£610	68	£657
2007	19	£720	18	£938	17	£835	85	£811
2009	32	£811	19	£1,140	31	£860	61	£760
2011	36	£925	20	£912	29	£1,084	59	£828
2013	32	£961	19	£1,422	10	£1,004	48	£1,329
2015	30	£963	20	£1,396	23	£978	9	£1,145

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