

Approach with care

Dr Chris Pamplin explains how to save money without damaging the supply of expert witnesses

In recent years, pressure on public finances has driven down fees for those lawyers who still work in the publicly funded arena. Fee capping and fixed fee schemes have played their part. Clearly, the Ministry of Justice (MoJ) believes that what was sauce for the lawyer goose will be sauce for the expert witness gander.

In its consultation paper, *Legal Aid: Funding Reforms*, the MoJ claims to recognise that quality expert evidence is essential for the effective running of the civil and criminal justice systems. Yet it proposes the unsophisticated application of arbitrary banding and capping of the fee rate of those expert witnesses paid out of the Legal Aid fund, with a maximum hourly fee of £100. Based on a decade's-worth of survey data (www.jspubs.com/downloads/PDFs/UKREW_MoJ_Nov09.pdf) gathered by the *UK Register of Expert Witnesses*, this action will represent an approximate halving of the average fee rates for medical expert witnesses.

Doubtless few lawyers will worry much about expert witnesses earning less money from future publicly funded work, especially given the cuts the lawyers themselves have had to swallow. But what is crucial is how expert witnesses might respond to such swingeing cuts. The MoJ is assuming that expert witnesses will react in the same way as the lawyers, take the financial hit and keep working. But they will not, for they need not.

Lawyers are part of the legal system, but expert witnesses are simply guests in it. If, for example, you ask a medical doctor to undertake some forensic work for far less money than he can earn in private medical practice—while exposing himself to a legal environment that can give rise to professional disruption and serious professional risks—what do you think the answer will be?

There is a better way

However, expert witnesses are not

unsympathetic to the need for the MoJ to save money. While the current proposals are unworkable, there are ways forward. What about relieving some of the inflationary pressures on expert witness fee rates? For example, consider the effects on experts of the requirements of the Civil Procedure Rules, the consequences of the *Meadows* debacle, more rigorous quality assurance requirements, endemic late payment of expert fees and professional sanctions against experts.

The MoJ proposals fail to address any of these issues, but they all represent cost-saving opportunities. Could the MoJ consider, for example, introducing staged instruction of experts, setting new brink points more distant from the court appearance and involving experts earlier in the assessment of cases?

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Staged instructions

The civil and criminal procedure rules place great importance on ensuring that the involvement of expert witnesses in a case is proportionate to its value (quantum or seriousness of the crime). Whether in the civil, crime or family arena, the same two basic considerations apply:

- expert witnesses should not be expected to work for inadequate payment; and
- expert witnesses are not competent to determine which aspects of a case can be omitted from consideration because they do not have conduct of the case and an overview thereof.

It follows, therefore, that if cost savings are required, they have to be



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realised by the solicitor instructing the expert witness. The expert must be instructed to undertake a programme of work that can be completed within the available budget. But solicitors, who are not experts themselves, can have difficulty knowing what can safely be omitted in pursuit of proportionality. Perhaps the answer is staged instructions.

An expert witness could be instructed to prepare an initial report designed as an overview of the expert matters raised by the case and identifying areas for more

useful detailed analysis. If the quantum in the case, or the seriousness of the crime, warrants investigation of particular avenues of expert enquiry, further report stages could be sanctioned.

New brink points

Opposing parties settle at the doors of the court because it is the last opportunity they have to “do a deal”. This is just brinkmanship, but it has a cost that others bear. If the court created a new brink, say one month before the trial date, perhaps by putting cost or sentencing sanctions in place after that date, would the lawyers and their clients then play out their brinkmanship without dragging all the witnesses, court officers and the judge along for the ride?

Some of the timetabling difficulties

experienced by the court would be reduced greatly if those cases that did get listed were very likely to proceed. So acting to create a new brink point more distant from the trial date could save significant court costs and improve the willingness of busy professionals to undertake forensic work.

Earlier expert involvement

An expert's involvement in a case can be a decisive factor in the path the case takes or—as the MoJ notes—in the outcome for the client. When instructed at the earliest stage, an experienced expert can help to focus the attention of the lawyers on the real issues in the technical evidence and enable cases to run more smoothly, or even settle early.

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So why doesn't the MoJ consider trialling within the LSC the involvement of experts in the very earliest stages of



case assessment? We've been told by experts time and again of examples of LSC-funded cases where the expert

evidence did not justify the case being taken on in the first place. With better decision making at the outset, the LSC could save money by not running with hopeless cases.

Discussion

The MoJ's proposals are not sufficiently targeted, or neutral in terms of supply and competition, as to be capable of being broadly accepted by expert witnesses. The MoJ is aware of the inflationary pressures on expert witness fees, but whether it will seek to address them and develop a more workable proposition, only time will tell. If budgetary factors and a lack of imagination force the MoJ to adopt its original destructive proposals, then quality, competition and supply in the expert witness "marketplace" will all be adversely affected. The result will be a further reduction in access to justice for the most vulnerable in society. NLJ

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