

EXPERT WITNESS LESSONS

A study of expert witness training and how it might be improved

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“It is therefore vital to ensure that experts are fully informed of, and well versed in, the idiosyncrasies of the adversarial system of civil litigation and that their expertise is well utilized by the courts”

Professor Klim McPherson in “One Expert’s Experience” ¹

¹ Blom-Cooper QC, Sir Louis (ed.) (2006), *Experts in the Civil Courts*, Oxford, Oxford University Press.

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1. Introduction

Expert witnesses have been criticized in a number of recent, high profile miscarriages of justice.

Media coverage fuels a debate about how best to ensure the quality of expert witness evidence. The issue of quality is inextricably linked with training, yet expert witness training is voluntary and unregulated. A whole host of training providers, universities, experts' own professional bodies, expert witness representative organisations and private training companies, sell training courses to expert witnesses.

In January 2007, I was awarded City University funding² to critically examine expert witness training. My research project ran from May to July 2007. It afforded me an opportunity to consider expert witness training as it is now and how it might develop in the future. This is the report of my research.

Penny Cooper³
September 2007
The Inns of Court School of Law
London

² £15,000 was supplied through a HEFCE “Scholarship of Teaching and Learning” fund administered by the Education and Development Centre of City University (now known as “CEAP”). The research supervisor was Joelle Fanghanel.

³ Penny Cooper is a barrister. She has designed and delivered many training courses for expert witnesses and has been widely published on the subject of expert witnesses and expert witness training. She is an Associate Dean at The City Law School and Director of Continuing Professional Development (CPD). In July 2007 she was elected a governor of the Expert Witness Institute and appointed co-chair of their Training and Professional Development Committee.

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2. Acknowledgements

There were numerous professionals who were prepared to give up their time to help me. I thank the following:

Catherine Groch, Continuing Professional Development, City Law School

Joelle Fanghanel, City University

Chris Pamplin, UK Register of Expert Witnesses

Gaby Posner, Barrister

Adam Wilson, law lecturer and writer

The governors and staff of The Expert Witness Institute (EWI) as well as

Michael Detyna, David Emmet, Edward Iredale, Professor Adrian Keane, Professor Peter Kunzlik,

Melissa Hardee, Steve Laurie, Robert McPeake, Stuart Sime, Keith Simpson and

Marcus Soanes, all of City University.

Above all, I thank those who gave their time to complete the research questionnaire and those who also commented upon my draft proposals.

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3. Summary

- This report includes an analysis of 353 completed questionnaires and extensive research into expert witness training.
- It concludes that whilst there is much positive to report, there is room for improvement particularly in course content and selection of trainers.
- The report contains recommendations for law schools and other expert witness training providers, expert witnesses' professional bodies, expert witness organisations and The Ministry of Justice.

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4. Background, aims of the report and research questions

Funding was obtained from City University with the agreed aims that the research would involve the systematic investigation of expert witness teaching and learning, followed by a critical reflection and evaluation of expert witness teaching and learning in order to set out the opportunities for improving such teaching and learning in higher education.

The questions the research aimed to answer were:

1. What teaching and learning is currently available for expert witnesses who practise in England and Wales?
2. What are the teaching and learning needs of expert witnesses practising in England and Wales?
3. To what extent does the teaching and learning that is available to experts in England and Wales match those needs?
4. What opportunities are there for higher education establishments, and in particular City University, to improve teaching and learning for expert witnesses?

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5. Project planning

A timeline (see below) was submitted with the application for funding. Broadly speaking it was adhered to. The one change to this plan was the timing of the interviewing.

Timeline 2006/2007

	Nov	Dec	Jan	Feb	Mar	April	May	June	July
Gathering literature	█								
Establishing database	█								
Set up Interviews				█					
Literature review			█						
Design quest're					█				
Distribute quest're						█			
Internet research						█			
Interviews						█			
Analysis								█	
Evaluation								█	
Report writing									█

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6. Overview chronology

I kept a chronology⁴ of the project as it progressed.

11/1/07	City University press release announcing the research award
22/2/07	Draft questionnaire sent to designer and printer
23/2/07	Questionnaire pdf finalised and approved for printing
27/2/07	Questionnaire ⁵ distributed at expert witness course in Leeds
	Abstract of expert witness training presentation accepted for ATINER 4 th Conference in Athens
	Questionnaires posted to over 2,500 experts with “Your Witness”, the newsletter of the UK Register of Expert Witnesses
March 07	Expert Witness training article in The Barrister Magazine
	Expert Witness training article in EWI newsletter
	Expert Witness training article in the New Law Journal
	Article and editorial mention in LINK (the magazine of the Association of Women Solicitors)
20/06/07	Notification of successful peer review of paper for Athens Conference
15/7/07	Draft recommendations emailed to interviewees
16/7/07	ATINER Conference, Athens - presentation of expert witness training paper
13/8/07	Draft research report submitted to supervisor

⁴ The fact analysis tools I learned at ICSL in 1989/1990 on the Bar Vocational Course have proved very useful over the years.

⁵ See Appendix 1 for a copy of the questionnaire.

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7. Research methodology

7.1 Questionnaires

The primary method of research was a survey; The City Law School Expert Witness Training Questionnaire⁶ (“the survey”) was distributed in the spring of 2007.

A four page, A4 questionnaire was written and designed in February 2007. 3,058 blank questionnaires were distributed to individual recipients.

Recipients were advised that their responses would be anonymised in the final report. They were given the option of indicating an email address and a phone number if they wished to receive a summary of the research findings. 67% chose this option and included contact details – their responses remain anonymous in this report.

7.2 Questionnaires distributed without return envelopes

The majority of the blank questionnaires were distributed by post in the first week in March. 2,678 were mailed with an edition of “Your Witness”, the newsletter of the UK Register of Expert Witnesses. These questionnaires were not accompanied by a return envelope.

A further 72 questionnaires were handed out as follows: 11 at an expert witness course in Leeds run by the Royal College of Psychiatry, 11 at an expert witness course in London run by the British Orthopaedic Association and 50 at an expert witness seminar in London run jointly by the Expert Witness Institute and the Institute of Psychiatry.

Of these 2,750 questionnaires distributed without accompanying return envelopes, a total of 290 were completed and returned. This represented a response rate of a little over 10%.

7.3 Questionnaires distributed with second-class stamped, return addressed envelopes

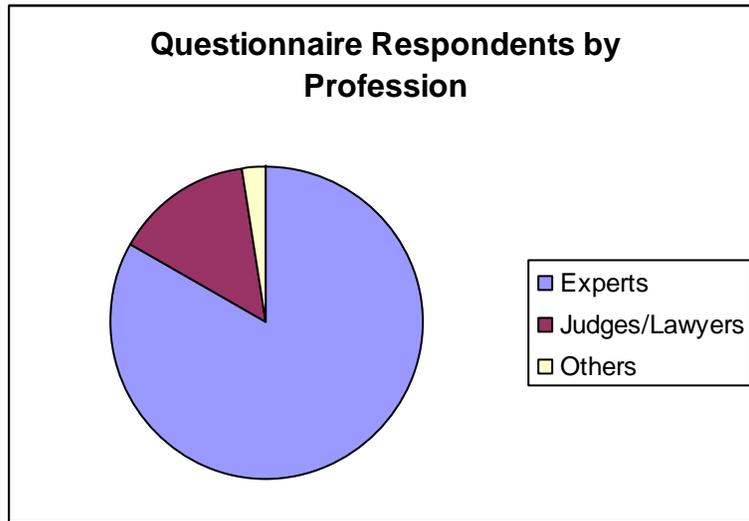
Questionnaires were also distributed to 308 people on a City Law School list of solicitors, barristers, judges, trainers/lecturers and representatives/ employees of professional bodies and expert witness organisations. A total of 63 completed questionnaires were returned in the stamped addressed envelopes supplied. This represented a return rate of just over 20%.

7.4 Total responses and respondents’ professions

All in all 353 completed responses were returned by the end of April 2007. 294 (or 83%) of the responses came from expert witnesses. Of the remaining 59 completed questionnaires, 27 came

⁶ See Appendix 1 for a copy of the questionnaire.

from full time judges and 32 from lawyers, trainers and representatives or employees of professional bodies and expert witness organisations.



7.5 Paper-based and internet research

As well as references to the survey results, this report takes into account paper-based and internet research (books, articles, conference papers, and websites).

7.6 Consultation on recommendations

Following analysis of the survey and paper-based and internet research, draft recommendations were circulated by email to some thirty individuals. Their responses helped shape my conclusions and recommendations.

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8. Survey data

Unless otherwise indicated, results in this report are expressed as percentages of the whole sample, **353**, where the question was directed at all respondents.

Part 2 of the survey was for experts only and for the results from part 2, the percentage responses of experts are indicated. There were a total of **294** expert respondents⁷.

Percentages have been rounded up or down to the nearest whole percentage point.

⁷ A very small number of non- experts completed or partially completed Part 2 before realising their mistake. These results are not included in the results from Part 2 which was specifically designed to question just expert witnesses.

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9. Research findings

“For centuries now – at least five – the courts of this country have allowed opinion evidence to be given on scientific and technological matters which are beyond the knowledge and experience of judges and juries, as an exception to the rule of evidence which excluded hearsay testimony from any witness.”

The Right Honourable Sir Anthony Clarke, Master of the Rolls, January 2006, in his foreword to “Experts in the Civil Courts”⁸

9.1 Expert witnesses and their duties

An expert witness is in a special position in the English courts: “The distinction between an expert witness and a witness of fact is that an expert is allowed to give opinion evidence on matters at issue within his expertise, based upon his knowledge, skills and experience.”⁹

The courts decide who can give expert testimony but usually only after a party or parties have decided whom to put forward as an expert witness. Sir Louis Blom-Cooper describes the position in civil cases:

“Courts in England and Wales have been left, unassisted legislatively, to determine ad hoc, the relevant expertise and the qualifications for the provision of the expertise. The sufficiency and the relevance of the expert’s specialised knowledge and skills have rarely involved any questioning of the particular expert. It has been left to the parties to decide who will give opinion evidence, although since April 1999 the court will decide whether the evidence can be called, and how many experts can be deployed. The quality of the expertise, however, may emerge only as a result of an assault by the opposing advocate, on the basis of specialized knowledge from the opponent’s expert.”¹⁰

Permission to give expert testimony rests with the court, but in practice the shortlist is firmly in the hands of the parties.

⁸ Blom-Cooper QC, Sir Louis (ed.) (2006), *Experts in the Civil Courts*, Oxford, Oxford University Press

⁹ Burn, S. (2005), *Successful Use of Expert Witnesses in Civil Disputes*, Crayford, Shaw & Sons

¹⁰ Blom-Cooper QC, Sir Louis (ed.) (2006), *Experts in the Civil Courts*, Oxford, Oxford University Press. I contributed the family law commentary in this chapter.

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Similarly in family cases¹¹ and criminal cases¹² the court has a degree of control over the use of expert evidence but the parties choose who they will call as an expert witness.

The English courts do not test the sufficiency of the expertise as occurs under US law¹³. The duties and responsibilities of an expert witness were summarised in a shipping case,¹⁴ known as “The Ikarian Reefer”. The duties set out in the Civil Procedure Rules, The Criminal Procedure Rules and the Code of Guidance for Experts Witnesses in Family Proceedings stem from the ruling of Mr Justice Cresswell (as he then was) at page 81 of the judgment:

“Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation. An expert witness should provide independent assistance to the Court by way of objective, unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate. An expert should state facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion. An expert witness should make it clear when a particular question or issue falls outside his area of expertise. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness, who has prepared a report, could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report. If, after exchange of reports, an expert witness changes his views on a material matter having read the other side's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.”

¹¹ Family Proceedings Rules 1991, SI 1991/1247, r 4.18 (3); Family Proceedings Court (Children Act 1989) Rules 1991, SI 1991/1395, r 18 (3) and The Protocol for Judicial Case Management in Public Law Children Act Cases, Appendix C: Code of Guidance for Expert Witnesses in Family Proceedings

¹² Criminal Procedure Rules, Part 33.6

¹³ Daubert v Merrill Dow Pharmaceuticals 509 US 579 (1993). See also Keane, A. (2006) “Unreliable evidence is putting justice in jeopardy - Are the English courts still too relaxed about expert witnesses?”, The Times, 7th November 2006, also available at <http://business.timesonline.co.uk/tol/business/law/article1086697.ece> The author is Professor of Law, the City Law School, City University London, and author of *The Modern Law of Evidence*, 6th edn, Oxford University Press

¹⁴ National Justice Compania Naviera SA v Prudential Assurance Company Ltd (Ikarian Reefer) [1993] 2 Lloyd’s Rep 68

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9.2 Membership bodies and training requirements

The main expert witness bodies are listed alphabetically below. Membership of these organisations is voluntary for the expert (but see footnote 19 below regarding the unique position of the crfp). Save for the crfp, all are open to experts of any specialty. Website addresses are correct as at 16th June 2007.

The Academy of Experts www.academy-experts.org

The Council for the Registration of Forensic Practitioners www.crfp.org.uk¹⁵

The Expert Witness Directory www.legalhub.co.uk¹⁶

The Expert Witness Institute www.ewi.org.uk¹⁷

The Society of Expert Witnesses www.sew.org.uk

The UK Register of Expert Witness www.jspubs.com

¹⁵ The crfp is in a slightly different position to the other expert witness organisations listed here. It was set up by and is (now partly) funded by the Home Office. It is a voluntary register for forensic practitioners in certain practice areas who give evidence in the criminal courts. Not all crfp members will act as expert witnesses. Although membership of the crfp is voluntary some employers have made membership a condition of employment.

¹⁶ This is a vetted register of experts run by Sweet & Maxwell. Other websites exist for expert witness directories such as www.expertsearch.co.uk and www.expertwitness.co.uk though neither of these vets members; experts join by applying and paying a fee.

¹⁷ Since commencing this research, the author of this report has been elected a governor of the Expert Witness Institute though her active duties do not commence until after the completion of this research.

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If an expert is a member of an expert witnesses body, they are not generally required to take expert witness training. The expert witness training requirements¹⁸ of the main expert witness bodies are summarised as follows [as at July 2007]:

Membership/listing requires expert witness training:

The Expert Witness Institute – maintenance of CPD log required for individual membership

Membership/listing does not require expert witness training though it is recommended:

The Academy of Experts
The Council for the Registration of Forensic Practitioners
The Expert Witness Directory
The Society of Expert Witnesses
The UK Register of Expert Witness

Neither is the expert witness likely to find that his or her professional body will require expert witness training for practice as an expert witness. Generally professional bodies do not regulate or even monitor the activities of their members who decide to undertake work as an expert witness. An exception is The Royal Institute for Chartered Surveyors (RICS) which maintains a voluntary register of expert witness surveyors¹⁹ and encourages those listed to undertake expert witness training though RICS does not “assess technical surveying knowledge” of those on the list. At least one other large professional organisation is actively looking at an expert witness registration and training scheme for its members (similar to that of RICS).

¹⁸ Note that expert witness training is not the same as training in the expert’s profession/ own field of expertise. If the expert is a member of a professional body there may well be requirements that he/she undertakes continuing professional development (CPD) training to remain up to date in his/her field.

¹⁹ see <http://www.rics.org/RICSservices/Findasurveyor/Findanexpertwitness> as at 13th July 2007

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9.3 Availability of expert witness training

Despite the fact that there is no legal requirement for expert witnesses to undertake training in the role of the expert witness, there are a substantial number of open-access courses available at a range of prices. The table below sets out providers and their prices. It is not an exhaustive list. The market is dynamic hence what is available changes over time.

Public Training Courses for Expert Witnesses (web page references correct as at 16th June 2007)

Provider	Minimum course duration	Max cost per person day	Web page
Academy of Experts*	1 day	£323	www.academy-experts.org/courses/expert_training.htm
Bond Solon*	1 day	£464	www.bondsolon.com/cat.asp?catid=21132
British Psychological Society*	1 day	£99	http://www.bps.org.uk/conferences-%26-events/events-home.cfm
Cardiff Law School*	5 days	£502	www.law.cf.ac.uk/school/contact.html
City Law School*	3 days	£497	www.city.ac.uk/law/cpd
Expert Witness Institute*	1 day	£370	www.ewi.org.uk/files/events/Events_Schedule.pdf
Forensic Access	1 day	£ Not available	www.forensic-access.co.uk/forensic-training/expert-witness-training.htm
InPractice*	3 days	£390	www.inpracticetraining.com/pdfs/courses/experts/Booking07-08_BOAv4.pdf
Professional Solutions*	1 day	£370	www.prosols.uk.com/expertwitness/expertwitness.htm
Royal Society of Medicine	2 days	£140	www.rsm.ac.uk/academ/childpsyc.php

*These training providers were also named by one or more respondents in survey results (see later).

In addition to expert witness training above which is provided on an “open to the public basis”, a number of professional/ expert witness bodies provide “in-house” training for their members:

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The British Orthopaedic Association, The Chartered Society of Physiotherapy, The Royal Institute of Chartered Surveyors, The Society of Expert Witnesses and The Royal College of Midwives etc.

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9.4 Size of the market – some figures and an estimate

Some known figures:

4,680 forensic scientists employed in the forensic science sector²⁰

2,600 registered in The Expert Witness Directory²¹

3,000 members listed on expertwitness.co.uk²²

4,500 members on an expert witness on-line directory that also allows experts to set up links to their own website²³

Since there is no system of registration it is not known how many people act as or offer themselves as expert witnesses. The available data suggests that the whole market, i.e. those who might be willing to undertake expert witness training, runs to many thousands and probably more than 10,000 especially when one considers that forensic scientists are only one category of expert witness and some experts will not be registered at all with a directory, though some will of course be registered with more than one²⁴.

9.5 The experts who responded to the training survey

353 responses to the survey were received in total. Part 2 was only for expert witnesses and 294 expert witnesses completed this section.

Experts were asked to identify their field of expertise. This revealed a broad cross-section of specialties ranging from accountants, biologists, chemists, dentists, many different fields of medicine, vets and water pollution specialists.

When asked which year they started practising, the results ranged from 1952 to 2007. All experts indicated that they had been instructed as an expert witness (Q10). 19% had been instructed in between 1 and 24 cases. 81% had been instructed in 25 or more cases. 60% had been instructed in 75 or more cases.

²⁰ House of Commons Science and Technology Committee, “Forensic Science on Trial”, Seventh Report of Session 2004-05, page 48

²¹ www.legalhub.co.uk as at July 11th 2007

²² www.expertwitness.co.uk as at July 11th 2007

²³ www.expertsearch.co.uk as at July 11th 2007

²⁴ This is not a question that could have usefully been asked in this survey since the vast majority were already on a register and that is how they came to receive the questionnaire via a UKREW mailing.

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9.6 Questions about expert witness training²⁵

Q11 asked whether the expert had ever undertaken expert witness training. 80% of respondents said that they had in the past undertaken expert witness training.²⁶ 18% indicated that they had never undertaken expert witness training.

9.7 Frequency of training undertaken

Of the 239 who indicated the year in which they had last undertaken expert witness training, 49% had undertaken expert witness training in the previous 16 months (the surveys were returned by April 2007). 59% said they had done so at some point in the last 5 years.

²⁵ With hindsight I would have included an explanatory note about the meaning of expert witness training even though the meaning became implicitly clear from Q14. A small number may have been unsure as to the definition of expert witness training which could account for the fact that Q11 yielded 237 affirmative replies (Have you ever undertaken expert witness training?) and Q13 yielded 239 (What year did you last take part in expert witness training?). Questions about the type of expert witness training (Q14 and Q22) might also have included another box labelled “published literature” as suggested by one respondent who indicated their reliance on “*published literature – one that comes to mind is Sir Louis Blom-Cooper: Experts in the Civil Courts*”. Another respondent said “*The concentration upon training is too focussed. An expert in his field wants guidance rather than strict regulated training. He wants to know procedures both in documentation exchange and in the court room. His experience and qualifications are the matters that need careful checking before being allowed to act as an expert.*”

²⁶ Experts were asked if they had undertaken expert witness training (Q11). 289 experts answered this question out of the total of 294 experts responding to the survey. 54 indicated that they had not, whilst 235 indicated that they had “ever undertaken expert witness training”.

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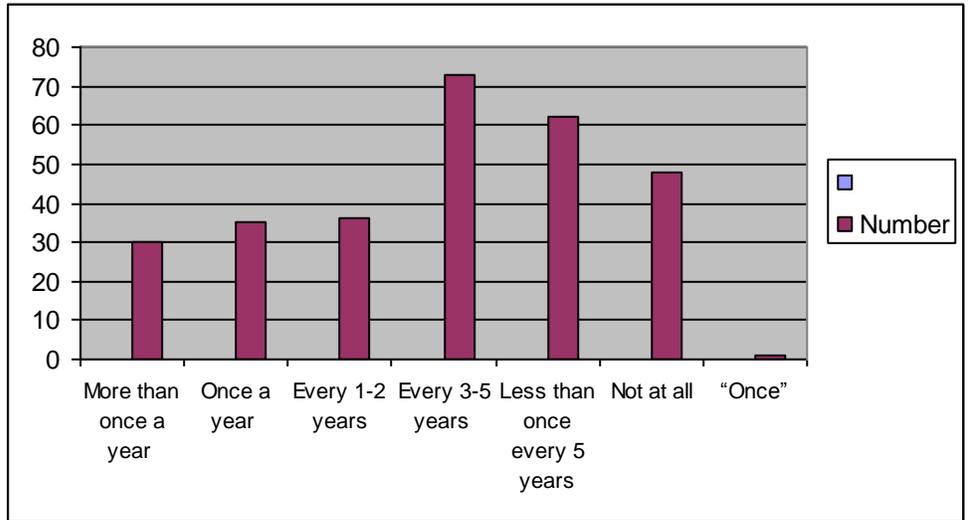
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BAR CHART ONE: Q12. On average how often do you currently take part in expert witness training?

More than once a year	30
Once a year	35
Every 1-2 years	36
Every 3-5 years	73
Less than once every 5 years	62
Not at all	48
“Once”	1



9.8 Intention to undertake training

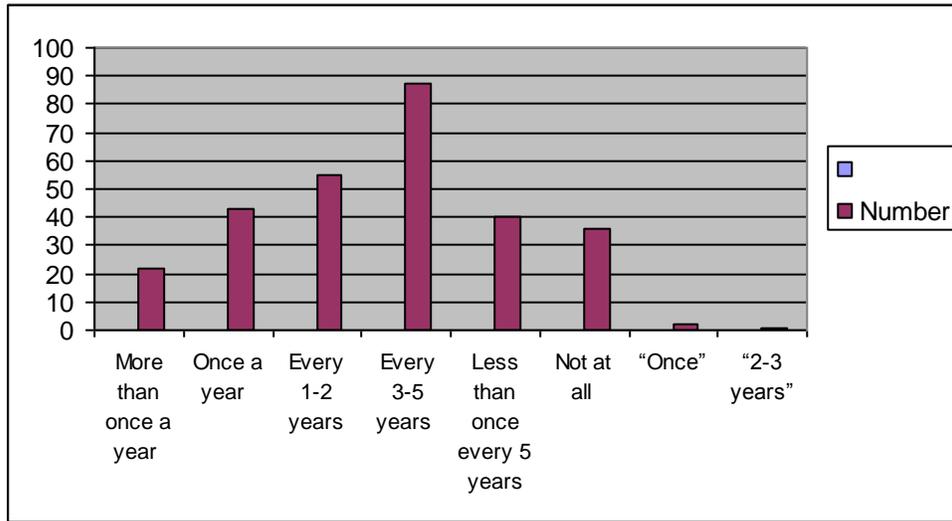
When asked to approximate how often they intend to take expert witness training (Q12.1) there was a spread of responses from more than once a year to less than once every five years though the most common response was “Every 3-5 years” where 25% of all expert respondents indicated that this would be the frequency.

70% of all expert respondents said that they intended to undertake training at some point in the next 5 years. Only 12% of expert respondents answered “Not at all” i.e. that they did not intend to undertake any in the future. Thus overall the data shows that intentions to undertake training were slightly higher than the pattern emerging from data on how often experts had undertaken training in the past.

8% of experts who had never taken training did not intend to take training in future.

BAR CHART TWO: 12.1 Approximately how often do you intend to take part in expert witness training in the future?

More than once a year	22
Once a year	43
Every 1-2 years	55
Every 3-5 years	87
Less than once every 5 years	40
Not at all	36
“Once”	2
“2-3 years”	1



9.9 Required frequency

All respondents were asked a hypothetical question: (Q5) “If expert witnesses were required to attend training, how often should they be required to attend?”

The results were as follows with percentages of all 353 respondents shown²⁷.

	%
More than once a year	1
Once a year	9
Every 1-2 years	18
Every 3-5 years	54
Don't know	9

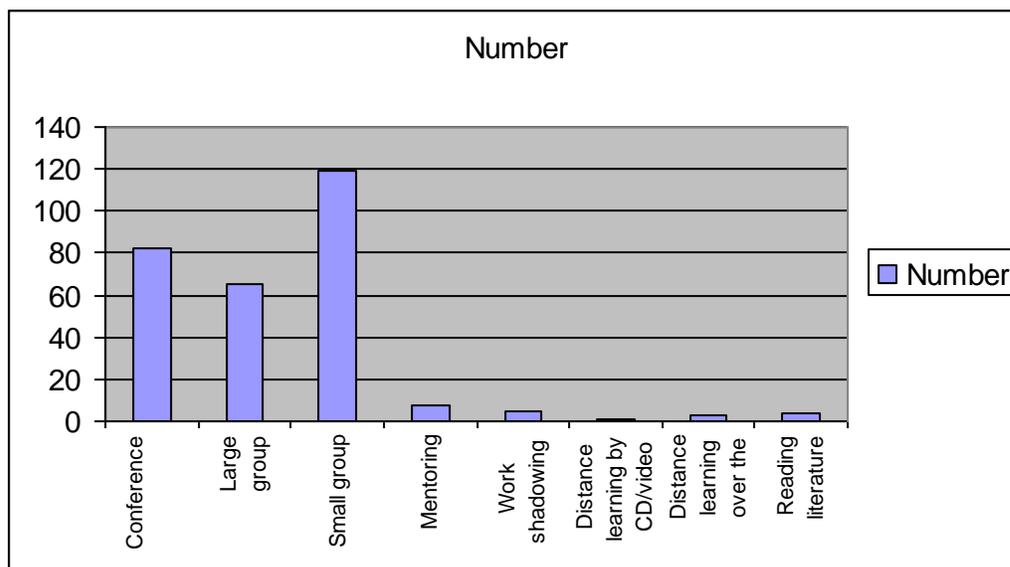
²⁷ 2% added in the response “Once”.

9.10 Type of training most recently undertaken

Respondents indicated that, when considering the most recent training they undertook, most had undertaken a “Small group up to 20/ workshop” training session with 40% indicating this (Q14). Next was “Conference” with 28% and then “Large group lecture/seminar” with 22%. The other forms of training resulted in very small numbers of responses. Fourth came “Mentoring” but with only 3%.

BAR CHART THREE: Q14. How would you describe the most recent expert witness training you undertook?

Conference	82
Large group lecture/seminar	65
Small group up to 20/ workshop	119
Mentoring	8
Work shadowing	5
Distance learning by CD/video	1
Distance learning over the internet	3
Reading literature	4



9.11 Length of training most recently undertaken

Q16 revealed that the most frequent length was one day. For 45% the length of the most recently attended training was a one day course followed by 16% attending a 2 day course. The shorter courses (1 or 2 hours) and the longer courses (4 days or more) were less frequently taken.

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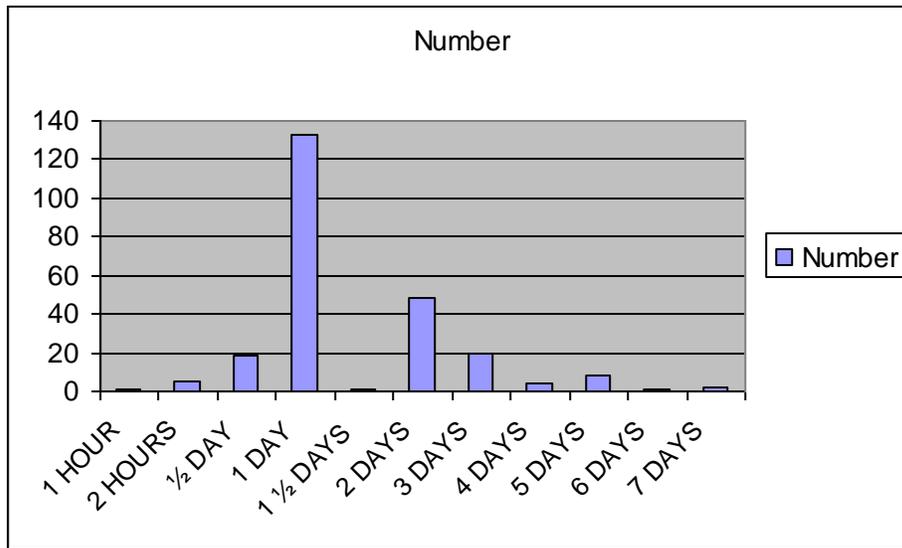
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BAR CHART FOUR: Q16. How long did the training last?²⁸

1 HOUR	1
2 HOURS	5
½ DAY	19
1 DAY	133
1 ½ DAYS	1
2 DAYS	48
3 DAYS	20
4 DAYS	4
5 DAYS	8
6 DAYS	1
7 DAYS	2



9.12 Content of courses taken

Expert respondents were asked to indicate, from a list of 15 subject areas, what topics their most recent training course had covered.

²⁸ In total 242 experts responded to this question. There is a slight anomaly here since only 235 had indicated at question Q11 that they had ever undertaken expert witness training and see above footnote 28.

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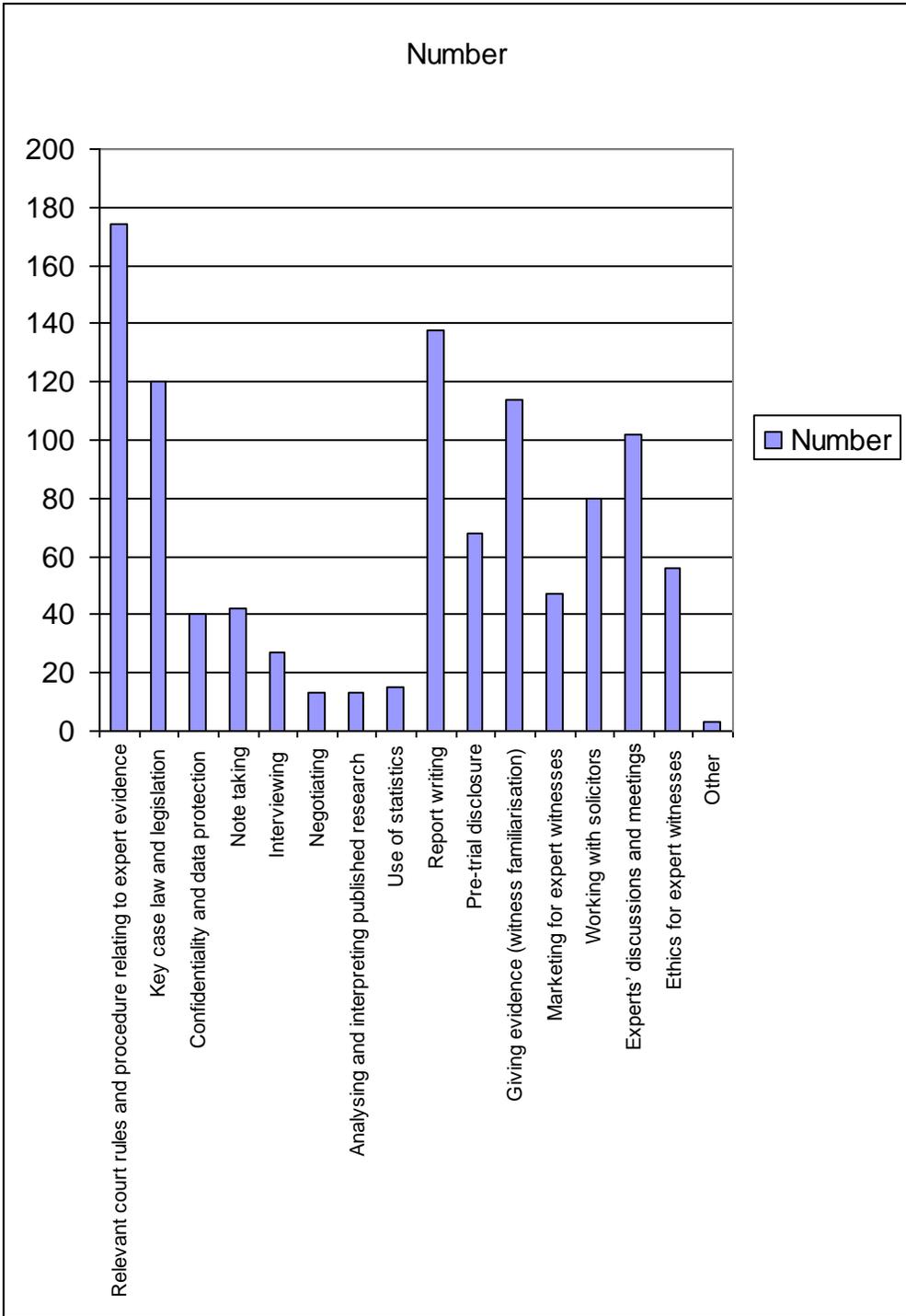
The top five in order, most commonly selected topic first with percentage of expert witness respondents selecting this topic, were:

- Relevant court rules and procedure relating to expert evidence (59%)
- Report writing (47%)
- Key case law and legislation (40%)
- Giving evidence (witness familiarisation) (39%)
- Experts' discussions (35%)

BAR CHART FIVE: Q15. What topic/s did it cover? (Please tick all that apply)

Relevant court rules and procedure relating to expert evidence	174
Key case law and legislation	120
Confidentiality and data protection	40
Note taking	42
Interviewing	27
Negotiating	13
Analysing and interpreting published research	13
Use of statistics	15
Report writing	138
Pre-trial disclosure	68
Giving evidence (witness familiarisation)	114
Marketing for expert witnesses	47
Working with solicitors	80
Experts' discussions and meetings	102
Ethics for expert witnesses	56
Other (please specify) SJE ²⁹	3

²⁹ Three experts indicated that they had attended training about the Single Joint Expert or "SJE". The SJE was introduced into Civil Procedure under the new Civil Procedure Rules (CPR) in 1999. Brian Thompson and Suzanne Burn suggest that there has been significant take up of SJE's in litigation although primarily in "low-value fast-track personal injury claims", *Experts in the Civil Courts*, 5.52, Blom-Cooper QC, Sir Louis (ed.) (2006), *Experts in the Civil Courts*, Oxford, Oxford University Press



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9.13 What should be included in expert witness training?

Q2 asked all respondents (not just experts) what they thought should be covered when experts are being trained.

The topics which respondents thought should be covered (in order of “essential” rating) were:

	% Essential	% Desirable
Relevant rules and procedure	81	16
Report writing	77	17
Giving evidence (witness familiarisation)	70	24
Ethics for expert witnesses	64	28
Experts’ discussions and meetings	56	36
Confidentiality and data protection	49	38
Pre-trial disclosure	45	41
Key case law and legislation	35	45
Analysing and interpreting published research	33	37
Working with solicitors	32	52
Note taking	22	41
Use of statistics	22	43
Interviewing	18	40
Marketing for expert witnesses	9	38
Negotiating	9	31

When the responses to this question from only the experts were analysed the order of topics was almost the same, save for the fact that the order of “Analysing and interpreting published results” (no 9) and “Working with solicitors” (no 10) came in the other way around for experts.

9.14 What training courses experts attend compared to what respondents thought they should be attending

The list of topics experts had trained on (Q15) bore a strong similarity to the ones that all respondents thought experts should receive training on (Q2). Relevant rules and procedure, report writing and giving evidence are all within the top four of both lists and in that same order.

There were however some notable differences between what had been covered in training courses and what was thought to be essential for the expert witness to be trained in. Key case law came 3rd in the “trained” list but 8th on the “essential” list. Ethics came 8th on the “trained list” but was 4th on “essential”. Confidentiality does not appear in the top eight of the “trained

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list” yet it is 6th on the “essential” list. The analysis shows a notable gap between what is perceived as essential and what is actually on offer to experts who chose to attend training. Compare, side by side, the top eight of the “trained” and “essential”.

TOP EIGHT TOPICS COMPARISON

Trained (Q5)

Relevant rules and procedure
Report writing
Key case law and legislation
Giving evidence (witness familiarisation)
Experts’ discussions and meetings
Working with solicitors
Pre-trial disclosure
Ethics for expert witnesses

Essential (Q2)

Relevant rules and procedure
Report writing
Giving evidence (witness familiarisation)
Ethics for expert witnesses
Experts’ discussions and meetings
Confidentiality and data protection
Pre-trial disclosure
Key case law and legislation

9.15 Quality

At Q17, experts were asked whether they thought the most recent training they had attended was of a high standard. Of the 244 who answered this question, 222 (91%) respondents answered that it was of a high standard.

9.16 What the training had achieved

Q21 asked experts what they thought the training they had attended had achieved. They were given four options and an “anything else” column.

Of all the indications the training had achieved something, the highest result was for being “better able to give evidence” (32%). Next came “better at report writing” (29%). The lowest scores were for making them “feel less likely to be sued” (11%) and for making them “feel better at attracting clients” (7%).

In the “anything else” part of the question, 22% said that it had achieved something else. Of that 22%, the majority indicated that it had updated their knowledge or skills, whilst others said that it had reassured them or improved their confidence or it had given them an opportunity to network/ meet other experts.

9.17 Value for money for the most recently attended training course

Respondents who had personally paid for the training were asked at Q19 whether they thought it represented good value for money. 213 experts answered this question and of those that did, 73% thought it had represented good value for money, 19% were not sure and 8% thought that it had not represented good value for money

Elsewhere in the questionnaire, a small number of experts made less positive and sometimes critical comments about training providers or the cost of witness training:

“It’s a tax!”

“There are too many people doing expert courses which primarily are out to make money rather than anything else.”

“Expert witness training seems to have become a very lucrative industry – another hoop to jump through to tax pay. Been on a XX course in the past, hugely expensive and tutors not done homework re course materials we provided so utility of course very limited.”

“My field, child development, does not command high fees, I find the course fees hard to justify”

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9.18 Shortcomings

Experts were asked (Q18) if they thought the training that they had attended had any shortcomings. 231 answered this question. Approximately one third of experts (83) thought there were shortcomings. In the questionnaire, experts were invited to explain:

"[The training] could have been condensed into 2/3 days.....I believe experts will require certification in due course" (expert witness who had taken a 5 day course)

"Not all parts relevant to medical topics" (expert witness neurology had taken a 5 day course)

"The 'experts' doing the training weren't good enough" (orthopaedic expert witness who had taken a 2 day course)

"University Certificate was waste of time and money....Training must be by practising solicitors and barristers not by so called "experts" in academia" (IT expert witness who had taken a 5 day training course)

Shortcomings fell into three categories:

- training being too long,
- training not being specialised enough for the particular expert
- trainers not being good enough,

but this is in the overall context that most experts were satisfied with the training they had received.

9.19 Drivers: why experts attend training

When asked why they had attended the training (Q20), of the responses to this question, 38% said it was to be better at giving evidence and 36% said it was to be better at report writing. The next highest was in the "Other" category where 15% had indicated that it was to keep updated or for professional development.

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9.20 Who should train the experts?

The favoured trainer category at Q6 was practising barristers who came top; 86% of all questionnaire respondents indicated that they thought expert witnesses would benefit from their training. Experienced expert witnesses came a very close second with 85%. Practising solicitors and judges also received a high percentage at 73% and 72% respectively. University lecturers received just 16% of affirmative responses to this question.

48% of all respondents thought that expert witnesses would not benefit from training from University lecturers, the highest negative response for any listed category in this question and almost twice as high as the other four categories' negative indications put together.

Individual respondents also commented on trainers in the questionnaire:

"I am particularly interested in the idea that experts should receive training from other experts in their field - as a psychologist there are issues relevant to working as an expert that are specific to the profession."

"The training can be useful but so many courses do not provide the information that the expert needs to actually do their work. Putting training into academic establishments would be very bad!"

"I do think some sort of accreditation would be helpful. It would also help to identify people who could train others and hopefully provide a means by which a wider pool of experts could be developed."

"It would be useful for someone to keep a record of experts prepared to teach/lecture/mentor – but NOT kept by quangos or government departments."

9.21 Who should be the providers?

Experts were asked who they thought should be the providers of expert witness training. The responses are shown below as percentages of experts responding to the survey (294).

	%
Expert witnesses' professional bodies	55
Expert witnesses' representative bodies	51
Private training firms	35
Universities as postgraduate/ professional development courses	33
Universities on their undergraduate courses	9
No preference	6
Don't know	5

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The clear favourites were expert witnesses' professional bodies and expert witnesses' representative bodies.

Q24 asked experts to indicate, if anyone, who was their "preferred provider". The responses that were written are listed below in alphabetical answer and indicate a broad cross section of training providers for expert witnesses.

- *Academy of Experts*
- *British Psychological Society*
- *Cardiff Law School/ Bond Solon*
- *City Law School (Inns of Court School of Law)*
- *Dental Protection Union*
- *Expert witness representative bodies*
- *Expert Witness Institute*
- *InPractice Training*
- *Practising experts/ in-house experts*
- *Professional Bodies*
- *Practitioners*
- *Professional Solutions*
- *Royal Colleges and faculties for medics*
- *Royal College of Psychiatry*
- *Society of Expert Witnesses*
- *The Grange*
- *UK Register of Expert Witnesses*
- *Mobile Doctors*
- *University postgraduate departments*

Though the question was not framed this way, approximately 1% of expert respondents took this opportunity to indicate who they would not buy from. Responses included "not profit making firms" and "not sure any are adequate".

9.22 Teaching and learning methods thought to be effective or very effective

A number of teaching and learning methods were listed at Q22 and the experts were asked to rate (Very effective, Effective, Not effective, or Don't Know) the effectiveness of the training method.

"Small group up to 20/workshop" was far ahead of the other methods; it was classed as "Very effective" by 57% of experts surveyed. 69% of experts said they thought it was either very effective or effective³⁰.

³⁰ 57% indicated that they thought it was a very effective method and 18% indicated they thought it was effective. Only 1% thought it was not effective.

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“Large group seminar” was selected as very effective/effective by 54%, and “conference” was selected as very effective/effective by 47%. “Mentoring” received 35%, “work shadowing” an expert 20% and “distance learning by CD/video” and “distance learning over the internet” received 11% each. Mentoring, work shadowing and distance learning also received the highest number of “Don’t Know” responses.

9.23 Attendees

Experts were asked their views (Q23) on whether it would be better if those who attended training courses were grouped according to their expertise, area of intended court practice (civil/family/criminal) or level of expertise³¹.

	Yes	No	Don’t Know
Expertise of the attendees (e.g. all engineers)	49%	21%	13%
The area of actual or intended court practice (E.g. civil, family or criminal)	52%	17%	12%
The level of experience of the expert witness	41%	29%	13%

The highest result was for area of court practice, with a little over half of expert respondents selecting this, notwithstanding the lower response rate by this stage of the questionnaire. Almost as many thought that experts should be grouped according to area of court practice. Fewer experts were of the view that they should be grouped according to their level of expertise, perhaps because they thought in the training environment it is useful to have those who are more experienced passing on tips to the others?

9.24 Compulsory or voluntary training

When all respondents were asked (Q3) if they thought that experts should be required to show that they had undertaken training in being an expert before being allowed to practise as an expert, 50% thought that they should not. The result was close in that 41% thought that they should be required to show that they had undertaken training and 8% did not know. The remaining 1% did not answer³².

Some respondents added comments including:

³¹ Percentages of experts responses as a whole (i.e. of 294) are shown, however not all expert respondents answered this question. There were fewer responses to these questions (247, 239 and 240 respectively). This lower response rate probably had something to do with the fact that it was the penultimate question on the experts’ part. They had already been through most of the questionnaire at this point.

³² The result when experts alone were looked at was the same i.e. 50% thinking that experts should not have to show training and 41% thinking that they should.

“12 years ago my answer would have [been] No. Today it is Yes”

“Being an expert is a second profession to one’s primary qualification and should be recognised as such”

“Training is no substitute for expert knowledge or experience”

“Regulation by approved body should be sufficient (EWI for example) or those listings where work has to be approved or references sought”

“Basic training should be compulsory but nothing too onerous as people would be deterred from acting”

“It is highly desirable and is a factor to be taken into account. But there will always be ‘one-off’ experts who can help the court”

“[Compulsory training] would rule out the occasional expert in a specialist field”

“I am very concerned by the poor quality of experts in my own field ...one is generally regarded in the profession as incompetent. How to avoid this? Don’t know!”

“All expert witnesses should have some form of training, either one to one or in a small group. The whole court procedure is so different from everyday business that there is no way a novice could cope without instructions from a source which understands. Qualification and training are obviously the norm but should NOT be mandatory. That would become a charter for box tickers and ineffective QA.”

“No to compulsory training - I remember being told of a case of copyright in a knitting pattern – expert evidence [was] given by a housewife who knitted!”

“Some form of mandatory training would enhance the profile of expert witnesses”

9.25 Assessment

Q4 asked respondents “If an expert attends an expert witness training course should they also have to pass an assessment in order to successfully complete the course?”

47% thought that they should have to pass an assessment whilst 38% thought they should not³³.

³³ Responses for experts alone were very similar with 47% of experts thinking that they should have to pass an assessment and 38% thinking they should not. With hindsight this question should have perhaps distinguished between accreditation type courses and general professional

The next question was about assessments and whether they should be classroom based, work based, or a combination of classroom and work based and there was also a “Don’t know” option. The answer of a combination of class room and work based received three times as many indications (140) as any of the others. 47% of all respondents indicated they thought this is the form an assessment should take.

9.26 Regulation of expert witness training

Q7 asked all respondents to indicate whether they thought expert witness training should be regulated. 69% of all respondents indicated that they thought that it should, 21% thought that it should not and 7% did not know.

The next question asked who they thought the regulator should be if it were regulated ; the most popular answers were the expert witness’ representative body, 32%, and the expert witness’ own professional body, 29%.

Comments included references to regulation of expert witnesses though the question was framed so as to be about regulation of expert witness training:

“It is high time this aspect of our work was regulated by our professional organisation and we are accountable”

“The wide scope of ‘experts’ makes it difficult for an ‘all embracing body’ to regulate all.”

“Not all expert witnesses are members of a ‘robust’ professional body – I’m not” (this came from an expert on highways)

9.27 Training on a expert’s CV

Part 3 of the questionnaire contained a question for solicitors, barristers and judges:

“Q25. When you look at an expert witness’ CV for the first time, do you check the CV to see if they have attended expert witness training?”

Overall 49 responses were received to this question. 75% said they did not check.

development courses. One expert commented “a balance is needed between CPD training and professional training...there should be 2 levels. A one day course for anyone being appointed as an expert witness and [one] for those with more than 20 cases under their belt”.

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Of the 25 judges who answered this question, only 4 answered in the affirmative. 21 said that when they looked at an expert witness' CV for the first time they did not check to see if they had attended expert witness training.

The sample of barristers and solicitors who answered this question was also very small (24), however the sample suggests that they may be a little, but not much, more likely than judges to check for training when looking at the CV for the first time. 8 out of 24 said they did check.

When one considers that solicitors and barristers are involved in the selection of experts and the judges decide whether or not to permit the expert to give evidence, these responses, if representative, are very interesting.

10. Discussion

10.1 Current teaching and learning: is it meeting experts' needs?

For the body of 10,000 or so expert witnesses there is certainly a wealth of choice when it comes to expert witness training. There is choice in terms of course duration (one hour to seven days), cost (under a hundred pounds to several thousand) and provider (University, professional body, expert witness body, or private company).

But is there sufficient choice in respect of the content? Courses advertised are heavily biased towards report writing, court room skills/ witness familiarisation and law and procedure for experts.

10.2 Content

This is the top of the most trained list:

- Relevant rules and procedure
- Report writing
- Key case law and legislation
- Giving evidence
- Experts' discussions and meetings
- Working with solicitors
- Pre-trial disclosure
- Ethics for experts

There were some notable differences in the essential list:

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Relevant rules and procedure
Report writing
Giving evidence
Ethics for experts
Experts' discussions and meetings
Confidentiality and data protection
Pre-trial disclosure
Key case law and legislation

Why such prominence for case law and legislation when it came in only eighth in the essential list? Is it perhaps because the training course content has been heavily influenced by lawyers as opposed to expert witnesses themselves?

And ethics which came in as fourth most essential only appeared in eighth place in the trained list. Therefore it seems that as ethics should be trained more often than it is.

Confidentiality and data protection was 6th on the essential list but not even in the top 8 for trained subjects, in fact it came eleventh.

In light of these results perhaps training providers will consider how to give greater prominence to:

- Ethics and
- Confidentiality and data protection.

These may be challenging topics to teach and learn but that is no reason to shy away from them especially when they are regarded as some of the most essential.

Alison Foster QC commented on the ethical challenges that litigation brings the expert witness³⁴:

"It was noted that in the 'hurley-burley' of the trial process, especially seen through the eyes of the expert witness' the duties of an expert witness to the court and the ethical code and standards of the profession do not necessarily compliment each other".³⁵

One expert put it even more starkly:

"Take specialists out of their known environment and place them in the adversarial

³⁴ She was at the time drawing out some of the lessons from the Court of Appeal Meadow v GMC decision, [2007] 1 All ER 1

³⁵ Alison Foster QC in her excellent paper "Satisfying the Courts' requirements", presented at an EWI training conference in Grays Inn in March 2007.

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*criminal or civil process...The personal pressure on the expert becomes intolerable.*³⁶

Respondents clearly liked the idea of experts teaching other experts. Who more suited to passing on advice on ethics than an experienced expert witness? Similarly with expert's discussions, experts would be exceptionally well placed to train other experts since lawyers in the case play a small part in experts' discussions, and even then apparently the lawyers don't always perform particularly well.³⁷

Confidentiality and data protection could be very dry subjects if trainers simply ploughed through case law and legislation but there is an opportunity here for lawyers and expert witness to work together to design a very practical course on confidentiality and data protection; it could be combined with other topics such as ethics or pre-trial disclosure.

Pre-trial disclosure was high on the essential and the trained list. Mistakes by experts have led to miscarriages of justice. Adam Wilson sought to identify the causes of recent miscarriages focusing in particular on the overturned convictions of Angela Cannings and Sally Clark. He said "Training must be provided for forensic scientists as to the need for full disclosure"³⁸.

It is suggested that training providers rethink their course content and more fully embrace opportunities to teach ethics and confidentiality and data protection. The providers of training should also involve experienced expert witnesses in course design and delivery if practicable.³⁹ Course design can often be "inward looking"⁴⁰. An opportunity exists for course providers to be

³⁶ Magner, T, Caught in the middle, New Law Journal, Vol 156, No 7247, p1679, November 2006.

³⁷ For instance Roger Clements said in his chapter in Experts in the Civil Courts, "few lawyers seem to exhibit the skills required for drawing up an agenda." in "Experts in the Civil Courts", Blom-Cooper QC, Sir Louis (ed.) (2006), Experts in the Civil Courts, Oxford, Oxford University Press

³⁸ Expert Testimony in the Dock, 69 J, Crim Law. 330 2005

³⁹ This is not a novel concept for providers or Universities. The HEFCE Higher Education – business and community interaction survey" 2005-06, July 2007/17 notes that "increasingly employers are getting involved in developing course and curricula, with a large majority of HEIs providing bespoke courses for business both on campus and at the partner's premises"

⁴⁰ Toohey, S. Designing Courses for Education, (1999, reprinted 2002), The Society for Research into Higher Education & Open University Press, Buckingham
Chapter 2 page 21-22: "Most models of course design suggest that a comprehensive needs analysis should be the first step in the process." "In practice the need for new courses is rarely determined on this logical basis, and development does not follow a linear pattern. New courses come into being for a whole range of reasons related to departmental survival, institutional prestige, desire to experiment with new kinds of teaching, unmet demand from prospective students or the need to create demand for higher education where none previously existed. Sometimes research into community need and student demand is carried out, but it is most likely to be after someone has decided that the new or revised course is a good idea and should go ahead." And Chapter 2 Page 32: "The planning process for a new course or a major review of an

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more outward-looking, in other words providers could take more notice of what expert witnesses believe is essential.

10.3 Teaching and learning methods

Currently there is little choice in terms of mode of learning. Most training is offered as a workshop, face to face large group seminar or conference. Most experts have no experience of distance learning, work shadowing or mentoring as a form of expert witness training.

Over the next few years, it is likely that the currently class-room based training of experts will be complemented by work-shadowing and mentoring as there are early signs of a move in that direction. One family law chambers with support from the Family Justice Council have sought to address the training needs and shortage of experts in public law children's cases by running a pilot scheme for recruitment and mentoring of experts. The scheme which marries training with work-shadowing and mentoring includes a detailed list of core competencies and training standards.⁴¹

In addition, also in the field of family law, the Chief Medical Officer consulted in the winter of 06/07 on recommendations for the reforming of the delivery of medical expert evidence.⁴² Proposals included a greater emphasis on experts working in teams and learning through mentoring and peer support.

10.4 Providers and quality

The majority of experts are happy with the current range of providers, the cost and the quality of the training they receive. 91% thought the training they had attended was high quality. However 20% of experts who were surveyed had not attended training – there was no question asking them why. Some intended to take training in the future but 8% of experts had no such intention.

Most who attended witness familiarisation and report writing felt they had achieved their aims of improving their skills.⁴³

existing course cannot be an inward looking exercise. It should provide an opportunity for the faculty to systematically seek information and opinions from the community, the profession or discipline, students and graduates about the success of past courses, the directions in which the profession or discipline is likely to move, the needs of future graduates and the characteristics of current or potential students.

⁴¹ See www.lgc.com for the scheme run by Charles Geekie QC.

⁴² "Bearing Good Witness", DoH 2006, the consultation process closed in February 2007 and the government is considering responses.

⁴³ In contrast few experts thought they were less likely to be sued or better able to attract clients. Albeit the evidence is limited and based on one question, the survey suggests that the training providers are not perceived to be very successful in these areas.

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Most respondents thought that professional bodies and representative bodies should be the providers (they came significantly ahead of Universities and private training companies). Professional/representative bodies that don't already offer training could consider becoming providers themselves by collaborating with existing expert witness training providers since many offer a bespoke course design and delivery service.

Uniquely University law schools can offer university accredited, quality assured expert witness training. Expert witness professional bodies/representative bodies may well want this quality assurance or accreditation should they decide to collaborate with a provider. The survey showed strong preferences for trainers to be practitioners, both legal and expert. There was a distinct view by most that training by lecturers would not be beneficial. Whilst academic institutions can clearly offer systems of accreditation and quality assurance, they should be careful to ensure that the trainers (who may also be lecturers) have practitioner experience.

Though most people were in favour of the regulation of expert witness training, no one body emerges as an obvious regulator.⁴⁴

10.5 Specialism

Just over half of experts in the survey thought that training would be better if those attending were grouped according to area of court practice. Respondents expressed concern that courses had not been specialist enough for their area of practice.

Providers should, where practicable, group attendees and making courses more relevant to the particular attendees⁴⁵. This would probably address the lack of relevant content comments from some respondents.

10.6 Trainers

Experts said:

"[There are] too many lawyers giving training. They have never been an expert – so what can they add?"

"The solicitor doing the training had no experience of some aspects and so was being unrealistic. However some parts of the course were good."

⁴⁴ Witness familiarisation is an area where in the past, at least one training provider has made mistakes when preparing witnesses of fact for court, but Court of Appeal/ Bar Council guidelines have existed for over two years. All training providers should by now be properly following these guidelines.

⁴⁵ Some providers such as The City Law School and InPractice already offer this.

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Research and personal experience shows that the majority of training is delivered by lawyers (barristers or solicitors) though there are some exceptions. The Expert Witness Institute for example runs one day conferences in conjunction with the Institute of Psychiatry and speakers include, barristers and QCs, solicitors and experts and well as business training consultants.

On the most common courses (one day, small group workshop on rules and procedure, report writing, case law and legislation and witness familiarisation) the trainers are lawyers who may or may not still be practising. It is accepted that it is difficult for a lawyer to combine a law practice with occasional training; whilst training days are known a long time in advance the litigation lawyer's client commitments change from day to day. However, training providers will need to engage practising lawyers and experts who are current in their field (but not past their sell-by dates) to satisfy the trainee expert witness' wishes and needs.

10.7 Compulsory or voluntary training and assessment

Most people answering the survey thought that training should not be a requirement for those wishing to practice as an expert witness and the main objection voiced was that this would preclude a number of experts from acting. But is this really the case? Litigation is rarely if ever so swift; an expert with appropriate professional expertise could quickly and easily undertake a basic training course if they knew they were required as an expert witness.

Much has been written about whether or not there should be compulsory accreditation (note accreditation not training) for expert witnesses. The excluding effect of registration is often relied on as an argument against compulsory training: "Some very unusual topics are brought into litigation. In these circumstances, experts may be called to give evidence only once in a lifetime. It would not be sensible to look for a mechanism to bring people like this into the Register."⁴⁶

In a House of Commons Science and Technology report, the crfp, Bar Council and CPS all indicated they were against mandatory registration⁴⁷. According to District Judge Suzanne Burn, "The Civil Justice Council and the senior judiciary currently take the view that a compulsory

⁴⁶ Professor Evelyn Ebsworth, the first Chairman of the crfp, in his chapter "Accreditation: a novel approach" in "Experts in the Civil Courts", Blom-Cooper QC, Sir Louis (ed.) (2006), *Experts in the Civil Courts*, Oxford, Oxford University Press. He also said in the same chapter, "The establishment of the Council for the registration of Forensic Practitioners (crfp) in 1999 is an attempt to help the courts identify witnesses who are competent in their own sphere of expertise and can indicate their availability to supply reports for the courts and give oral evidence... Accreditation will not, nor should it, replace the absolute power of the court to decide on the admissibility of expert testimony. But what the scheme of voluntary accreditation is intended to do (and hopefully will) is to provide the parties and the court with a basis of expert credibility and this heighten the judicial awareness of the need to examine fully the witness's credibility and reliability to give expert evidence."

⁴⁷ House of Commons Science and Technology Committee, "Forensic Science on Trial", Seventh Report of Session 2004-05

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accreditation scheme is unnecessary, would be expensive and difficult to administer. But the experiment of voluntary accreditation is being greatly welcomed.”⁴⁸

Adam Wilson, a senior law lecturer at Sheffield Hallam University, wrote:

“The problem is that mistakes were made [in the Cannings and Clark cases] by eminent experts who would have no difficulty securing membership. Indeed they may be the very people scrutinising standards. Nevertheless the Council [for Registration of Forensic Practitioners] is a huge step forward... The mere presence of a register instils an atmosphere of professionalism”⁴⁹. The same could be said of compulsory training, it would instil an atmosphere of professionalism, but most respondents were not in favour of it.

Half of the survey respondents were against making training a requirement. The numbers in favour may have increased over recent years with the advent of the crfp and the high profile Clark/Meadow cases. The tide may be turning in favour of compulsory training but it hasn't fully turned yet.

There is currently no requirement for experts to undertake training in what it is to be an expert witness and less than half of those surveyed believe it should be.

10.8 Better communication and understanding between experts and lawyers

Some respondents were keen to point out that there could be better communication between experts and lawyers. One expert said of training:

“This should be a two way process, lawyers need to learn from experts as well”

Comments regarding the need for better communication are not new. Auld LJ said in 2001⁵⁰,

“If we expect experts to raise their act in the manner of presentation of their evidence, the least we [the legal profession] can do is complement and assist their task by ensuring at a basic level of understanding of what they are talking about”

More recently it was said by the House of Commons Science and Technology Committee⁵¹:

⁴⁸ At 3.15 in “Experts in the Civil Courts”, Blom-Cooper QC, Sir Louis (ed.) (2006), Experts in the Civil Courts, Oxford, Oxford University Press.

⁴⁹ Wilson. A.N., Expert Testimony in the Dock”, 69 J, Crim Law. 330 2005

⁵⁰ In Review of the Criminal Courts of England and Wales (September 2001) 582, para 151, available at www.criminal-courts-review.org.uk

⁵¹ House of Commons Science and Technology Committee, “Forensic Science on Trial”, Seventh Report of Session 2004-05

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“The Committee was of the opinion that the distinct lack of communication between scientists and lawyers, and the absence of formal opportunities for experts and scientists to give feedback on their courtroom experiences, represents a serious flaw in the criminal justice system.”

The same committee recommended in 2005 that the Home Office establish a “Science and the Law Forum”.⁵²

Organisations such as The Medico-Legal Society and The Forensic Institute⁵³ promulgate better lawyer/expert witness communication. The former is a membership body open to solicitors, barristers and physicians. The society exists to “promote medico-legal knowledge in all its aspects” and they do this through holding meetings and training events at the Royal Society of Medicine. The Forensic Institute provide forensic (including expert witness) consultancy services and according to their website “is committed to improving the awareness of scientific issues and the use of science in the law. We provide a range of training and learning opportunities for the legal profession”

Suzanne Burn and Sir Louis Blom Cooper QC were right when they said: “Experts frequently complain that they receive no feedback at all on their reports, positive or negative. How can an expert improve if he is not told why his reports are unsatisfactory?”⁵⁴

In the survey comments from experts included:

“Feedback from solicitors/ barristers would be very helpful”

“Why is there never feedback on evidence from the trial judge”

“Getting feedback from solicitors and barristers is very useful”

Only in the Protocol for Judicial Case Management in Public Law Children Act Cases⁵⁵ is there a requirement that experts should be given feedback by the instructing solicitor in the form of a letter “informing the expert of the outcome of the case and the use made by the court of the expert’s opinion”. Whilst it is not a provision that is always adhered to in family cases (possibly

⁵² I wrote to the chair of the committee, who is still a serving Member of Parliament, to see what came of this recommendation and I received a reply in September 2007 including mention of plans for a Forensic Science Advisory Council and a forensic science regulator. The Home Office is taking these plans forward.

⁵³ The website of the Medico-Legal Society can be found at <http://www.medico-legalsociety.org.uk>, accessed July 11th 2007 and the website of The Forensic Institute can be found at www.theforensicinstitute.com also accessed 11 July 2006

⁵⁴ 9.05, Blom-Cooper QC, Sir Louis (ed.) (2006), *Experts in the Civil Courts*, Oxford, Oxford University Press

⁵⁵ Appendix C: Code of Guidance for Expert Witnesses in Family Proceedings. See <http://www.hmcourts-service.gov.uk/docs/protocol-complete.pdf> for the entire protocol.

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due to lack of awareness amongst experts and lawyers) protocols, or better still court rules, in civil and criminal courts could emulate this provision.

A requirement for feedback in all cases would be a significant step toward better communication and would provide a learning opportunity for expert witnesses.

10.9 Lawyers' training

It has been said that science is “much more than a body of knowledge: it is a way of thinking”.⁵⁶ Lawyers need to understand better the way of thinking of the expert witness and have the skills and knowledge to challenge expert witnesses.

Today the best known instance of flawed expert evidence is that of Professor Sir Meadow in the Clark case saying that the chance of a second cot death in the Clark family was 1 in 73 million. He was a paediatrician but not qualified to give this statistic. Professor Sir Alec Jeffreys described the fact that this statistic was not tackled at the trial as “a failure not only of the experts but of the courts”.⁵⁷

It has been said that “Professor Meadow’s evidence in Clark provides another illustration of lawyers accepting too readily the parameters of an expert’s testimony.”⁵⁸

The basic training for barristers, known as the Bar Vocational Course (BVC) includes expert evidence as part of the courses in civil litigation, criminal litigation and evidence and experts’ reports are included in practical training exercises. However “Sophisticated points on how to deal with expert witnesses are really beyond the BVC, though I do not think we shy away from them when they come up”, said Stuart Sime, Head of the BVC at City Law School, City University.

There are no CPD requirements for barristers requiring barristers to learn about how to handle expert testimony though a small number of barristers choose to attend advanced advocacy courses that cover this topic. David Wurtzel said: “As long as the barrister does 12 hours per year in a qualifying activity, then that’s that. A new practitioner courses might include expert evidence but it does not have to. Some barristers will learn how to deal with expert evidence on specialist CPD courses.”⁵⁹

The basic training for solicitors (the Legal Practice Course or LPC) does not address, in depth, how to deal with expert witnesses. Solicitors currently have to study the handling of expert

⁵⁶ Sir Louis Blom-Cooper QC and Sir Robin Jacob refer to Carl Sagan’s quote at 14.06, Sir Louis (ed.) (2006), *Experts in the Civil Courts*, Oxford, Oxford University Press

⁵⁷ Page 69, House of Commons Science and Technology Committee, “Forensic Science on Trial”, Seventh Report of Session 2004-05

⁵⁸ Wilson, A.N., *Expert Testimony in the Dock*, 69 J, Crim Law. 330 2005

⁵⁹ David Wurtzel is a barrister and CPD consultant at The City Law School, City University.

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evidence if they seek to attain higher rights of audience but that will is likely to change in 2008 with plans to deregulate higher rights training.

Some would argue that the training that barristers receive both academically and throughout pupillage and their careers is sufficient to teach barristers how to deal with expert evidence. But as one student poignantly put it in a rhetorical question about the Sally Clark trial: “If these safeguards are sufficiently robust, why was the flawed evidence not challenged at the outset?”⁶⁰

Some law students can be well-schooled in expert evidence. For example City University provides voluntary forensic science training for BVC and LPC students. Keith Simpson, senior lecturer at the Inns of Court School of Law, The City Law School runs a series of approximately ten forensic science lectures each academic year. The lectures, delivered by eminent expert witnesses, are open to City University’s law school students and staff and they are free to attend. The experts are drawn from diverse fields (ballistics, pathology and voice recognition etc) and Simpson says the lectures “give real insight into the complexity of issues that some will be facing relatively shortly. It is great preparation for what they may encounter in pupillage or training contract. It also brings law to life – it is also fun – a vital quality in teaching law”. Currently these lectures are not advertised to barristers and solicitors as CPD but they could be.

⁶⁰ Recent Developments in the law relating to Expert Evidence in Criminal Trials, Tosku, O. (2006), a dissertation for The City Law School Crim Lit LLM.

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10.10 CVs and training

The survey suggests that most judges do not look on the CV to see if an expert has received expert witness training. It is possible that judges do not look because they do not think that expert witness training holds any value, equally it could be that they are not aware of what happens in it.

If the results of this small sample are even approximately representative of the judiciary as a whole, there seems a long way to go to heighten the awareness of the judiciary.

It is surprising that more solicitors and barristers do not check to see if their own expert or the other party's has attended training. A change in court rules or protocols could change this and give expert witness training the recognition that in my view it deserves.⁶¹ This in turn would act as an incentive to the expert witness who is reluctant to undertake any training.

⁶¹ The Protocol for the Instruction of Experts to Give Evidence in Civil Claims (The Protocol) at paragraph 6.1(d) says that those intending to instruct experts should consider whether “the expert has the experience, expertise and training appropriate to the value, complexity and importance of the case”. The context of this provision suggests it is directed primarily at training in the expert's field of specialty rather than training as an expert witness. Paragraph 7.1 of this protocol also requires certain matters to be established before an expert is appointed and this includes “that they have the appropriate expertise and experience” and “that they are familiar with the general duties of an expert”.

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11. Conclusions

11.1 The survey resulted in a good sized sample with strong trends emerging in many areas. 353 completed questionnaires were returned and 294 were from expert witnesses. All of the experts were experienced and many were very experienced, 81% had been instructed in 25 or more cases.

11.2 Eighty per cent of experts who completed the survey had undertaken expert witness training in the past despite no court requirement to do so. The main drivers were the experts' own desires to gain or improve skills and knowledge for court. A commendably high proportion of experts intend to take training in the next five years however 12% do not intend to take expert witness training within the next five years and 8% of experts say they will never be trained.

11.3 Since the Civil Procedure Rules have come into force "there is a strong impression among the judiciary that the sobriquet of the 'hired gun' is less apposite than hitherto"⁶² Although it is impossible to estimate the difference made by training, credit must be due to those who have voluntarily spent time and money attending expert witness training courses.

11.4 The survey indicates a high level of satisfaction amongst experts with the courses that they have taken but providers are advised to ensure that practitioners, both legal and expert, are involved in the creation of course content and delivery.

11.5 The survey reveals an opportunity to deliver expert witness training using multidisciplinary (lawyer, judge, expert) teams and to broaden the syllabus to include more training for expert witnesses on subjects such as ethics and confidentiality and data protection.

11.6 Training providers should also look closely at the length of course and the degree of specialism within it to ensure that it is relevant and appropriate to the experts who are attending.

11.7 The survey results do not make out a case for compulsory training. The fact that 8% of expert witnesses have never trained to be an expert witness and don't intend to could be cause for concern and could strengthen an argument for compulsory training but most people are currently against this.

11.8 I think there should be a carrot encouraging experts to take training, in the form of court rules for lawyers and judges to check CVs, rather than a stick requiring experts to take expert witness training. I recommend court rules are amended to require judges and lawyers to take notice of expert witness training before deciding what use they will make of the expert's evidence. Most professional bodies and most expert witness organisations could also do more

⁶² Blom-Cooper QC, Sir Louis (ed.) (2006), *Experts in the Civil Courts*, Oxford, Oxford University Press.

to encourage their members to be trained.

11.9 Other themes that emerged in the course of research included a perceived need for better communication generally between lawyers and expert witnesses so that they understood their respective ways of thinking. More feedback from barristers and solicitors after the case has concluded would be welcomed and would help experts learn.

12. Recommendations

What follow are recommendations not only for expert witness training providers but also for expert witness professional bodies, representative bodies and the Ministry of Justice.

Providers of expert witness training (including Law Schools where applicable) should:

- Ensure that the teaching is delivered by multidisciplinary teams with up to date, practical knowledge – this includes practising lawyers, judges and expert witnesses.
- Ensure adequate emphasis is placed on practical topics including ethics for experts and confidentiality and data protection.
- Offer expert witness training divided into court practise areas e.g. civil/family/crime, where numbers of expert witness students are sufficient.
- Communicate well with expert witnesses and their professional and representative organisations to ensure that expert witness training meets the needs of the trainee.

Law schools (ideally with the SRA and the BSB) should:

- Extend opportunities for expert witnesses to teach law students and legal practitioners about expert evidence.

The Ministry of Justice should amend civil, family and criminal court rules so as to require:

- lawyers to consider what expert witness training an expert has had before instructing them (In civil cases the wording of the relevant protocol simply refers to general “training” and “appropriate expertise and experience”, in family cases the protocol refers to an expert’s “qualifications and expertise”),
- judges to consider what expert witness training an expert has had before allowing the expert’s evidence to be relied on, and
- solicitors to give feedback to the expert witness on the outcome of the case, the use made (if any) by the court of the expert’s opinion and any particular comments the judge may have made about the expert evidence (The Protocol in family cases already says that experts should be given feedback by the instruction solicitor in the form of a letter “informing the expert of the outcome of the case and the use made by the court of the expert’s opinion”).

Expert witness’ professional bodies and expert witness organisations should:

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- Introduce requirements, or at the very least strong guidance, for expert witnesses to undertake expert witness professional development training.
- Explore new/less utilised forms of professional development training for expert witnesses e.g. work shadowing/mentoring and distance learning.

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13. Post script

- This research gave me the opportunity to look in detail into expert witness training and to identify ways in which it could be improved.
- The research gave rise to the submission and acceptance of a peer-reviewed paper on the subject of expert witness training which was presented to a conference of international legal academics in Athens in July 2007.

Appendix 1: Research Questionnaire

The City Law School Expert Witness Training Questionnaire

March 2007

Dear Reader,

I am seeking your help with a survey about expert witness training. This will be one of the largest ever surveys of its kind. I would very much appreciate it if you could spare the time to complete this questionnaire. Please rest assured that your answers and your details will be kept confidential in accordance with the Data Protection Act 1998 and the City University data protection policy. Participation is voluntary and you are not required to provide your contact details, however if you do provide your details at the end of this form, confidentiality will be maintained. I will not divulge identifiable responses to other parties except, if necessary, to my research supervisor at City University. In the final published report all responses will be anonymised.

The results of the research will help shape the future of expert witness training. Your assistance is extremely valuable and I know your time is valuable too so thank you very much for your help.

Penny Cooper p.cooper@city.ac.uk 020 7400 3630

Penny Cooper is a Barrister and Associate Dean, The City Law School, The City University. She designs and delivers numerous expert witness courses. She is a co-author of *Experts in the Civil Courts* (OUP, 2006) and author of *Reporting to Court under The Children Act 1989* (TSO, 2006). She has written widely on the subject of expert witnesses.

Completing the questionnaire

This questionnaire should take no more than ten minutes to complete. Most questions contain tick boxes. Please feel free to make additional comments where space is provided. Thank you for giving your time to help with this research. If you have any queries about this questionnaire please email Penny Cooper p.cooper@city.ac.uk.

Return date and address

Once you have completed the questionnaire please return it by Tuesday 10th April 2007 to Penny Cooper at The Inns of Court School of Law, 4 Gray's Inn Place, London WC1R 5DX.

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PART 1

Q1. ABOUT YOU

How would you describe yourself?
Please tick all that apply.



- An expert witness
- A solicitor
- A junior barrister
- Queen’s Counsel
- A judge (full time)
- A trainer/ lecturer
- An employee/representative of a professional body
- An employee/ spokesperson for an expert witness representative body
- Other (please specify).....

Q2. CONTENT OF TRAINING FOR EXPERT WITNESSES

In your opinion should the following be covered when expert witnesses are being trained?

	Essential	Desirable	Not	Don’t
			necessary	know
Relevant rules and procedure	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Key case law and legislation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Confidentiality and data protection	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Note taking	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Interviewing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Negotiating	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Analysing and interpreting published research	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Use of statistics	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Report writing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Pre-trial disclosure	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Giving evidence (witness familiarisation)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Marketing for expert witnesses	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Working with solicitors	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Experts’ discussions and meetings	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Ethics for expert witnesses	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

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Other (please specify).....

Q3. VOLUNTARY OR COMPULSORY TRAINING

Should an expert witnesses be required to show that they have undertaken training in being an expert witness before being allowed to practise as an expert witness?

- Yes
- No
- Don't know

Comments.....

Q4. ASSESSMENT

4.1 If an expert attends an expert witness training course should they also have to pass an assessment in order to successfully complete the course?

- Yes
- No
- Don't know

4.2 Should an assessment be?

- Classroom based only (e.g. an exam)
- Work based only (e.g. assessment of a piece of day-to-day work)
- Both classroom and work based
- Don't know

Q5. FREQUENCY OF EXPERT WITNESS TRAINING

If expert witnesses were required to attend training, how often should they be required to attend?

- More than once a year
- Once a year
- Every 1-2 years
- Every 3-5 years
- Don't know

Q6. TRAINERS

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Do you think expert witnesses would benefit from training delivered by the following?

	Yes	No	Don't know
Practising solicitors	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Practising barristers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Judges	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Experienced expert witnesses	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
University lecturers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other (please specify).....			

Q7. REGULATION OF EXPERT WITNESS TRAINING

7.1 Do you think that expert witness training courses should be regulated to ensure the quality of the training?

- Yes
- No
- Don't know

7.2 If expert witness training were regulated who would be the best regulator?

- A university/universities
- The expert witness's own professional body
- An expert witness representative body
- Don't know
- Other?.....

WHAT PART TO DO NEXT

If you are an expert witness please go to PART 2. If you are a solicitor, barrister or judge please go to PART 3. If you are not an expert witness, solicitor, barrister or judge please go to PART 4.

PART 2 TO BE COMPLETED BY EXPERT WITNESSES ONLY

Q8. What is your field of expertise?.....

Q9. In which year did you start practising as an expert witness?.....

Q10. Approximately how many cases have you been instructed in as an expert witness?

- 0
- 1-24
- 25-74

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75+

Q11. Have you ever undertaken expert witness training?

Yes

No

Q12. On average how often do you currently take part in expert witness training?

More than once a year

Once a year

Every 1-2 years

Every 3-5 years

Less than once every 5 years

Not at all

12.1 Approximately how often do you intend to take part in expert witness training in the future?

More than once a year

Once a year

Every 1-2 years

Every 3-5 years

Less than once every 5 years

Not at all

PLEASE CONSIDER THE MOST RECENT EXPERT WITNESS TRAINING YOU TOOK UNDERTOOK

Q13. Please specify the year in which you last took part in expert witness training?

Q14. How would you describe the most recent expert witness training you undertook?

Conference

Large group lecture/seminar

Small group up to 20/ workshop

Mentoring

Work shadowing

Distance learning by CD/video

Distance learning over the internet

Other (please specify).....

Q15. What topic/s did it cover? (Please tick all that apply)

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- Relevant court rules and procedure relating to expert evidence
- Key case law and legislation
- Confidentiality and data protection
- Note taking
- Interviewing
- Negotiating
- Analysing and interpreting published research
- Use of statistics
- Report writing
- Pre-trial disclosure
- Giving evidence (witness familiarisation)
- Marketing for expert witnesses
- Working with solicitors
- Experts' discussions and meetings
- Ethics for expert witnesses
- Other (please specify).....

Q16. How long did the training last?
days or
hours

Q17. Did you think that the training provided was of a high standard?

- Yes
- No

Q18. Did the training have any shortcoming/s?

- Yes Please explain.....
- No

Q19. If you personally paid for the training, do you think it represented good value for money?

- Yes
- No
- Not sure

Q20. Why did you decide to attend the training? (Please tick all that apply)

- To be better at report writing
- To be better at giving evidence

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- To learn how to attract more clients
- Fear of being sued/avoid litigation
- Other (please specify).....

Q21. Did the training you attended?

	Yes	No	Not sure
Make you better at report writing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Make you better able to give evidence	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Make you better at attracting clients	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Make you feel less likely to be sued	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Achieve anything else (please specify).....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Q22. In your experience, when it comes to learning, how effective have you found the following methods of expert witnesses training?

	Very effective	Effective	Not effective	Don't know
Conference	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Large group lecture/seminar	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Small group up to 20/ workshop	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Mentoring by an expert	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Work shadowing an expert	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Distance learning by CD/video	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Distance learning over the internet	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Q23. ATTENDEES

Some expert witness training courses are open to all experts regardless of their area of expertise, area of court practice, or level of experience. In your opinion, would it be better if attendees on expert witness training courses were grouped according to:

	Yes	No	Don't know
Expertise of the attendees (e.g. all engineers)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The area of actual or intended court practice (e.g. civil, family or criminal)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The level of experience of the expert witness	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Q24. WHO SHOULD PROVIDE EXPERT WITNESS TRAINING

In your opinion who should provide expert witness training? Please tick all that apply.

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- Universities on their undergraduate courses
- Expert witnesses' representative bodies
- Expert witnesses' professional bodies
- Universities as postgraduate/ professional development courses
- Private training firms
- Don't know
- No preference

If you have a particular preferred provider, please tell us who it is?.....

Experts, please go to Part 4.

PART 3 TO BE COMPLETED BY SOLICITORS, BARRISTERS AND JUDGES

Q25. When you look at an expert witness' CV for the first time, do you check the CV to see if they have attended expert witness training?

- Yes
- No

PART 4 FOR ALL THOSE COMPLETING THIS QUESTIONNAIRE

Q26. WOULD YOU LIKE TO RECEIVE A SUMMARY REPORT OF THE RESEARCH FINDINGS?

- Yes Please supply your name, email address and contact telephone number below.
- No

NAME:.....

EMAIL:.....

TELEPHONE:.....

ANY OTHER COMMENTS?

If you have any other comments regarding current or future provision of expert witness training please include them here. (Please continue on a separate sheet if necessary.)

.....

.....

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THANK YOU once again for your time and co operation. Your views are invaluable to this research and will help shape future expert witness training.

Penny Cooper

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