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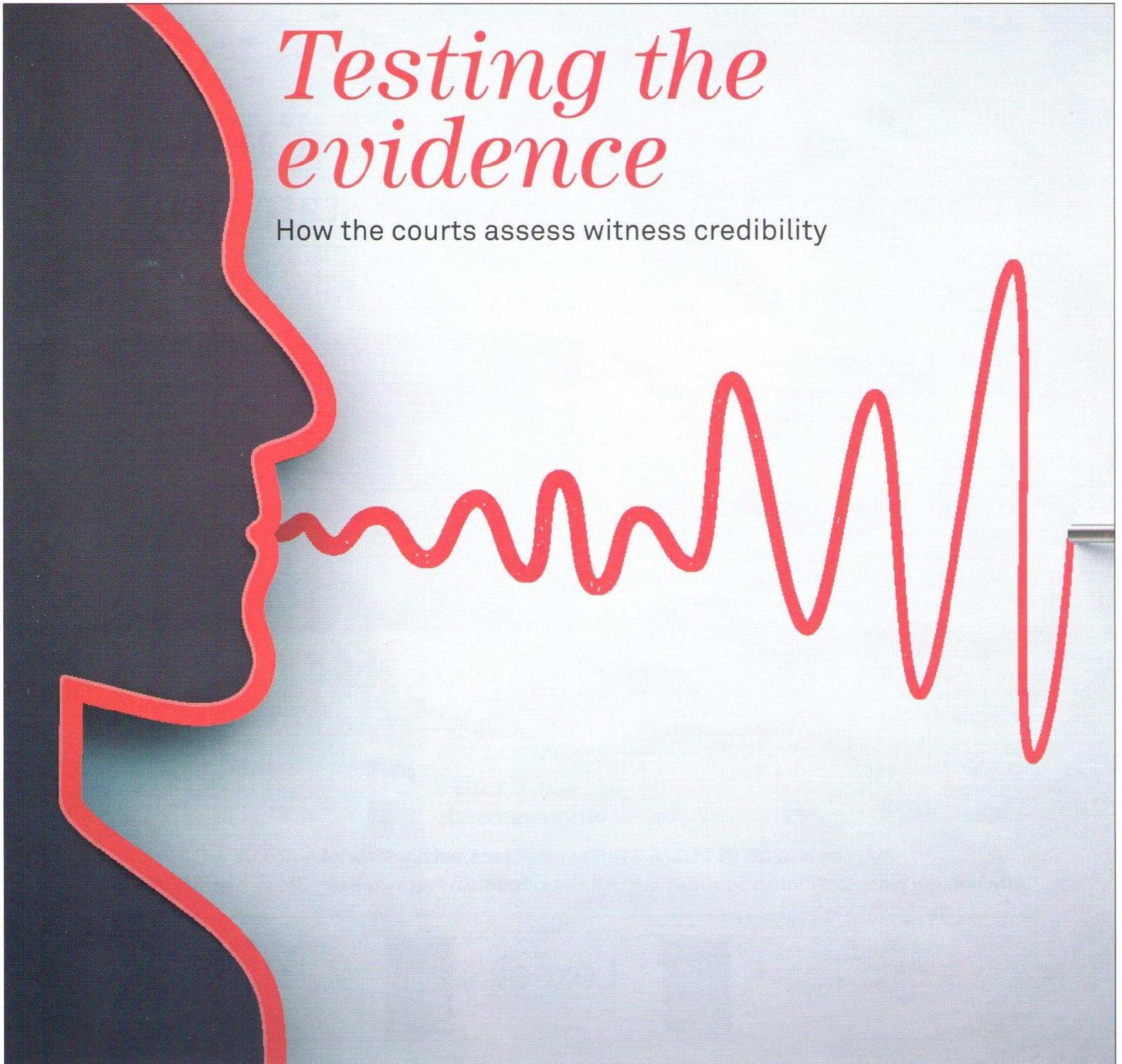
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CONFLICTING ADVICE

Nic Cosmos on how professions within the construction sector approach conflicts of interest by experts

This article outlines the ways in which architecture and building design professions provide expert witness evidence, the way some are regulated, and how one might deal with any conflicts of interest.

The particular professions referred to here - architecture, surveying and building engineering - differ substantively from medicine, with which many readers may be more familiar. That is because they have clients or employers as the focus of their expertise, rather than patients; and a client or employer is not necessarily an individual, as some may be corporations or other entities. The courts provide clear obligations for all professionals giving evidence as expert witnesses within the Civil Procedure Rules, but many professions may also stipulate their own obligations.

You might expect less scope for potential conflicts of interest by experts in the field of architecture, surveying and building engineering, than within medical practice. But is this the case?

In the normal course of events, a client or employer requests that something be done, such as a building designed, a project managed, or a contract drawn - or they may ask for the provision of expert witness services. Before any potential instruction, the parties would

usually have time to think through any issues that may result from any instructions subsequently given.

Because of their relatively strong position compared both with patients and with the professional in question, clients or employers need not necessarily accept any conflicts that are disclosed to them. Clients are often more likely to insist that a conflict be avoided or resolved beforehand.

Architects and surveyors in the legal process

Solicitors representing both claimants and defendants often need to find and retain members of the architectural, surveying and engineering professions to serve as expert witnesses and advise the court on the particular matters at issue.

An expert witness can be defined as anyone that has a special knowledge, skill, experience, training, or education in a particular field.

In cases related to building design, construction costs or for accommodation needs associated with a personal injury, architects, surveyors or building engineers can serve a broad client group by offering expert witness evidence on a variety of technical, design, cost and contractual matters. The architecture and surveying professions have

become ever more specialised, due to growing complexity in modern design and construction processes. Many of today's technically complex legal cases are not resolved without expert evidence, particularly when it comes to quantum.

The courts rely on these experts to provide objective, unbiased professional expert opinions, and the value of good expert witnesses should not be overlooked.

For all professionals who give expert evidence, expert and trustworthy opinion is at the root of what makes members of that profession an essential benefit to the court or the public at large. A conflict of interest can make the perception of that opinion unreliable just when reliability is needed.

The professional background

While there are a number of professional institutions regulating the practice of architecture and surveying, most have similar obligations - although it should be borne in mind that in the UK, it is not a statutory obligation for a design practitioner to have any professional membership or qualification at all. For giving expert evidence in most technical spheres, however, some form of recognised technical

qualification and an appropriate professional membership is expected.

Some of the main relevant institutions have the following guidance in managing conflicts of interest.

The Architects Registration Board (extract from *The Architects Code: Standards of Professional Conduct and Practice*):

'Where a conflict of interest arises you are expected to disclose it in writing and manage it to the satisfaction of all affected parties. You should seek written confirmation from all parties involved giving their informed consent for you continuing to act. Where this consent is not received you should cease acting for one or more of the parties.'

In the Royal Institute of British Architects Code of Professional Conduct, the RIBA lists the following matters that may amount to a conflict of interest:

'Members' personal, private, religious, political or financial interests should not conflict with their duties and obligations to their clients or employers. Should such a conflict arise it should be declared to the client or employer, and, if the conflict is unacceptable or cannot be resolved, the member should withdraw from the engagement or resign from the employment.

'Members involved in any other business activity which might impact, even indirectly, on their practice of architecture, must declare that involvement to the client or employer before any contract is finalised.

'If the other activity is unacceptable to the client, members should either withdraw from it during

the engagement, or decline the commission; if the other activity is unacceptable to the employer, members must either withdraw from it during the employment or resign from/refuse to accept the job.

'Members must not undertake any architectural functions which require independence and impartiality (such as the issue of Architect's Certificates) if they are connected to the contracting party.'

The Royal Institution of Chartered Surveyors' code of ethics has been simplified in recent years, but lists the following matters that may affect or be perceived to impede a professional members' ability to act impartially or in the best interests of a client:

'Before taking on a new client or undertaking new work, you should ask yourself whether your ability to act in the best interest of your client could potentially be impaired by:

- Any financial interest (eg. where you stand to gain over and above your normal fee or lose money depending on the advice you provide)
- A personal relationship (eg. where the advice you provide is influenced by the relationship you have with a third party)
- Commercial relationships (eg. obligations to another commercial entity affect your ability to provide objective advice to a client)
- The interests of your firm (eg. where the financial interests of your own firm conflict with the interests of the client)

If you believe that your impartiality could be compromised in any way, then it's likely that there is a conflict of interest.'

These professional bodies generally treat conflict of interest breaches as serious matters.

It is well understood that the possibility of conflicts of interest may threaten the quality or perceived quality of the individual professional's judgment, and consequently, the welfare of the client or employer in question, the profession's standing with the public, and the reputation of the profession as a whole. The professions manage ethical considerations in different ways, but the foremost values revolve around loyalty to the client (or the employer), professional judgment, and public service.

Clients are often more likely to insist that a conflict be avoided or resolved beforehand

Regardless of the litigation process, for these professions, conflicts of interest are always considered to be a threat to the profession's reputation. That is what makes having a conflict of interest a serious concern in professional ethics. within most - if not all - of the relevant professional institutions.

Expert witnesses must disclose any perceived conflicts of interest, and must have no interest in the outcome of the litigation. They must be current in practice, appropriately educated, impartial, candid, truthful, and articulate.

A conflict of interest may occur when an expert could be influenced, or could be seen to be influenced, by a personal interest in carrying out the assigned work. While there may be

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a myriad of factors, some examples may be because the expert has:

- A financial interest with the party in dispute or the outcome of the dispute;
- Accepted a gift or benefit in kind that may be seen to influence the impartiality of the expert opinion;
- A personal, philosophical, moral or other belief or attitude that could be seen to influence the impartiality of their expert opinion in respect of the matter considered;
- A personal (non-professional) relationship with a party, relative or associate of a party to the matter;
- Use of their position as an independent expert witness to seek employment opportunities for themselves, friends, family or colleagues.

The examples suggested cannot be all encompassing, but any matter that may give rise to an actual or perceived conflict of interest should be disclosed.

As noted in my commentary, the professions of architecture, surveying and building engineering - as far as their professional institutions are concerned - recognise themselves as having an obligation to serve the public.

Any professional may sometimes find themselves in some conflict of interest situations, even when all reasonable precautions have been taken to avoid them.

When the avoidance of a conflict of interest cannot reasonably be foreseen or cannot be avoided, any censure is likely to attach not because of the conflict of interest itself, but rather the professional's failure to take proper steps to deal with it in a proper manner.

Initial enquiries

When a solicitor calls an expert or enquires about a case, I would hope that they will first want to ascertain whether that particular expert has a conflict of interest. A conflict might occur if the expert is doing work for the opposing solicitor and working on the subject of the dispute, or knows personally the opposing party in the litigation.

It is not at all unusual for practising experts to be retained by the same firms of solicitors for both claimants and defendants in different cases,

and in these circumstances it is inevitable at some stage that the expert may be appointed by either simultaneously. If regularly acting for both claimants and defendants, the expert may wish to make it clear that they will not be precluded from accepting such instructions, but conversely will also need to ensure total confidentiality and discretion within their own organisation.

Architecture, surveying and building engineering differ substantively from medicine... because they have clients or employers as the focus of their expertise, rather than patients

The expert should take all possible steps to ensure that they are not already retained by the other party to the case. In my own experience it is usual practice to do a cross check immediately at the time of any initial enquiry from a client, to ensure that confidential information is not inadvertently passed in either direction. Incidentally, now that anonymised documents and parties to an action are becoming more common, this is becoming all the more difficult. In the extreme, if a case bundle turns up without prior enquiry, office staff should be briefed to check whether the expert is already retained on the particular matter before reviewing documents at all - and certainly before passing on to the expert. In the event of a potential conflict, both parties to the case should be informed of what has occurred in a clear and transparent manner. In some instances, it is still open to the parties to take the view that the expert be appointed on a single joint basis, and this approach may be preferred.

Basic premise

The client and architect or surveyor's professional relationship in a building project is critical, and if a professional is tasked with a certain brief or scope of work, they must discharge that duty for their client

regardless of any questions of recovery or ongoing litigation.

Interestingly, fees for most of the professions acting as building designers have traditionally been calculated on the basis of a percentage fee, which is directly related to the total project cost.

In the particular circumstances of quantum accommodation claims, it is the expert witnesses' responsibility to advise the court on the costs to provide the accommodation reasonably necessary. In practice, this may differ somewhat from what is actually built, dependent on a client's particular requests, which sometimes may not be relevant at all to the claim. Actual costs incurred in a particular project may vary substantially between these two sometimes conflicting standpoints.

So it can be seen that an expert witness would put themselves in a very difficult position if acting both as an expert and as project designer in the same case, because they would inevitably have a perceived - if not real - conflict of interest based on the fees generated by the project, and their explicit duty to the court as an expert witness.

Nevertheless, it appears that the presence of a conflict of interest does not automatically disqualify an expert from providing their evidence. The Court of Appeal has confirmed this in the case of *Toth v Jarman* (2006).

The real issue appears to be whether or not the expert's opinion is considered to be independent, impartial and unbiased.

Where the conflict of interest is found to be material or significant, the court is unlikely to act on the evidence - or indeed give permission for the evidence to be heard.

The Court of Appeal in the case above also considered what should happen in future, as follows:

'The expert should not leave undisclosed any conflict of interest which might bring into question the suitability of his evidence as the basis for the court's decision. The conflict of interest could be of any kind, including a financial interest, a personal connection, or an obligation - for example, as

a member or officer of some other body. But ultimately, the question of what conflicts of interest fall within this description is a question for the court, taking into account all the circumstances of the case.'

Professional services provided by a firm where the particular expert is in practice for minor non-contentious initial advice may be considered acceptable, based on the premise that any potential for conflict is fully disclosed and that any fees due are not materially dependent on the expert's own evidence at any subsequent stage. The exact circumstances will be material in each and every case.

Summary

According to the Civil Procedure Rules Part 35.3, it is the duty of an expert to help the courts on the matters within their expertise, and that duty overrides any obligation to the person from whom experts have received instructions, or by whom they are paid.

Judges have been known, in the exercise of their discretion, to reject evidence that has been tendered by experts whom they know to have, or they suspect of having, any financial stake in the outcome of the litigation.

This is the main reason why expert witnesses should never accept instructions to act as an expert witness on a 'no-win, no-fee' or similar basis. For many of the same reasons, an expert witness's personal, professional or direct financial links with parties to a dispute would normally prohibit them from acting as an expert witness in any litigation in which those parties are engaged.

Courts tend not to look favourably at expert witnesses with a vested interest in the outcome of a hearing.

As noted previously, the court has the power to reject evidence that would otherwise be admissible, if it should form an unfavourable view as to the impartiality of the expert witness that has provided it. It is therefore important to make sure that any potentials for a conflict of interest are assessed at the outset.

If, for some reason, using such an expert is unavoidable, any potential conflict of interest should be clearly disclosed in the report subsequently produced, along with a clear explanation as to why the potential conflict is immaterial (if indeed it is). This may render the impartiality of the expert's opinion unaffected, but

would always depend on the facts of the matter in question.

In many instances prior to settlement of a claim, the safest option may be to get an expert witness or unconnected professional from an independent firm to deal with any construction proposals or major adaptations which commence before settlement or trial - or to simply choose an expert in respect of whom there could be no appearance of a potential conflict of interest. Appointments made after settlement of a claim would obviously not have a bearing on any expert witness conflict issues that would otherwise have previously arisen.

In practice, law practitioners and deputies acting on behalf of protected parties for cases in progress therefore need to have a clear understanding of the potential for difficulties at the outset.

Nic Cosmos is a chartered building surveyor, chartered building engineer and director of Camplings Building Surveying Consultancy, which provides specialist design for the disabled. He regularly acts for the court as an expert witness, instructed by both claimant and defendant solicitors. See www.cbiconsultancy.co.uk

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