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Meetings between experts: a route to simpler, fairer trials?

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Meetings between Experts: a route to simpler, fairer trials?

Abstract: *Expert evidence which is both accurate and forensically sound can be daunting for a lay audience, particularly if opposing experts have points of disagreement. The current position in English law is examined to show the advantages and problems of pre-trial meetings between experts*

Keywords: Expert evidence, Court Procedure, Digital evidence, English Criminal Procedure Rules, Admissibility

A persistent problem in criminal trials involving complex technical evidence is how such material can be fairly presented to a lay audience while ensuring that prosecutors have the maximum opportunity to see wrong-doers convicted and the defence equal opportunity – “parity of arms” - to challenge evidence and produce alternative explanations. The problem is at its greatest when experts retained by each side do not or cannot agree.

Existing court procedures do not help: “Many legal rules and procedures were ostensibly designed to facilitate disputes about facts. Yet, certainly at common law, legal processes often seem to provide smoke-screens to conceal subjective judgements by persons with an interest in the outcome of proceedings”¹

The rate of change within digital forensics - itself a function of rates of change in operating systems, hardware, applications programs and social constructs – exacerbates the difficulties. There are always new challenges which have to be met via enquiry and experimentation. Even highly skilled and experienced experts may find themselves at any one time ignorant of individual new developments.

A related but increasingly significant problem is the cap on public funding experienced by prosecution and defence experts alike; full exhaustive tests to establish a particular point may take longer than courts will tolerate or be more expensive than the state is prepared to fund from tax-payers’ money. There can be strong pressure simply to concentrate on the immediate issues in contention before the court.

¹ Andrew Ligertwood, *in* Innovations in Evidence and Proof, ed Roberts & Redmayne, Hart Publishing, Oxford, 2007

A possible solution is now formally available in the English courts via a provision in Part 33 of the Criminal Procedure Rules². Rule 33(5) says:

33.5 Pre-hearing discussion of expert evidence

- (1) This rule applies where more than one party wants to introduce expert evidence.
- (2) The court may direct the experts to –
 - (a) discuss the expert issues in the proceedings; and
 - (b) prepare a statement for the court of the matters on which they agree and disagree, giving their reasons.
- (3) Except for that statement, the content of that discussion must not be referred to without the court's permission.

The Rule appeared at the end of 2007 but meetings between experts had been taking place informally for many years before that, either voluntarily because the respective legal teams thought a meeting would be useful or because a judge had suggested or ordered it.

The precise details are a function of specific English criminal procedure but there are potential lessons for other jurisdictions

In this article I want to describe some of the advantages and difficulties associated with such meetings and the necessary framework within which they must take place.

Some definitions and background.

“Expert” in the way it used by the courts can mean two different things. The first is the provision of evidence that is technical in nature. A technician carries out a procedure, reports on it and produces some exhibits. A typical example would be the making of a forensic image of a disk including a description of the precise methodology and verification; at the end there is the provision of an exhibit in the form of a disk image. A second example is when the forensic image is examined and a series of print-outs of files are produced together with a statement about their locations on disk.

The second sense of “expert evidence ” is evidence of opinion, which may be tendered by the same technician or by another witness. Here, and the rules vary between jurisdictions, the court must first be persuaded that the witness has relevant expertise and that the opinion to be provided is within the scope of the witness’s expertise but does not trespass into territory where the court can make up its own mind. Moreover opinion evidence should never directly address the “ultimate question” of a defendant’s guilt. A typical example might involve a reconstruction of events and an opinion, based on analysis and experience, leading to the conclusion that one particular person rather than several alternatives was responsible for a specific sequence of events. Another example is where a court is given technical and socio-cultural background on a particular Internet institution such as chat-rooms,

² http://www.justice.gov.uk/criminal/procrules_fin/contents/rules/part_33.htm

social networks, e-commerce protocols, so that it can understand the circumstances of an alleged offence.

In the United States, for example, this second type of expert evidence is dealt with under Federal Rules of Evidence 702³:

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

The apparent alternatives

Judicial systems seem to offer a number of alternatives to handling disputed expert evidence⁴:

Let the court decide This is the simplest form, particularly in the common law jurisdictions where the procedure is adversarial⁵. Expert witnesses take their turn among all the other witnesses that each side decides to offer. The Prosecution expert may appear quite late in the prosecution case. S/he is examined, cross-examined and re-examined. The prosecution case continues and the defence case opens. Several days, sometimes weeks and months later, the defence expert goes into the witness box. S/he too is examined, cross-examined and re-examined. The court, and especially a lay jury, are expected to retain in their minds the earlier explanations and assertions of the prosecution expert and compare them with that of the defence expert. The defence expert witness finishes and is followed by other witnesses. Still later the respective lawyers make their closing speeches, referring among other things, to the expert evidence. The judge then sums up, again referring to the expert evidence and describing the law as it affects the trial as a whole.

The jury, assuming there is one, must finally retire and decide.

The danger here is that the jury has never had a clear technical explanation of the technologies and science involved; it has heard competing views presented in circumstances which makes learning and understanding very difficult. There is little assistance in seeing how far the respective experts agree. There may be not much in the way of background to some of the technologies – what is IRC or P2P? What is an Internet browser cache? What is a botnet?

³ <http://www.law.cornell.edu/rules/fre/rules.htm#Rule701> provides a convenient annotated guide

⁴ A lengthy discussion of this and other issues relevant to this article appears in the UK *Criminal Court Review* conducted by Auld, LJ and published in 2001: <http://www.criminal-courts-review.org.uk/>. Chapter 11 is particularly helpful

⁵ In the adversarial criminal procedure police investigate, a prosecuting authority determines precise charges, and the judge acts as a chairman of proceedings and enunciates the law. The jury, if there is one, decides on facts as presented by opposing advocates and their witnesses. In the inquisitorial criminal procedure the investigation is supervised from an early stage by a judge who also frames the charges; the trial is presided over by a different judge.

It is small wonder that many fear that the basis of arbitrating between different expert evidence is not the intrinsic merit but the theatrical experience – do members of the jury “trust” one expert over another on the basis of a recital of qualifications, or because one looks avuncular and professorial and another is a casting director’s idea of a geek and who wears an off-putting T-shirt? Or is it the voice, manner and self-confidence of an expert which becomes the determinant?

But the principle of the adversarial system is retained.

The single expert In this situation the court appoints an expert. The expert may be called an “assessor”; they may even sit along side the judge as opposed to be called to testify from the witness box. This was a solution suggested in relation to trials involving complex fraud by the UK Roskill Committee in 1986, though it was heavily criticised at the time and subsequently⁶

There is one great advantage; that a lay jury does not have to bother itself with “difficult” material. But then great reliance is put upon who-ever the court-appointed expert is. How is s/he selected in the first place? What opportunities exist to challenge their findings?

There is a variant: the single *joint* expert, or SJE. Here the parties agree on the expert and also on his/her precise instructions. Usually the agreement is then supported and enforced by the court. This can work quite well in civil cases where the Claimant and Defendant have equal status and are under an obligation to restrict, so far as possible, the scope of their dispute⁷. In England and Wales the precise arrangements appear in the Civil Procedure Rule 35.8⁸ and with greater detail in a Practice Direction⁹.

One criticism of the SJE is that one can end up with, not the single expert the system advocates, not the two – one per side – that is seen in conventional disputes, but three: the court appointed SJE and each side retains an expert in order to “manage” the SJE.

In criminal cases, though, what may be at issue is the reputation and liberty of an individual. There is far less possibility for agreement between prosecution and defence lawyers as to limiting the scope of the dispute: the prosecution makes the best case it can on the evidence it has acquired and the defence disputes it as far as it is able.

The English Criminal Procedure Rules do allow for a SJE – CPR 33.7 and 33.8¹⁰ but this is limited to the circumstances in which there are several co-defendants. The aim here is to avoid unnecessary duplication of effort in the presentation of the defence case, not to have a SJE who settles a point in contention between the prosecution and the defence.

Judicial arbitration on expert evidence Here, to a greater or lesser extent, the task of evaluating experts and expert evidence is devolved to a judge.

⁶ <http://www.dca.gov.uk/criminal/auldcom/jud/jud10.htm>; <http://www.criminal-courts-review.org.uk/ccr-11.htm>

⁷ In English law the Civil Procedure Rules describes the “overriding objective” as dealing with a case to save expense and to deal with the issues in a manner proportionate to the sums involved: http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part01.htm

⁸ http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part35.htm

⁹ http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part35.htm

¹⁰ http://www.justice.gov.uk/criminal/procrules_fin/contents/rules/part_33.htm#rule33_7

In the code-based law of Europe and those jurisdictions borrowing from it, the procedure is inquisitorial, with a supervising or investigating magistrate – *juge d'instruction* – directing the activities of the police and framing the charges. These judges will look at the expert evidence and test it for “relevance” and “fairness”. Their scope for discretion is increased in those jurisdictions where there is an “inclusionary” as opposed to “exclusionary” doctrine of admissibility. In the former, almost any item of evidence can be admitted for consideration unless there is a rule forbidding it. Examples include, to varying degrees, France, Portugal, Belgium and Italy. Under the exclusionary doctrine all evidence is excluded unless there is a positive rule to allow it in. Dutch and German law provide lists of allowable evidence. There is an argument for saying that because the investigating judge can look at expert evidence freed from the formal procedures of a trial they can test it more thoroughly. On the other hand, much will then depend on the knowledge and ability of the investigating judge. There does not seem to be much scope for testing by a defence expert until quite late in a final trial.

In the United States there is sort-of half-way house for novel scientific evidence under the Frye / Daubert / *Kumho Tire* Rules¹¹. Here the judge has a *voir dire* or trial-before-the-trial to consider whether a strand of scientific or technical evidence is “generally accepted”. The aim is to prevent quack science being placed before a jury. If the judge decides that the evidence meets the four main “Daubert” tests;

- Has the theory or technique been reliably tested?
- Has the theory or technique been subject to peer review?
- What are the theories or techniques known or potential error rates?
- Has the theory or technique been generally accepted as a standard in its scientific community?

then the evidence can be admitted for consideration in the main trial. But these tests apply to the techniques deployed, not to the credibility of an expert and not to any conclusions that might be drawn from them.¹²

The English Procedure

The English way of handling expert evidence has to be understood within the broader context of criminal justice procedure and in particular those features which are different from those in similar jurisdictions. These are: an explicit statement of where the expert’s ultimate duty lies, the regime which defines Prosecution and Defence duties of disclose, and the role and function of pre-trial Case Management hearings

Expert’s Duty

¹¹Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); Daubert v Merrell Dow Pharmaceuticals 509 U.S. 579 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137

¹² Christopher V Marsico; COMPUTER EVIDENCE V. DAUBERT: THE COMING CONFLICT; CERIAS Tech Report 2005-17; Rogers, M. Computer Forensics: Science or fad. *Security Wire Digest*, Vol 5. No. 55,

Under English law the over-riding duty of an expert witness is to the court:

33.2 Expert's duty to the court

- (1) An expert must help the court to achieve the overriding objective by giving objective, unbiased opinion on matters within his expertise.
- (2) This duty overrides any obligation to the person from whom he receives instructions or by whom he is paid.
- (3) This duty includes an obligation to inform all parties and the court if the expert's opinion changes from that contained in a report served as evidence or given in a statement

33.3 Content of expert's report

- (1) An expert's report must –
 - (i) contain a statement that the expert understands his duty to the court, and has complied and will continue to comply with that duty; and
 - (j) contain the same declaration of truth as a witness statement.

The expert witness is thus not “on the team” of either the prosecution or the defence.

Disclosure

English law is also unusual in the way in which it handles disclosure, the prosecution have an obligation to make the defence aware of material it has collected during the course of an investigation and which might affect the outcome of a trial even though that material is not being presented as evidence. (The US term is “discovery”). Until 1997, English law was similar to that of most other “common law” countries: the defence could make demands of the prosecution for “unused” material against a relevancy test¹³. In 1997 the Criminal Procedure and Investigation Act, 1996, came into force; it has since been modified by a further Act in 2003. It places on *prosecutors* the obligation to disclose to the defence “unused material” which is “relevant”. This is defined in the Code of Practice as anything that appears to an investigator, or the officer in charge of an investigation or the disclosure officer to have some bearing on any offence under investigation or any person being investigated or on the surrounding circumstances unless it is incapable of having any impact on the case¹⁴.

But the defence have obligations as well: they must produce a Defence Case Statement which sets out the main limbs of their argument, for example, that facts are disputed, that there is an alibi, that the defendant was acting under duress, and so on. It must also indicate if there are to be any legal arguments, such as admissibility, abuse of process, or interpretation and application of law. The prosecutor is required to consider the Defence Case Statement, among other things, to see if he is holding any material which now looks relevant to the defence. The main penalties faced by the defence for not producing a Case Statement, or one with sufficient detail, are that

¹³ R v Keane (1994) 99 Cr. App.R 1 summarised the earlier common law precedents.

¹⁴ http://www.cps.gov.uk/legal/section20/chapter_a.html#012

they won't then be able to challenge the Prosecution that there is still further material which ought be disclosed, while at trial "adverse inferences" may be drawn. (Including that the defendant was given an opportunity to give the police a chance to decide that they had been mistaken, or that a line of defence has been produced at the very last moment).

In the United States there is a general obligation on the prosecution not to withhold evidence which is either material to guilt or punishment. *Brady v. Maryland*, [373 U.S. 83 \(1963\)](#). In effect failure to disclose is regarded as violation of due process and the equal protection of the laws under the Fourteenth Amendment to the US constitution. As with many features of US law, precise details vary between individual States.

Case Management Hearings

English courts are placing increasing importance on pre-trial hearings in which opposing lawyers and the judge discuss and settle issues about the management of the trial: How long is it expected to last? How many witness will be produced and how long will each be examined? Will there be a need for special equipment in court – such as a computer or video player? Are there young defendants whose identity must be guarded? Will some witness testify by video link? Will there be expert witnesses and when will their reports be available? Are there any admissibility and legal issues? Is there scope for agreement between prosecution and defence on certain facts? A timetable is set by which both sides are required to produce papers to each other.

The current term for this is "Plea and Case Management Hearing", or PCMH.

Both the Disclosure regime and the PCMH requirement came from reforms which in turn had emerged from reports and commissions which had concluded that all was not well with English criminal justice procedures¹⁵. In the case of disclosure there were concerns about miscarriages of justice because the police had withheld key information from the defence – these have not entirely disappeared even now¹⁶. But there were also complaints from the police that defence lawyers had been engaging in "fishing expeditions", asking for huge amounts of information in the vague hope that something useful – or embarrassing to the police might turn up.

Case Management hearings have become steadily more important because of the need to discipline the trial process. The movie and tv screenwriter thrives on witnesses and essential evidence discovered at the last minute; in practice the most efficient way of delivering justice is where both sides and the judge are entirely clear before the trial starts about what will be said before a jury. That way, witnesses can be called in an order which explains the events in the most logical way and there are a minimum of situations where the jury has to be sent out while opposing lawyers argue a point of law. But it is also fair to say the PCMHs are still not working as well as they might: the mechanics of the way in which public funding is granted often has the result that

¹⁵ Runciman Cmnd 2263 (HMSO 1993); Auld <http://www.criminal-courts-review.org.uk/>

¹⁶ <http://www.innocent.org.uk/misc/disclosure.html>

PCMHs are attended, not by the leading advocates who will appear at trial, but their juniors. As a result critical issues are sometimes missed. Expert and technical witnesses, who might be able to make a significant contribution to how specialist evidence will be presented, are almost never in attendance.¹⁷ And the success of a PCMH also depends on the skill of the judge; in some complex cases, where defendants have been held in prison until trial, judges have pressed for an early trial start-date and said that evidence can be served while the trial is in progress.¹⁸

Expert Report Format

The Criminal Procedure Rules set out what is expected in a Report¹⁹:

- 33.3 Content of expert's report
- (1) An expert's report must –
 - (a) give details of the expert's qualifications, relevant experience and accreditation;
 - (b) give details of any literature or other information which the expert has relied on in making the report;
 - (c) contain a statement setting out the substance of all facts given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
 - (d) make clear which of the facts stated in the report are within the expert's own knowledge;
 - (e) say who carried out any examination, measurement, test or experiment which the expert has used for the report and –
 - (i) give the qualifications, relevant experience and accreditation of that person,
 - (ii) say whether or not the examination, measurement, test or experiment was carried out under the expert's supervision, and
 - (iii) summarise the findings on which the expert relies;
 - (f) where there is a range of opinion on the matters dealt with in the report –
 - (i) summarise the range of opinion, and
 - (ii) give reasons for his own opinion;
 - (g) if the expert is not able to give his opinion without qualification, state the qualification;
 - (h) contain a summary of the conclusions reached;
 - (i) contain a statement that the expert understands his duty to the court, and has complied and will continue to comply with that duty; and
 - (j) contain the same declaration of truth as a witness statement.

¹⁷ But it does happen sometimes

¹⁸ eg Jubilee Line fraud, Operation Blossom trial, currently two of the most expensive ever UK trials

¹⁹ http://www.justice.gov.uk/criminal/procrules_fin/contents/rules/part_33.htm#rule33_3

One weakness of the Rule is that it doesn't address a constant dilemma of anyone whoever writes an expert forensic report: to whom is a witness statement actually addressed? The court or another expert?

The problem is this: good scientific forensic practice requires the qualities of accuracy, completeness, transparency and testability. But that can lead to levels of detail that lay members of the court – a judge, a jury if present, may find intimidating and unhelpful. What assumptions should be made in terms of levels of knowledge? How far and when are “accurate ethical simplifications” justified?

But there may also be circumstances where an opposing expert needs the detail in order to be convinced of the rightness of the methodology and conclusions being tendered in a witness statement.

Meetings between Experts

This is what Sir Robin Auld said in his Report in 1999:

145 As to pre-trial meetings between experts, this occasionally takes place on an informal basis with the agreement of both parties, but I believe it to be the exception rather than the rule. If the views expressed in the Review are representative, the reluctance to arrange such meetings comes mainly from the defence, not the prosecution or the expert witnesses themselves, both of whom urge it. Subject to proper safeguards of confidentiality as to undisclosed information on both sides, I strongly encourage it. It is obviously of great assistance to the court in the simplification of the expert evidence over-all. And it can give no improper advantage to either party if they can discuss and identify in advance the extent of the likely issue between them when the matter goes to court. It is of particular importance where one side is proposing to use information technology for the presentation of some of its evidence, since there will need to be discussion of the system to be used, as well as of content of the evidence.²⁰

This recommendation led to the creation of the Criminal Procedure Rule 33.5, quoted at the beginning of this article.

Perhaps the three most important features, other than the overarching one that such meetings can take place are

- The judge can order a meeting to take place irrespective of the wishes of the prosecution and defence lawyers
- The output is an agreed statement indicating points of agreement disagreement
- No reference can be made in court to any discussions between the experts other than that which is in the agreed statement

²⁰ <http://www.criminal-courts-review.org.uk/ccr-11.htm>

Examples

The following are examples within the writer's own experience, largely gathered from the "informal" situation that existed prior to the arrival of CPR 33.5:

- **Agreement on how to explain a particular technology** In a case where "place of publication" was an issue and a web-server was located overseas outside the jurisdiction of the court, there was an agreed statement on how web-site authoring, web-server publication, and web-site reception worked. The judge was then able to apply the law; the matter went to appeal, where the original judge's findings were accepted.
- **Agreement on a demonstration** IRC - Internet Relay Chat had been used in a covert form by a group of file-swapping paedophiles. There was an agreed "live" demonstration in court of what IRC looked like from the perspective of the ordinary user.
- **Agreement on glossary of terms** Such agreements are now used in almost all hi-tech cases of any complexity
- **Agreement on specific aspects of evidence** It is often quite easy to get agreement on such issues as:
 - That there is no dispute that a hard-disk was preserved and imaged correctly
 - That certain file or fragments are located on a hard-disk at specific disk location and with associated date-and-time stamps

Such agreements can speed the trial process and the respective lawyers can focus the court's attention on areas where there is real dispute

- **Defence seeking clarification of technical infrastructure at victim's premises** . It is often difficult to understand how a complex computer system operates simply from documentation and paper-based description. The defence expert may need to develop an understanding quite quickly. Examples include: a site visit to a computer manufacturing company which had suffered an internal fraud; an examination of the facilities available at branches of the UK Post Office where there had been clerical frauds, a site visit to an insurance company which had been email-bombed
- **Prosecution demonstration of methodology and/or tool to show validity / Mutual testing of artefacts to show there is a valid forensic argument** It is still the case that many significant discoveries about the forensic value of OS and application artefacts emerge during real investigations, as opposed to being the product of academic research. In those circumstances there may be no peer-reviewed article on whose authority the parties can rely, though an article might appear later. Examples include: the extent to which useful information can be found in thumbs.db files, the linking of registry items about USB devices to actual devices material to the case, the ways in which date/time stamps are recorded in Restore Points.
- **Agreement on chronology of events** One of the commonest techniques of investigation, or of the repudiation of an allegation – is the chronology of events. Indeed this technique is fundamental to any "whose fingers on the

keyboard at the relevant time” argument. Using modern forensic software it is trivial to arrange files in date order. But interpretation is much more complex: which files do you regard as significant? Are you sure about the circumstances in which a file was “created”, or “last written” or “last accessed”? How do you establish a date of deletion? How can you reconstruct Internet browsing activities where some important pages almost certainly would have had a no-cache flag? Sometimes chronologies have to be built up from several different strands of evidence, computer hard-disks, web-access logs, anti-virus logs, cellphone usage logs, diaries. Recent examples have included an internet defamation and several accusations of downloading of indecent images of children where several people had access to the computer upon which the images were found.

- **Agreement on chronology of successive drafts of a document.** In one case where over a period of several days a police officer compiled statement to be signed by a witness. Later the witness claimed that the statement as signed by him was not the true final version. A chronology of drafts was compiled from recovered temporary files and file fragments and associated date/time stamps were married with other sources of timed evidence. After a short meeting the opposing experts were able to agree.
- **Method of decrypting** In one case a prosecution expert announced via a witness statement that he had successfully decrypted an encrypted file. But he failed to refer to any methodology, any identification of the encryption algorithm and did not provide the key he said he had discovered. The matter was resolved in an expert-to-expert meeting
- **Examination of Java in web-pages to test for “pop-up” defence** The unexpected, not-sought, pop-up windows defence occurs with depressing frequency in cases involving the downloading of indecent images of children. Although many of these claims are undeserving it is possible to examine date/time stamps on pages adjacent to the ones containing the offending material and then examine any java code. This is precisely the sort of evidence that is difficult for lay juries but on which experts ought to be able to agree.

Problems and Limitations

Although there are many benefits to expert-to-expert meetings within the English law framework a number of dangers and problems are being identified.

- **Setting of parameters of meetings** Faced with conflicting expert reports, some judges are tempted to leave the details of what is discussed at an expert-to-expert meeting to the experts. The meeting then starts without a clear agenda. This can sometimes have an unfortunate effect. Inexperienced experts may exceed their remits. Opposing lawyers may try to influence the meetings, either extending or restricting the terms, depending on what they think the outcome may be. Experts may need to be robust to ensure that their duty to the court is not compromised. Generally speaking, if an expert believes the parameters are unclear, he may have to force those instructing and if necessary the trial judge to set the agenda.

- **Experts can usurp the role of the jury** The principle is quite clear: experts are there to assist the court and jurors in just those areas where the layperson is unlikely to be able to make up his/her mind. But where nearly all the evidence is technical and nearly all the action takes place within computers, it may be extremely difficult for experts to know precisely the point at which they should stop – and for judges to know when to intervene
- **Lack of Training Courses** At the moment training for expert witnesses tends to concentrate either on the particular expertise (eg hard-disk examination) or on court requirements – writing reports and statements in the approved manner and how to give oral evidence. There appears to be no training available in how to manage the expert-to-expert meeting. Another critical requirement in training is to assist the expert in managing his relationships with “those instructing” when there is an over-riding duty to the court – we consider this below.
- **Funding** The vast majority of criminal cases in England are publicly funded and that means that an independent body, the Legal Service Commission, has to agree that a particular activity should be supported, and to what extent. Decisions are usually made by civil servants and they may not understand what is involved in an expert-to-expert meeting and what level of preparation is required. Or they may take a very long time to reach a decision, by which point the trial start date is imminent.
- **Opposing experts may be too friendly** Quite often experts will know each other from previous instructions and may also have met on other occasions. In effect, in a trial, the person to whom the expert most closely relates is his/her opposite number. The danger here is that they do not test each other sufficiently. There is a corollary: some times experts form a mutual dislike and then their aim can be to show up the supposed deficiencies of their opponent rather than serve the court.
- **A conversation between an expert hired by the defence and one hired by the prosecution may result in “too much” of the defence case being released prematurely** Although the trend in the English criminal courts is towards greater clarity of each side’s arguments before the trial begins, the defence can still make decisions about what and when to reveal. A defence expert may be privy to other aspects of the defence case and may inadvertently reveal privileged and other information. There is a formal safeguard in the rule that no reference can be made in court to any discussions between the experts other than that which is in the agreed statement but this may not stop informal (and very damaging) leakage.
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- **Problems for prosecution experts** Prosecution experts have usually played some part in the investigation that lead to the charges against the defendant being framed. Indeed they may be law enforcement officers, civilians employed by a law enforcement agency, or be in private practice but regularly receiving contracts from law enforcement agencies. They are the colleagues of the investigators. But they also owe duties to the court. If they are to give evidence the over-riding duty is then to the court, not to colleagues and

employers. In English law, they also have a duty to record their activities accurately and to respond to a prosecutor's demands that anything adverse to the prosecution case will have to be disclosed to the defence. When giving evidence, it is not an option for a prosecution expert to be helpfully selective in what he says.

- **Problems for defence lawyers** There are a set of related problems, not directly connected to expert-to-expert meetings, but which apply to defence experts. Since the expert is not “on the defence team” but owes a duty to the court, defence lawyers will want to exercise some control over investigations carried out by defence-instructed experts. In particular if a defence advocate suspects that his client is not telling him the truth he will not want to be put in a position where the extent of the lie is forcibly drawn to his attention as a result of investigations by his own expert. If that happens, he will be bound either to confront the client, or “return the brief” (resign). But constraining the activities of the defence expert may also mean that evidence that could help the defendant remains hidden. In any event making decisions in this area implies that the advocate has a great deal of knowledge about digital forensics. Usually the only way round this is for the defence advocate to warn the client that an expert is being instructed, that it may not be possible to control the situation if adverse evidence is found and to be quite sure that the client is happy for the investigation to go ahead. It is quite common for a defence expert to make a finding which is not “helpful” to a defendant but not to the point at which the advocate feels he has been lied to. The usual route then is not to “call” the expert to give evidence but to use him to assist in building a general understanding of the case and to develop a cross-examination strategy for the prosecution's expert. In addition there is no doubt that, faced with an unpromising case, a defence advocate may prefer not to be too helpful in assisting a jury to understand a case. The advocate may want to play the “reasonable doubt” card – “if you don't understand you shouldn't convict”

Conclusions

The formal English procedure for Expert-to-Expert meetings is still very new. Some of the problems indicated above are likely to be solved by a combination of training (for experts, lawyers and judges) and experience.

There is no such thing as a perfect criminal justice system and there is always the temptation for professionals in one jurisdiction to look enviously at the best features of procedures in other jurisdictions.

But the problems of placing complex technical evidence in front of a court full of laymen whilst preserving overall fairness and parity of arms won't go away. The precise methods currently evolving in the English court, though, may provide some lessons for other jurisdictions. In particular some formalisation of the ways in which experts can meet prior to trial must be a good idea.