Guidance for the instruction of experts in civil claims 2014

Introduction

1. The purpose of this guidance is to assist litigants, those instructing experts and experts to understand best practice in complying with Part 35 of the Civil Procedure Rules (CPR) and court orders. Experts and those who instruct them should ensure they are familiar with CPR 35 and the Practice Direction (PD35). This guidance replaces the Protocol for the instruction of experts in civil claims (2007).

2. Those instructing experts, and the experts, must also have regard to the objectives underpinning the Pre-Action Protocols to:-

a. encourage the exchange of early and full information about the expert issues involved in the prospective claim;
b. enable the parties to avoid or reduce the scope of the litigation by agreeing the whole or part of an expert issue before proceedings are started; and
c. support the efficient management of proceedings where litigation cannot be avoided.

3. Additionally, experts and those instructing them should be aware that some cases will be governed by the specific pre-action protocols and some may be “specialist proceedings” (CPR 49) where specific rules may apply.

Selecting and Instructing experts

The need for experts

4. Those intending to instruct experts to give or prepare evidence for the purpose of civil proceedings should consider whether expert evidence is necessary, taking account of the principles set out in CPR Parts 1 and 35, and in particular whether *"it is required to resolve the proceedings"* (CPR 35.1).

5. Although the court's permission is not generally required to instruct an expert, the court's permission is required before an expert's report can be relied upon or an expert can be called to give oral evidence (CPR 35.4).

6. Advice from an expert before proceedings are started which the parties do not intend to rely upon in litigation is likely to be confidential; this guidance does not apply then. The same applies where, after the commencement of proceedings, experts are instructed only to advise (e.g. to comment upon a single joint expert's report) and not to prepare evidence for the proceedings. The expert's role then is that of an expert advisor.

7. However this guidance does apply if experts who were formerly instructed only to advise, are later instructed as an expert witness to prepare or give evidence in the proceedings.

8. In the remainder of this guidance, a reference to an expert means an expert witness to whom Part 35 applies.

Duties and obligations of experts

9. Experts always owe a duty to exercise reasonable skill and care to those instructing them, and to comply with any relevant professional code. However when they are instructed to give or prepare evidence for civil proceedings they have an overriding duty to help the court on matters within their expertise (CPR 35.3). This duty overrides any obligation to the person instructing or paying them. Experts must not serve the exclusive interest of those who retain them.

10. Experts should be aware of the overriding objective that courts deal with cases justly and that they are under an obligation to assist the court in this respect. This includes dealing with cases proportionately (keeping the work and

costs in proportion to the value and importance of the case to the parties), expeditiously and fairly (CPR 1.1).

11. Experts must provide opinions that are independent, regardless of the pressures of litigation. A useful test of 'independence' is that the expert would express the same opinion if given the same instructions by another party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates or mediators.

12. Experts should confine their opinions to matters which are material to the disputes and provide opinions only in relation to matters which lie within their expertise. Experts should indicate without delay where particular questions or issues fall outside their expertise.

13. Experts should take into account all material facts before them. Their reports should set out those facts and any literature or material on which they have relied in forming their opinions. They should indicate if an opinion is provisional, or qualified, or where they consider that further information is required or if, for any other reason, they are not satisfied that an opinion can be expressed finally and without qualification.

14. Experts should inform those instructing them without delay of any change in their opinions on any material matter and the reasons for this (see also paragraphs 62-64).

15. Experts should be aware that any failure to comply with the rules or court orders, or any excessive delay for which they are responsible, may result in the parties who instructed them being penalised in costs, or debarred from relying upon the expert evidence (see also paragraphs 86-88).

The appointment of experts

16. Before experts are instructed or the court's permission to appoint named experts is sought, it should be established whether the experts:

a. have the appropriate expertise and experience for the particular instruction;
b. are familiar with the general duties of an expert;

c. can produce a report, deal with questions and have discussions with other experts within a reasonable time, and at a cost proportionate to the matters in issue;
d. are available to attend the trial, if attendance is required; and
e. have no potential conflict of interest.

17. Terms of appointment should be agreed at the outset and should normally include:

a. the capacity in which the expert is to be appointed (e.g. party appointed expert or single joint expert)*;*
b. the services required of the expert (e.g. provision of an expert's report, answering questions in writing, attendance at meetings and attendance at court);
c. time for delivery of the report;
d. the basis of the expert's charges (e.g. daily or hourly rates and an estimate of the time likely to be required, or a fixed fee for the services). Parties must provide an estimate to the court of the costs of the proposed expert evidence and for each stage of the proceedings (R.35.4(2);
e. travelling expenses and disbursements;
f. cancellation charges;
g. any fees for attending court;
h. time for making the payment;
i whether fees are to be paid by a third party;
j. if a party is publicly funded, whether the expert's charges will be subject to assessment; and
k. guidance that the expert's fees and expenses may be limited by the court (note expert's recoverable fees in the small claims track cannot exceed £750: see PD 27 paragraph 7).

18. When necessary, arrangements should be made for dealing with questions to experts and discussions between experts, including any directions given by the court.

19. Experts should be kept informed about deadlines for all matters concerning them. Those instructing experts should send them promptly copies of

all court orders and directions that may affect the preparation of their reports or any other matters concerning their obligations.

Instructions

20. Those instructing experts should ensure that they give clear instructions (and attach relevant documents), including the following:

a. basic information, such as names, addresses, telephone numbers, dates of incidents and any relevant claim reference numbers;
b. the nature of the expertise required;
c. the purpose of the advice or report, a description of the matter(s) to be investigated, the issues to be addressed and the identity of all parties;
d. the statement(s) of case (if any), those documents which form part of disclosure and witness statements and expert reports that are relevant to the advice or report, making clear which have been served and which are drafts and when the latter are likely to be served;
e. where proceedings have not been started, whether they are contemplated and, if so, whether the expert is being asked only for advice*;*
f. an outline programme, consistent with good case management and the expert's availability, for the completion and delivery of each stage of the expert's work; and
g. where proceedings have been started, the dates of any hearings (including any case/costs management conferences and/or pre-trial reviews), the dates fixed by the court or agreed between the parties for the exchange of experts' reports and any other relevant deadlines to be adhered to, the name of the court, the claim number, the track to which the claim has been allocated and whether there is a specific budget for the experts' fees.

21. Those instructing experts should seek to agree, where practicable, the instructions for the experts, and that they receive the same factual material.

Acceptance of instructions

22. Experts should confirm without delay whether they accept their instructions.

23. They should also inform those instructing them (whether on initial instruction or at any later stage) without delay if:

a. instructions are not acceptable because, for example, they require work that falls outside their expertise, impose unrealistic deadlines, or are insufficiently clear. Experts who do not receive clear instructions should request clarification and may indicate that they are not prepared to act unless and until such clear instructions are received;
b. they consider that instructions are insufficient to complete the work;
c. they become aware that they may not be able to fulfil any of the terms of appointment;
d. the instructions and/or work have, for any reason, placed them in conflict with their duties as an expert. Where an expert advisor is approached to act as an expert witness they will need to consider carefully whether they can accept a role as expert witness; or
e. they are not satisfied that they can comply with any orders that have been made.

24. Experts must neither express an opinion outside the scope of their field of expertise, nor accept any instructions to do so.

25. Where an expert identifies that the basis of his instruction differs from that of another expert, he should inform those instructing him.

26. Experts should agree the terms on which they are to be paid with those instructing them. Experts should be aware that they will be required to provide estimates for the court and that the court may limit the amount to be paid as part of any order for budgeted costs (CPR 35.4-5 and 3.15).

Experts' Withdrawal

27. Where experts' instructions are incompatible with their duties, through incompleteness, a conflict between their duty to the court and their instructions, or for any other reason, the experts may consider withdrawing from the case. However, experts should not do so without first discussing the position with those who instruct them and considering whether it would be more appropriate to make a written request for directions from the court. If experts do withdraw, they must give formal written notice to those instructing them.

Experts' right to ask court for directions

28. Experts may request directions from the court to assist them in carrying out their functions (CPR 35.14), for example, if experts consider that they have not been provided with information they require. Experts should normally discuss this with those who instruct them before making a request. Unless the court otherwise orders, any proposed request for directions should be sent to the party instructing the expert at least seven days before filing any request with the court, and to all other parties at least four days before filing it.

29. Requests to the court for directions should be made by letter clearly marked "expert's request for directions" containing:

a. the title of the claim;
b. the claim number;
c. the name of the expert;
d. why directions are sought; and
e. copies of any relevant documentation.

Experts' access to information held by the parties

30. Experts should try to ensure that they have access to all relevant information held by the parties, and that the same information has been disclosed to each expert in the same discipline. Experts should seek to confirm this soon after accepting instructions, notifying instructing solicitors of any omissions.

31. If a solicitor sends an expert additional documents before the report is finalised the solicitor must tell the expert whether any witness statements or expert reports are updated versions of those previously sent and whether they have been filed and served.

32. Experts should be specifically aware of CPR 35.9. This provides that, where one party has access to information that is not readily available to the other party, the court may direct the party who has access to the information to prepare, file and copy to the other party a document recording the information. If experts require such information which has not been disclosed, they should discuss the position with those instructing them without delay, so that a request for the information can be made, and, if not forthcoming, an application can be made to the court.

33. Any request for further information from the other party made by an expert should be in a letter to the expert's instructing party and should state why the information is necessary and the significance in relation to the expert issues in the case.

Single joint experts

34. CPR 35.7-8 and PD 35 paragraph 5 deal with the instruction and use of joint experts by the parties and the powers of the court to order their use. The CPR encourage the use of joint experts. Wherever possible a joint report should be obtained. Single joint experts are the norm in cases allocated to the small claims track and the fast track.

35. In the early stages of a dispute, when investigations, tests, site inspections, photographs, plans or other similar preliminary expert tasks are necessary, consideration should be given to the instruction of a single joint expert, especially where such matters are not expected to be contentious. The objective should be to agree or to narrow issues.

36. Experts who have previously advised a party (whether in the same case or otherwise) should only be proposed as single joint experts if the other parties are given all relevant information about the previous involvement.

37. The appointment of a single joint expert does not prevent parties from instructing their own experts to advise (but the cost of such expert advisors will not be recoverable from another party).

Joint instructions

38. The parties should try to agree joint instructions to single joint experts, but in default of agreement, each party may give instructions. In particular, all parties should try to agree what documents should be included with instructions and what assumptions single joint experts should make.

39. Where the parties fail to agree joint instructions, they should try to agree where the areas of disagreement lie and their instructions should make this clear. If separate instructions are given, they should be copied to the other instructing parties.

40. Where experts are instructed by two or more parties, the terms of appointment should, unless the court has directed otherwise, or the parties have agreed otherwise, include:

a. a statement that all the instructing parties are jointly and severally liable to pay the experts' fees and, accordingly, that experts' invoices should be sent simultaneously to all instructing parties or their solicitors (as appropriate); and
b. a copy of any order limiting experts' fees and expenses (CPR 35.8(4)(a)).

41. Where instructions have not been received by the expert from one or more of the instructing parties, the expert should give notice (normally at least 7 days) of a deadline for their receipt. Unless the instructions are received within the deadline the expert may begin work. If instructions are received after the deadline but before the completion of the report the expert should consider whether it is practicable to comply without adversely affecting the timetable for delivery of the report and without greatly increasing the costs and exceeding any court approved budget. An expert who decides to issue a report without taking into account instructions received after the deadline must inform the parties, who may apply to the court for directions. In either event the report must show clearly that the

expert did not receive instructions within the deadline, or, as the case may be, at all.

Conduct of the single joint expert

42. Single joint experts should keep all instructing parties informed of any material steps that they may be taking by, for example, copying all correspondence to those instructing them.

43. Single joint experts are Part 35 experts and so have an overriding duty to the court. They are the parties' appointed experts and therefore owe an equal duty to all parties. They should maintain independence, impartiality and transparency at all times.

44. Single joint experts should not attend a meeting or conference that is not a joint one, unless all the parties have agreed in writing or the court has directed that such a meeting may be held. There also needs to be agreement about who is to pay the experts' fees for the meeting.

45. Single joint experts may request directions from the court (see paragraphs 28-29).

46. Single joint experts should serve their reports simultaneously on all instructing parties. They should provide a single report even though they may have received instructions that contain conflicts. If conflicting instructions lead to different opinions (for example, because the instructions require the expert to make different assumptions of fact), reports may need to contain more than one set of opinions on any issue. It is for the court to determine the facts.

Cross-examination of the single joint expert

47. Single joint experts do not normally give oral evidence at trial but if they do, all parties may ask questions. In general, written questions (CPR 35.6) should be put to single joint experts before requests are made for them to attend court for the purpose of cross-examination.

Experts' reports

48. The content of experts' reports should be governed by their instructions and general obligations, any court directions, CPR 35 and PD35, and the experts' overriding duty to the court.

49. In preparing reports, experts should maintain professional objectivity and impartiality at all times.

50. PD 35, paragraph 2 provides that experts' reports should be addressed to the court and gives detailed directions about their form and content. All experts and those who instruct them should ensure that they are familiar with these requirements.

51. Model forms of experts' reports are available from bodies such as the Academy of Experts and the Expert Witness Institute and a template for medical reports has been created by the Ministry of Justice.

52. Experts' reports must contain statements that they:

a. understand their duty to the court and have complied and will continue to comply with it; and
b. are aware of and have complied with the requirements of CPR 35 and PD 35 and this guidance.

53. Experts' reports must also be verified by a statement of truth. The form of the statement of truth is:

> *"I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer."*

54. The details of experts' qualifications in reports should be commensurate with the nature and complexity of the case. It may be sufficient to state any academic and professional qualifications. However, where highly specialised expertise is called for, experts should include the detail of particular training and/or experience that qualifies them to provide that specialised evidence.

55. The mandatory statement of the substance of all material instructions should not be incomplete or otherwise tend to mislead. The imperative is transparency. The term “instructions” includes all material that solicitors send to experts. These should be listed, with dates, in the report or an appendix. The omission from the statement of ‘off-the-record’ oral instructions is not permitted. Courts may allow cross-examination about the instructions if there are reasonable grounds to consider that the statement may be inaccurate or incomplete.

56. Where tests of a scientific or technical nature have been carried out, experts should state:

a. the methodology used; and
b. by whom the tests were undertaken and under whose supervision, summarising their respective qualifications and experience.

57. When addressing questions of fact and opinion, experts should keep the two separate. Experts must state those facts (whether assumed or otherwise) upon which their opinions are based; experts should have primary regard to their instructions (paragraphs 20-25 above). Experts must distinguish clearly between those facts that they know to be true and those facts which they assume.

58. Where there are material facts in dispute experts should express separate opinions on each hypothesis put forward. They should not express a view in favour of one or other disputed version of the facts unless, as a result of particular expertise and experience, they consider one set of facts as being improbable or less probable, in which case they may express that view and should give reasons for holding it.

59. If the mandatory summary of the range of opinion is based on published sources, experts should explain those sources and, where appropriate, state the qualifications of the originator(s) of the opinions from which they differ, particularly if such opinions represent a well-established school of thought.

60. Where there is no available source for the range of opinion, experts may need to express opinions on what they believe to be the range that other experts would arrive at if asked. In those circumstances, experts should make it clear that

the range that they summarise is based on their own judgement and explain the basis of that judgement.

Prior to service of reports

61. Before filing and serving an expert's report solicitors must check that any witness statements and other experts' reports relied upon by the expert are the final served versions.

Conclusions of reports

62. A summary of conclusions is mandatory. Generally the summary should be at the end of the report after the reasoning. There may be cases, however, where the court would find it helpful to have a short summary at the beginning, with the full conclusions at the end. For example, in cases involving highly complex matters which fall outside the general knowledge of the court the judge may be assisted in the comprehension of the facts and analysis if the report explains at the outset the basis of the reasoning.

Sequential exchange of experts' reports

63. Where there is to be sequential exchange of reports then the defendant's expert's report usually will be produced in response to the claimant's. The defendant's report should then :

a. confirm whether the background set out in the claimant's expert report is agreed, or identify those parts that in the defendant's expert's view require revision, setting out the necessary revisions. The defendant's expert need not repeat information that is adequately dealt with in the claimant's expert report;
b. focus only on those material areas of difference with the claimant's expert's opinion. The defendant's report should identify those assumptions of the claimant's expert that they consider reasonable (and agree with) and those that they do not; and
c. in particular where the experts are addressing the financial value of heads of claim (for example, the costs of a care regime or loss of profits), the defendant's report should contain a reconciliation

between the claimant's expert's loss assessment and the defendant's, identifying for each assumption any different conclusion to the claimant's expert.

Amendment of reports

64. It may become necessary for experts to amend their reports:

a. as a result of an exchange of questions and answers;
b. following agreements reached at meetings between experts; or
c. where further evidence or documentation is disclosed.

65. Experts should not be asked to amend, expand or alter any parts of reports in a manner which distorts their true opinion, but may be invited to do so to ensure accuracy, clarity, internal consistency, completeness and relevance to the issues. Although experts should generally follow the recommendations of solicitors with regard to the form of reports, they should form their own independent views on the opinions and contents of their reports and not include any suggestions that do not accord with their views.

66. Where experts change their opinion following a meeting of experts, a signed and dated note to that effect is generally sufficient. Where experts significantly alter their opinion, as a result of new evidence or for any other reason, they must inform those who instruct them and amend their reports explaining the reasons. Those instructing experts should inform other parties as soon as possible of any change of opinion.

Written questions to experts

67. Experts have a duty to provide answers to questions properly put. Where they fail to do so, the court may impose sanctions against the party instructing the expert, and, if there is continued non-compliance, debar a party from relying on the report. Experts should copy their answers to those instructing them.

68. Experts' answers to questions become part of their reports. They are covered by the statement of truth, and form part of the expert evidence.

69. Where experts believe that questions put are not properly directed to the clarification of the report, or have been asked out of time, they should discuss the

questions with those instructing them and, if appropriate, those asking the questions. Attempts should be made to resolve such problems without the need for an application to the court for directions, but in the absence of agreement or application for directions by the party or parties, experts may themselves file a written request to court for directions (see paragraphs 28-29).

Discussions between experts

70. The court has the power to direct discussions between experts for the purposes set out in the Rules (CPR 35.12). Parties may also agree that discussions take place between their experts at any stage. Discussions are not mandatory unless ordered by the court.

71. The purpose of discussions between experts should be, wherever possible, to:

a. identify and discuss the expert issues in the proceedings;
b. reach agreed opinions on those issues, and, if that is not possible, narrow the issues;
c. identify those issues on which they agree and disagree and summarise their reasons for disagreement on any issue; and
d. identify what action, if any, may be taken to resolve any of the outstanding issues between the parties.

They are not to seek to settle the proceedings.

72. Where single joint experts have been instructed but parties have, with the permission of the court, instructed their own additional Part 35 experts, there may, if the court so orders or the parties agree, be discussions between the single joint experts and the additional Part 35 experts. Such discussions should be confined to those matters within the remit of the additional Part 35 experts or as ordered by the court.

73. Where there is sequential exchange of expert reports, with the defendant's expert's report prepared in accordance with the guidance at paragraph 61 above, the joint statement should focus upon the areas of disagreement, save for the need for the claimant's expert to consider and respond to material, information and commentary included within the defendant's expert's report.

74. Arrangements for discussions between experts should be proportionate to the value of cases. In small claims and fast-tracks cases there should not normally be face to face meetings between experts: telephone discussion or an exchange of letters should usually suffice. In multi-track cases discussion may be face to face but the practicalities or the proportionality principle may require discussions to be by telephone or video-conference.

75. In multi-track cases the parties, their lawyers and experts should co-operate to produce an agenda for any discussion between experts, although primary responsibility for preparation of the agenda should normally lie with the parties' solicitors.

76. The agenda should indicate what has been agreed and summarise concisely matters that are in dispute. It is often helpful to include questions to be answered by the experts. If agreement cannot be reached promptly or a party is unrepresented, the court may give directions for the drawing up of the agenda. The agenda should be circulated to experts and those instructing them to allow sufficient time for the experts to prepare for the discussion.

77. Those instructing experts must not instruct experts to avoid reaching agreement (or to defer doing so) on any matter within the experts' competence. Experts are not permitted to accept such instructions.

78. The content of discussions between experts should not be referred to at trial unless the parties agree (CPR 35.12(4)). It is good practice for any such agreement to be in writing.

79. At the conclusion of any discussion between experts, a joint statement should be prepared setting out:

a. issues that have been agreed and the basis of that agreement;
b. issues that have not been agreed and the basis of the disagreement;
c. any further issues that have arisen that were not included in the original agenda for discussion; and
d. a record of further action, if any, to be taken or recommended, including if appropriate a further discussion between experts.

80. The joint statement should include a brief re-statement that the experts recognise their duties (or a cross-reference to the relevant statements in their respective reports). The joint statement should also include an express statement that the experts have not been instructed to avoid reaching agreement (or otherwise defer from doing so) on any matter within the experts' competence.

81. The joint statement should be agreed and signed by all the parties to the discussion as soon as practicable.

82. Agreements between experts during discussions do not bind the parties unless the parties expressly agree to be bound (CPR 35.12(5)). However, parties should give careful consideration before refusing to be bound by such an agreement and be able to explain their refusal should it become relevant to the issue of costs.

83. Since April 2013 the court has had the power to order at any stage that experts of like disciplines give their evidence at trial concurrently, not sequentially with their party's evidence as has been the norm hitherto: PD 35 paragraphs 11.1-11.4 (this is often known as "hot–tubbing"). The experts will then be questioned together, firstly by the judge based upon disagreements in the joint statement, and then by the parties' advocates. Concurrent evidence can save time and costs, and assist the judge in assessing the difference of views between experts. Experts need to be told in advance of the trial if the court has made an order for concurrent evidence.

Attendance of experts at court

84. Those instructing experts should ascertain the availability of experts before trial dates are fixed; keep experts updated with timetables (including the dates and times experts are to attend), the location of the court and court orders; consider, where appropriate, whether experts might give evidence via video-link; and inform experts immediately if trial dates are vacated or adjourned.

85. Experts have an obligation to attend court and should ensure that those instructing them are aware of their dates to avoid and that they take all reasonable steps to be available.

86. Experts should normally attend court without the need for a witness summons, but on occasion they may be served to require their attendance (CPR 34). The use of witness summonses does not affect the contractual or other obligations of the parties to pay experts' fees.

87. When a case has been concluded either by a settlement or trial the solicitor should inform the experts they have instructed.

Experts and conditional and contingency fees

88. Payment of experts' fees contingent upon the nature of the expert evidence or upon the outcome of the case is strongly discouraged. In *ex parte Factortame* (no8) [2008] QB 381 at [73], the court said ' we consider that it will be a rare case indeed that the court will be prepared to consent to an expert being instructed under a contingency fee agreement'.

Sanctions

89. Solicitors and experts should be aware that sanctions might apply because of a failure to comply with CPR 35, the PD or court orders.

90. Whether or not court proceedings have been commenced a professional instructing an expert, or an expert, may be subject to sanction for misconduct by their professional body/regulator.

91. If proceedings have been started the court has the power under CPR 44 to impose sanctions:

a. cost penalties against those instructing the expert (including a wasted costs order) or the expert (such as disallowance or reduction of the expert'' fee) (CPR 35.4(4) and CPR 44).
b. that an expert's report/evidence be inadmissible.

92. Experts should also be aware of other possible sanctions

a In more extreme cases, if the court has been misled it may invoke general powers for contempt in the face of the court. The court would then have the power to fine or imprison the wrongdoer.
b If an expert commits perjury, criminal sanctions may follow.

c. If an expert has been negligent there may be a claim on their professional indemnity insurance.

Civil Justice Council

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