Instructing experts – Part 35: practical issues

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1. The admissibility and the presentation of expert evidence in civil cases is governed by Part 35 CPR. Part 35 is restrictive. It encourages the use of joint experts particularly, but not exclusively, in fast-track cases. The first paragraph of the Practice Direction to Part 35 reads:

> "Part 35 is intended to limit the use of oral expert evidence to that which is reasonably required"

The heading to Part 35.1 refers to the "duty to restrict evidence", while the rule itself states:

> "Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings."

In the Family Court the test under Part 25 of the FPR is more restrictive still, namely, that the expert evidence must be "necessary" and this expression is one that has found its way into the civil cases too (and is the word used in paragraph 4 of the 2014 Guidance).

2. The Practice Direction to Part 35 contains the invaluable *Guidance for the Instruction of Experts to Give Evidence in Civil Claims 2014* (set out in the

Appendix to this Note). Much of what one needs to know is contained in this. It is helpful advice to both lawyers and experts alike. The Guidance helps with the interpretation of Part 35 but it does not replace the Rules or the Practice Direction itself. The rules prevail over the Guidance. Nor does the Guidance apply where an expert is advising a party before action, when the advice will usually be privileged. However, it does apply if that same expert is then instructed to provide a report for the proceedings (see the notes to the Guidance). Nevertheless, it provides sound advice even in pre-action matters.

3. Part 35.4 provides that no party may call an expert or put in evidence an expert's report without the court's permission. The granting of that permission will, of course, be guided by the above policy considerations

4. Whether the expert evidence is indeed 'necessary' to resolve the issues is therefore not a bad place to start, but in order to decide whether the expert evidence is 'necessary' or 'reasonably required' it is necessary to have identified the issues which will have to be resolved, and so at an early stage of the case it is essential to have focused on the issues, to have identified them, and to have decided how they are to be proved or resolved. This in turn will dictate the choice of expert and the Court will, at an early CMC, be able to specify the disciplines upon which it wants expert evidence and even the specific issues which are to be addressed (Part 35.3). It is essential, therefore that the parties are clear before attending the CMC what those issues are and why they are relevant to the case. Care needs, therefore, to be given to answering the questions about experts in the allocation questionnaire.

5. It may well be helpful to have had a conference with counsel at an early stage to review where the case is going and what the issues are likely to be. Review disclosure and establish that everything that should be has been disclosed. Establish a chronology. Identify what the medical issues are likely to be and identify the probable disciplines that will be required and then review the known experts in the field who should be approached for initial advice (assuming that such advice is necessary at this stage to guide further inquiries).

6. It is important to note that the rules do not prevent a party instructing an expert to provide that party with advice. The restriction is on the adducing of that evidence and in particular the calling of a live witness at trial. Plainly, and especially in clinical negligence claims, the lawyer will frequently need advice as to whether what has happened represented a breach of acceptable practice.

7. What test is employed to establish if such a breach has occurred, however, is a matter which the lawyers will need to ensure is carefully set out for the advising medic. A simple *Bolam* test is no longer always appropriate and the lawyers need to have decided how to formulate the question to the expert to ensure they are getting an answer which will stand up to subsequent analysis in court.

8. The CPR were also designed to usher in a new era of objectivity in the provision of expert evidence, doing away with the old 'guns for hire' approach that used to exist. It is fair to say that this has been largely but not wholly successful. However, there is undoubtedly a more healthy approach from most experts to their task and the provisions of Part 35.3 identifying the duty of experts to help the court on matters within their expertise as overriding any obligation to the person from whom they have received instructions or by whom they are being paid, a duty which the expert has to acknowledge in the statement at the end of the report (Part 35.10(2) and 35PD.2), has resulted in a greater degree of neutrality than was once the case.

9. The focus on the issues in the case has been further assisted by the requirement for experts in the same field or discipline, once reports have been exchanged, to discuss and seek to narrow the issues that divide them and rationalize the reasons for disagreement into what has come to be called the joint statement (Part 35.12).

10. Thus this talk will thus focus on:

    a. The choice of expert
    b. The report itself
    c. The joint statement (arising from the discussion between the experts)

11. But first it may be worth a short comment on what is expert evidence and when is it reasonably required?

12. The Civil Evidence Act 1972 s. 3 provides that:

> "Subject to any rules of court made in pursuance of . . . this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence".

Thus expert evidence is an exception to the general rule that opinion evidence is not admissible.

13. There is no single test for what amounts to relevant expertise and whether the witness is qualified to provide expert evidence. It is for the judge to decide whether a particular witness has sufficient knowledge or expertise to qualify as an expert in a particular case. In each case the decision will be one of fact and degree, but the basis for the purported expertise and the grounds of the expert's opinion may always be investigated by examination (and indeed by pre-trial inquiry and experiment).

14. In the context of clinical negligence an important factor is that the court should be slow to find that a professional person has breached his duty of skill and care without evidence from those within the same profession, and in particular within the same branch of the same profession.

15. As to when such evidence is reasonably required, in *R v Turner* [1975] QB 834 it was said that:

> 'An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury ….'

However, manifestly such evidence will only be necessary where there is likely to be an issue which has to be resolved, and therefore it is essential that the statements of case have been clearly drafted to identify what is and is not in issue between the parties.

16. The Choice of Expert

The appointment of experts is covered in the Guidance at paras 16-21 where the important point is made that the expert must have the appropriate expertise and experience for the particular instruction. It can too often be the case that an inappropriate choice is made where (eg) a general radiologist is instructed in a matter concerning neuro-radiology, or a psychologist is instructed in a matter on which psychiatric evidence is required, or an adult specialist is instructed in a case requiring paediatric expertise. Another error (in this writer's experience) is the expectation that a neurologist can advise on pretty much anything.

17. One area of current interest is the issue of life expectancy. Who to instruct? A clinician or a statistician? There is a useful recent decision, albeit by a deputy master, *Mays v Drive Force (UK) Ltd* [2019] EWHC 5 (QB), which reviews the authorities (although the review does not include the observations of Tugenhadt J in *Arden v Malcolm* [2007] EWHC 404 (QB), para [36]:

> 'In my judgment it is in the spirit in the decision of the Court of Appeal in [*Royal Victoria Hospital v B*] that the clinician experts should be the normal and primary route through which such statistical evidence should be put before the court. It is only if there is disagreement between them on a statistical matter that the evidence of a statistician, such as Professor Strauss, ought normally to be required.')

The current writer does not necessarily agree with this view, not least because it is not unusual for clinicians in brain injury and spinal injury cases to base their views on life expectancy on statistical studies, so one might ask: why not go straight to the statistician? While it is accepted that the experience of the clinician in managing such cases may also be useful, such experience is bound to be largely anecdotal and fact and case specific, whereas a statistician is likely to have access to cohort studies of significant size. The decision in *Mays* concludes

that statistical evidence can be admissible in appropriate cases alongside the evidence of clinicians, especially where, as in that case, there were co-morbid factors in issue, or (it is suggested) where there is a complex interaction of conditions.

18. The Guidance also advises ensuring that the expert is familiar with the duties of an expert. While the expert always owes a duty to exercise reasonable skill and care to those instructing them, and to comply with any relevant professional code, when they are instructed as an expert to give evidence for civil proceedings they have an overriding duty to help the court on matters within their expertise, overriding any duty to those instructing or paying them.

19. The independence of their opinion may be tested by whether they would give the same opinion if given the same instruction by the other party. What an expert may not do is 'enter the arena' and become an advocate for the party instructing them. The 'partisan' expert will almost certainly do more harm than good to your case.

20. That duty to the court will also extend to an obligation not to offer an opinion outside their own particular area of expertise and to advise if and when the questions put to them do fall outside their expertise. That advice should be given without delay, and it may be that an expert will be able to advise as to the appropriate specialism from which advice should rather be sought. It is quite good practice, especially when seeking advice at an early stage, to specifically ask the expert if there is a discipline or specialism from which a further report should be obtained.

21. Equally, if the expert's instructions are unclear or incomplete, or the information upon which they are required to advise is incomplete, it is part of the expert's duty to advise forthwith those instructing him or her of the lacunae (and ultimately, if the expert does not receive the necessary assistance from that source then they have the right, and in some circumstances the duty, to apply to the court themselves for directions (CPR 35.14 and 35PD.23).

22. It is further essential that those instructing an expert ensure that the expert can comply with the timetable set by the court, is available for trial, and has no conflict of interest (35PD.9). To this end it is important to ensure that any order requiring the expert to do something, or which affects or concerns the expert, is served on him or her forthwith (35PD.8). If it becomes apparent to the expert that they cannot comply, again they must alert those instructing them forthwith.

23. Ultimately, if the expert finds him/herself unable to comply with this duty to the court (or their instructing party) they may have to consider withdrawing (see 35PD.22)

24. From a practical point of view it makes sense to establish what experience the expert has of the forensic process. Has he or she provided reports before? Have they given evidence before? If so at what court level, in what context (and perhaps with what outcome)? Have they been cross-examined before? Are there any adverse judicial comments in the law reports as to the evidence they have given?

25. A further issue is the currency of their experience. Are they still practising, and if retired, for how long? When did the expert surgeon last operate? If there has been a gap since they last practised, does this compromise the validity of their opinion (it may not, but it is an issue which needs to be addressed)?

26. If the parties decide on or the Court directs the instruction of a Single Joint Expert (SJE) it is important that such an expert should not be one who has already advised one of the parties separately unless there has been full disclosure of that expert's previous involvement.

27. <u>The Report</u>

As with everything, the product depends on the materials provided. The Guidance at para 20 provides advice as to the essential elements of appropriate instructions but an important element is identified at para 21 which is that

parties instructing experts should, where practicable, agree the instructions for the experts, so that they are at least addressing the same topic. This may well, in practice, be a counsel of perfection but in medical cases what is essential is that all experts should be working off the same set of medical notes and records which should be (commonly) paginated so that references to the key documents can be made easily.

28. The report itself must be in writing unless the court directs otherwise (CPR 35.5) and its content is circumscribed by Part 35.10 and PD35PD.3. See also the Guidance at paras 48-60.

29. In accordance with the nature of expert evidence, the report must give details of the expert's qualifications. The Guidance at para 54 notes that in a case calling for highly specialized expertise the report should set out why the expert is qualified to report on the particular issue.

30. As already noted the expert must certify that they understand and have complied with their duty to the court, but in addition must state "the substance of all material instructions whether written or oral, on the basis of which the report has been written". In other words there is no room for 'off the record' briefings (see more generally Guidance para 55). The instructions are therefore not privileged from disclosure although no order will be made for the disclosure of specific documents, nor will questioning be allowed in cross examination about the instructions unless the court is satisfied that there are reasonable grounds for believing that the statement about the substance of the instructions given is inaccurate or incomplete. In other words, and consistent with the expert's duty to the court, there is an obligation of transparency in respect of the delivery of expert opinion.

31. Similarly, and in compliance with the duty to the court, the expert must set out the totality of their opinion, so that the report includes everything which the expert regards as relevant to the opinion provided and that any matter which would affect the validity of the opinion is identified. So when there is a range of

opinions which might legitimately be held on an issue, the expert must identify the range of issues, and if their opinion comes down in favour of one then that choice must be rationalized, ideally by way of a 'balance sheet' approach.

32. It is not for the expert to resolve any issue of fact, that being for the judge as the tribunal of fact, but the expert must make clear the factual basis upon which the report is provided. However, there may be room for the expert to provide an opinion on the basis of alternative factual matrices. The report must, nevertheless, make this clear (i.e if the facts are A then my conclusion is 'x' but if the facts are B then my conclusion is 'y'). Moreover the statement of truth (see below) requires the expert to identify those facts which he knows to be true and those which are assumed to be true so that the basis of the report is fully understood.

33. A further requirement is that the report must give details of any literature or other material which has been relied on in making the report. The origin of such literature should be identified, whether it is published and if so whether it was peer reviewed, and the qualifications of the author of the material relied on. In clinical negligence claims any such literature should be served together with the report itself (or at the latest one month before trial) and no further material should be introduced without the permission of the court.

34. So as to ensure that all experts are advising on the same basis, if one party has access to information which is not reasonably available to another, the court may direct that the first party prepare and file a document recording that information and serve it on the other (CPR 35.9). This may have particular relevance in clinical negligence claims where the defendant has access to greater information or expertise than the claimant, and this power can be exercised before proceedings are issued. If an expert requires such information before the report can be prepared then they should approach their instructing solicitors who should then request that information from the other side, and in default make the application under 35.9.

35. There should always be a summary of the conclusions (35PD.3.2(7)). This is usually at the end of the report but it can be helpful to have a summary at the beginning of the report as a synopsis (rather like one would expect in a research paper).

36. Like all evidence, the expert's report must carry a statement of truth, which in the case of an expert's report is set out at 35PD.3.3: "*"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."*

37. An expert should not be asked to amend or alter the report if that would distort their true opinion. It may, however, be necessary to clarify a report, or to ensure that it focuses on the relevant issue before the court. The Code of Conduct of the Bar (paragraph 607.3) states that a barrister must not rehearse, practise or coach a witness in relation to his evidence or the way in which he should give it. It is, however, submitted as being entirely appropriate that counsel should identify from the pleadings the issues upon which the expert in question is to report. He should then seek to ensure that the expert understands those issues and appreciates where the burden of proof lies and what the relevant standards of proof are. It is not for counsel to write the report – it is for counsel to seek to ensure that the expert appreciates the legal matrix in which the expert is volunteering an opinion.

38. There is sometimes some misunderstanding of the ability to ask questions of an expert. This arises under CPR 35.6 and is limited to (proportionate) questions addressed to the other side's (not your own) expert. Unless the court orders otherwise (or the parties agree) such questions may be put once only, within 28 days of receipt of the report and only for the purposes of clarification. It is NOT an opportunity to cross examine the expert on paper. The costs of answering such questions will usually fall on the party asking them. The expert is under a duty to answer such questions unless they are regarded as improper in which case, if the parties cannot agree, the court will have to give directions, but if an

expert fails to answer such appropriate questions, then as well as costs sanctions, that expert's evidence may be ruled inadmissible.

39. The Joint Statement

CPR 35.12 provides for discussions (not in fact a meeting, and most discussions are by phone or emails rather than face to face) between experts. These are not obligatory unless directed by the court but such a direction may be given at any stage of the proceedings. The object is to identify the issues between them and if possible resolve those differences, but it is not for the experts to seek to settle the case in such discussions. However, the object is to reduce the issues which remain in contention and to that end it is impermissible for an expert to be instructed (or for the expert to accept instructions) not to agree (or to defer agreeing) any matters which fall within the experts' competence, and indeed the joint statement should contain a declaration that they have not been so instructed

40. The subject(s) for such discussions may be set by the court, or the parties may agree the agenda, but care must be taken that such agenda setting does not become itself a proxy war. If necessary directions can be sought from the court.

41. The content of these discussions remains privileged (unless the parties agree otherwise) but the statement of agreement or disagreement (with reasons) will be disclosed. Such a statement does not bind the parties (unless this is expressly agreed). The statement is governed by the same duties as the substantive reports (so eg the discussion should not stray beyond the experts' area of expertise). A similar declaration of recognition of these duties is required.

42. There are different views as to whether lawyers should attend such discussions. There may be merit in a lawyer chairing the discussion to ensure that there is focus on the legal issues, but such a chair will need to be independent. In family cases such meetings are often chaired by the children's guardian's solicitor, and the discussion itself is sometimes recorded and transcribed. This can be particularly helpful where the meeting or discussion involves experts from several different disciplines, and in a civil claim where there are co-morbidities a similar

procedure might be valuable. It has been suggested that in clinical negligence cases, to ensure that the claimant does not feel that there has been a 'stitch up' by members of the profession, the parties themselves should be present or represented. However, if others are present they should not become involved in the discussion.

43. If an expert significantly changes their opinion after the discussion, this may give rise to problems. If the experts does this then the joint statement must set out a note explaining this (and the reasons). However, it is essential that very real care is taken by the experts in approaching such discussions and there have been several cases where a lack of such care has resulted in real criticism of the expert, for instance when concessions have been made and then the expert sought to renege on them. Such behaviour may lead to a claim by the instructing party against the expert witness in negligence: see eg *Jones v Kaney* [2011] UKSC 13 in which the Supreme Court abolished witness immunity in such a case. Dr Kaney, a psychologist, had been instructed by the claimant, Mr Jones. Dr Kaney had diagnosed PTSD in her report. She agreed to a joint statement which was very damaging to Mr Jones' claim in that it recorded an agreement that his psychological reaction to the accident was no more than an adjustment reaction that did not reach the level of a depressive disorder of PTSD. It further stated that the respondent had found the appellant to be deceptive and deceitful in his reporting, and that the experts agreed that his behaviour was suggestive of "conscious mechanisms" that raised doubts as to whether his subjective reporting was genuine. Dr Kaney signed this joint statement despite not having seen the other side's expert's reports, and despite the fact that the joint statement did not in fact reflect either what she had said during the discussion or her true opinion. She said she felt under pressure to agree the joint statement. She did not amend her own report or explain her apparent change of view as recorded in the joint statement. The Supreme Court decision was on the principle of immunity on assumed facts and not on the issue of Dr Kaney's liability. Of course an expert has the overriding duty to the court and it would not be negligent to change her opinion for good reason but it was accepted by her representatives that on these facts she would be liable if there was no immunity.

44. There have been some other recent cases where joint statements have not served the purpose for which they were intended. In *Igloo Regeneration (General Partner) Ltd v Powell Williams Partnership* [2013] EWHC 1718 (TCC), a professional negligence case, the experts included some who were inexperienced in forensic work, and who were verging on the partisan. The judge was critical not only of this but of the lawyers for allowing the exchange of multiple addendum reports. He noted:

> *'It was a disappointing feature of the case that there was what some might call a "disconnect" between the experts on each side and in each discipline. They were permitted to exchange a number (up to 5) addendum reports in report or letter form, which is not a practice to be encouraged as it adds to the cost and to the complication of any given case; supplementary reports may be necessary but not generally because the whole idea of the experts producing joint statements listing what is agreed and disagreed is to enable the experts to deal in their main reports only with what is not agreed. Examination of the voluminous second joint statement of the engineer experts reveals what is essentially a running debate on numerous points which is almost like a long and partly repetitive pleading; it was not helpful. It also revealed as was confirmed by Mr Brown in oral evidence that by this stage the two experts had fallen out with each other, which again was not satisfactory. The quantum expert statements were not particularly helpful because they seem to have largely incorporated almost verbatim what was in their reports; it was surprising (and unusual) that there was such little agreement on the figures.'*

45. In *Saunders v Central Manchester University Hospitals NHS Foundation Trust* [2018] EWHC 343 the judge was critical of a 60 page joint statement that did nothing to "agree and narrow" the issues. It seems there had been two separate agendas with repetitive questions, rather than one agreed agenda. The solicitors had failed to co-operate and had descended into a proxy war over the issues.

What is required is a succinct and clear summary of issues, and of the reasons for the remaining disagreement.

46. In another recent decision *Mayr & Others v CMS Cameron McKenna Nabarro Olswang LLP* [2018] EWHC 3669 (Comm) one party's expert failed to engage properly in the process of the experts' discussion. On two successive occasions a joint statement was prepared which wholly failed to address the issues. There was a suspicion that the expert may have had instructions not to agree or to delay expressing an opinion (contrary to the required practice: see para 39 above). Males J commented:

> *'Nobody involved in litigation in this court, whether as client, lawyer or expert, can be in any doubt that the court expects and requires the experts at the joint meeting to take a constructive approach, discussing the contents of their report and the issues on which they are required to express their opinions, reaching agreement where they can and setting out concisely where they cannot reach agreement and why they cannot.*

That agreement is then to be recorded in a joint statement or memorandum. He went on:

> *It is the experts' responsibility to agree the content of the joint memorandum. This is part of their duty to the court as independent experts and is the basis on which the court gives permission for expert evidence. While the lawyers may properly assist the experts by ensuring that they focus on the issues which the court will need to determine, neither clients nor lawyers have any role in dictating to the experts what they can or cannot agree.*
>
> *It is only once that joint memorandum is produced that there is scope for supplemental reports which are usually described, and were described in the order made on this occasion, as short supplemental reports. The object of those reports is not simply to repeat what has been said the first time around but to engage with the points, hopefully although not always, the narrowed points on which the experts remain in*

disagreement after their joint meeting. Sometimes the order will spell this out but, even when it does not, this is implicit.

47. In this case no agreement was reached on any issue but the claimant's expert claimed (twice) that he had "not finalized his thinking" and in the event never produced any constructive contribution to the process. The result was that the claimant was (even though there had been no 'unless' order) debarred from producing their evidence on the issues which had the practical effect of their claim being struck out. While the case (which needs to be read) is an exiguous example of what can go wrong it is nevertheless an important lesson, as well as a useful illustration of the court's power to control the evidence and especially the expert evidence in the case before it..

48. Conclusion

The most important message is that for both instructing lawyers and experts, the identification of, and then focus upon, the issues which are necessary for the resolution of the case is crucial. This depends on clear pleading and common materials shared between the parties and their experts. The initial (privileged) advice will be essential to guide the lawyer to the issues but the lawyer will then need to refine the legal elements, to ensure that the expert reports address the relevant questions. It is essential that the expert has the necessary expertise, at the appropriate level, and that the expert also has a familiarity with the forensic process. Bringing the expert's attention to the provisions of Part 35, the Practice Direction and the Guidance will be mandatory to ensure compliance with the practice and procedure which will play an essential part in the successful prosecution or defence of the claim

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APPENDIX

Guidance for the instruction of experts in civil claims

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 (2005, amended 2009).

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 64-66).

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 89-92).

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 (CPR.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(2) and (4) 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 7 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 3.1 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 63 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) [2003] 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.

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