

Getting in line



Chris Pamplin considers revised guidance for expert witnesses & those who instruct them

In 2005 the Civil Justice Council (CJC) published guidance on instructing experts to give evidence in civil claims, and this is now annexed to Civil Procedure Rules (CPR) Practice Direction (PD) 35. Although the guidance was updated in 2009, there have been no significant changes since its inception.

However, in July 2012, a CJC working party published revised guidance for the instruction of experts (see http://www.jspubs.com/Experts/library/lib_eridx.cfm). It is designed, say its authors, to help litigants, instructing solicitors and expert witnesses to understand best practice in meeting the requirements of the CPR.

The CJC expects that this revised version will replace the Experts' Protocol currently appended to PD35. However, before it comes into force, it needs to be reviewed and approved by the Civil Procedure Rules Committee - such matters are seldom swiftly done.

Although the substance of the guidance is not radically different from the 2005 version, there are some subtle changes and one or two quite significant ones. One clear difference is how the guidance has been structured. The latest version addresses the following in turn:

- key points affecting litigants and those instructing expert witnesses
- key points for expert witnesses, and
- specific issues, such as single joint

experts (SJE), contingency fees and sanctions for failing to comply with the CPR or court orders.

This makes the new guidance quite 'user friendly' but does result in some elements that were grouped together previously being fragmented and scattered throughout the text. The significant revisions, designed principally to reflect the Jackson Reforms, can be summarised as follows.

Fees

The section on terms of appointment now makes it clear that the court may require experts to provide an estimate of their charges (paragraph 2.2.2.2). Furthermore, paragraph 2.2.2.11 imposes an additional duty on those instructing experts to ensure that the expert's terms of appointment include guidance that fees and expenses may be limited by the Court. Experts should agree the terms on which they are to be paid with those instructing them. What's more, they should be mindful that they may be required to provide estimates for the court, their fees may be scrutinised and the court may limit the amount to be paid as part of any order for costs (3.3.4).

A potentially major change concerns contingency fees for experts. With the implementation of the Jackson Reforms in

April 2013, contingency fees for lawyers will be permitted for most contentious work. Interestingly, the new guidance includes a specific section on contingency fees (4.3). It notes that the payment of expert fees contingent on the nature of the expert evidence given or the outcome of the case is 'highly undesirable' due to the overriding concern of ensuring the independence and objectivity of expert evidence. The guidance expressly provides that experts must not be retained on such a basis, save in *exceptional cases* where the court gives authorisation. This is a departure from the 2005 wording which was effectively an absolute prohibition. It seems that with the expected increase in contingency fees for lawyers in civil cases, the door has been left slightly ajar for experts to work on this basis too, should any expert think that desirable.

Instructions

The revisions now provide that those instructing experts should seek to agree, where possible, the details of the instructions for the experts, and this should include any difference in the factual material that is to be considered by the experts (2.3.2). The previous guidance included such a provision but only for parties instructing an SJE.

Acceptance

The revised guidance appears to give greater emphasis to the duty of an expert to ensure that the instructions received are clear. While elements of this are contained in the old protocol, a slight shift in emphasis suggests that there is an

increased burden of responsibility on the expert to ensure compliance.

Section 3.3 – dealing with an expert's acceptance of instructions – provides that 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. Similarly, 3.5.1 – dealing with an expert's right to ask the court for directions – now offers a failure by the instructing solicitor to give required information as a specific example of a circumstance when an expert might request such directions.

There is also increased emphasis on the duty of the expert to be satisfied that access to all relevant information held by the parties has been allowed. Experts should seek to confirm this quickly after acceptance of instructions and notify instructing solicitors of any omissions. The revised guidance also requires that experts should continue to monitor this duty (3.6.1).

There is a slight change in the section dealing with reliance on the work of others. The 2005 wording is retained regarding the expert's need to state those facts (whether assumed or otherwise) upon which his or her opinions are based and to distinguish clearly between those facts known to be true and those assumed. However, the revision adds that, in this respect, all experts should have primary regard to their instructions. Consequently, so long as there are no obvious anomalies or conflicts of fact, an expert is unlikely to fall foul of the rules if those facts are identified that lie outside the expert's specific knowledge but are relied upon in the instructions.

The revisions also include a provision that expert joint statements following discussions 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 to otherwise defer from doing so) on any matter within their competence (3.10.4).

Sequential exchange of expert reports

The revised guidance contains specific provisions for the sequential exchange of expert reports (3.7.17).

The defendant's expert report should: confirm that the background to

the case, as set out in the claimant's expert report, is agreed; where some or all of it is not, identify those parts that require revision, setting out the revisions considered to be necessary

- seek to focus only on material areas of difference with the claimant's expert's opinion and to identify assumptions considered to be reasonable and those that are not, and
- contain reconciliation between any loss assessment made by him/her and that made by the claimant's expert, identifying any different conclusions and the related financial impact.

Where there is sequential exchange in accordance with the above, it is expected that the expert discussions, and hence the joint statement, would focus on the areas of disagreement. The claimant's expert would then also consider and respond to any material, information and commentary included within the defendant's expert report (3.10.2).

Where an SJE has been instructed but the parties have, with permission of the court, instructed their own additional experts, there may be, if the court so orders or the parties agree, discussions between the SJE and the additional experts. Such discussions should be confined to those matters within the remit of the additional experts or as ordered by the court (3.10.6).

Sanctions & penalties

Unlike the 2005 protocol, the revised guidelines conclude with a summary of the sanctions that may be imposed for failure to comply with CPR 35, the PD or any court order (4.4). Experts are reminded of the duty to the court that overrides any obligation to the party instructing them. Following the case law that eroded and then removed expert immunity from suit, the revised guidelines identify two types of sanction in the context of cases where court proceedings have not been commenced. These are:

- any misconduct of a professional instructing an expert or the expert may be subject to sanction by their professional body or regulator, and
- the court has the power under CPR 35.4(4) and CPR 44 to impose costs sanctions which may alter the level of cost to be recovered or fees to be paid to the expert.

In cases where proceedings have been commenced, the guidelines identify the

following potential penalties for breach:

- matters of misconduct may be dealt with by the professional instructing experts or the expert's professional or regulatory body
- the court may impose cost penalties against those instructing the expert (including a wasted costs order) or the expert (such as a disallowance or reduction of the expert's fee)
- the court may rule the expert's evidence to be inadmissible
- in extreme cases, if the court has been misled, it may invoke general powers for contempt of court, which may carry a fine or term of imprisonment, and
- if an expert commits perjury, criminal sanctions may follow.

Summary

Given the expected implementation of the Jackson Reforms in April 2013, there is, perhaps, little to surprise us in these revised guidelines. For the most part, they are simply a tidy up of the 2005 protocol and bring it into line with Jackson's overall vision.

The removal of expert immunity means that the need for experts to focus on their duties and responsibilities is more acute than ever. Indeed, one of the possible benefits of the revisions is that they do seem to make clearer those matters that fall within the express responsibility of the expert and those that lie mainly with the instructing party.

However, there are areas where the Civil Rules Committee will want to finesse the text. For example, 3.6.1 states that the "experts in a case should satisfy themselves that they have access to all relevant information and in any event the same information that has been disclosed by all the parties." Naturally, any expert will be able to see where expected material is missing, but how is an expert to know what instructions another party has given to some other expert?

Perhaps the biggest surprise lies in the changes made to the provisions prohibiting contingency fees for experts. While it is really just toying with the wording, we must assume that the authors of the guidance have some specific, but as yet unclear, agenda in mind.

NLJ

Dr Chris Pamplin is the editor of the *UK Register of Expert Witnesses* and can be contacted on nlj@jpubs.com. Website: www.jpubs.com