



## Compare & contrast (Pt 1)

In the first of a two part series, [Dr Chris Pamplin](#) explains why the new guidance for experts should be required reading for all expert witnesses & those who instruct them

### IN BRIEF

- ▶ Revisiting the duties & obligations of experts
- ▶ Appointing & instructing experts

The long-awaited update to the 2007 *Protocol for the Instruction of Experts to give Evidence in Civil Claims* (written by the Civil Justice Council (CJC): see [www.jspubs.com/cjcguidance2014](http://www.jspubs.com/cjcguidance2014)) is with us at last. Renamed *Guidance for the instruction of experts in civil claims*, it leaves much of the original guidance in place but adds some new material in areas that have changed, or been introduced, since 2007. This short series works through the new guidance drawing out the key points for experts, providing a refresher on the guidance that has not changed, and an introduction to the areas that have.

- ▶ References in the form (para 1) represent the paragraph number in the new guidance.
- ▶ New material is **highlighted red**.

### Purpose

The purpose of the guidance is now to allow litigants, experts and those who instruct them to “...understand best practice in complying with Part 35 and court orders”. In the original, the purpose was to provide “...clear guidance as to what they are expected to do in civil proceedings” in the interests of “good practice” (Para 1).

### Pre-action protocol

As before, experts and those instructing them (so does that exclude the lawyer’s client?) must have regard to the objectives underlying the pre-action protocols. These are:

- ▶ to ensure early and full disclosure of the expert issues
- ▶ to agree as many of the expert issues before proceedings begin, and
- ▶ to support efficient management of the proceedings (Para 2).

### Specialist proceedings

Experts, and those who instruct them, still need to be aware of other court guidance and of specialist proceedings in some cases (para 3).

### Judicial notice & limitation

The 2007 guidance warned that the courts could take account of any failure to comply with the protocol, and stated that if complying with the protocol would time bar a case, then the protocol could be bypassed but the court had to be told of such abrogation. Perhaps the CJC feels that both are self-evident truths because both have been removed for the 2014 update.

### Need for experts

Of course, proportionality is now paramount in the civil justice system’s pursuit of justice. So we are offered a new section on the need for experts (para 4). It requires those intending to instruct experts specifically to consider whether, bearing in mind Civil Procedure Rules (CPR) Parts 1 and 35, such evidence “... is required to resolve the proceedings...” – it used to say “... reasonably required”. We are reminded that the court’s permission is required to use expert evidence in court proceedings, but that in general the parties are free to instruct an expert for their own private purposes without any particular permission (para 5).

### Expert advisers

There is helpful emphasis given to the important difference between expert witnesses instructed under CPR 35 and expert advisers—upon whose opinions the parties do not intend to rely in court (para 6). There is also implicit acceptance that an expert adviser can later take on the role of expert witness proper (para 7). The new guidance does not apply to expert advisers (para 8).

### Duties & obligations of experts

The duty for experts to exercise reasonable care, comply with any professional codes and have an overriding duty to the court all remain (para 9).

- ▶ **The overriding objective:** experts are reminded of their obligation to help the court achieve the overriding objective set out in CPR 1.1. Helpfully, a meaning of “proportionate” is spelt out—“... keeping the work and costs in proportion to the value and importance of the case to the parties...” (para 10). The previous exhortations not to stray into mediation or otherwise trespass on the court’s function are gone, but clearly they still apply!
- ▶ **Other duties:** an expert’s duty to independence (para 11), to stay within their area of expertise (para 12), to take into account all material facts (para 13) and to promptly flag up any change of opinion (para 14) all remain.
- ▶ **Sanction:** there remains the warning that failure to comply with court rules or court judgments may have consequences (para 15). However, instead of stressing the wholly exceptional case of *Phillips v Symes*, the guidance speaks only of sanctions on the parties. Before

any, possibly reckless, expert starts to relax, though, an entirely new section on sanctions has been added at paras 89–92.

### Appointment of experts

Before instructing an expert, a lawyer must still establish that the expert has the appropriate expertise, understands the duties of an expert witness, has capacity to perform the work to the required timescale and at a cost proportionate to the matters in issue, can attend trial if needed and has no potential conflict of interest (para 16). Oddly, the need to establish a description of the work required has been removed.

- ▶ **Terms of appointment:** the agreement of terms at the outset of the instruction remains. It must include setting out the nature of the instruction, ie party expert, single joint expert, or adviser, the services required, the timescale, the basis for the expert fees and payment terms. Both cancellation fees and the acceptance, or otherwise, of any fee reduction based on court assessment should also be defined. Furthermore, the expert should be reminded that the court has powers to limit the expert fee (para 17). In an addition to the guidance, parties are reminded that CPR 35.4(2) requires them to provide estimates of the cost of the proposed expert evidence in every case. The need to make arrangements for dealing with questions to experts and expert discussions is unchanged (para 18), while those instructing experts remain under a duty to keep experts informed about deadlines and court orders that touch on the work of the expert (para 19).

### Instructions

The requirement to give clear instructions stays (para 20)—for all the good it did in the previous version! In a move that may in fact cause confusion, **there is now a need, when disclosing documents, for the solicitor to make “... clear which have been served and which are drafts and when the latter are likely to be served...”**. In so far as this helps experts to avoid pulling quotes from a draft witness statement which changes in the final version—something that has made more than one expert look foolish in the witness box—then this has to be for the good. But there is a long-standing problem with lawyers sending experts “background material” that should not be cited in the expert report. The practice is unhelpful and risks putting experts in breach of their duty under CPR 35.10(3) to state the “... substance of all material instructions”.

Whether a document attracts

legal privilege is a legal issue outside the competence of expert witnesses. If an expert is shown evidence that is relevant to the opinion given in the expert report, the source of that evidence must be noted in the report. Alternatively, if a lawyer sends an expert material that should not be cited, in our view the expert should return it unread. But what an expert should never do is ignore known evidence relevant to the opinion.

- ▶ **Agreed instructions: a new section requires those who instruct experts to try to agree the instructions and use the same factual material as the baseline (para 21).** It's a helpful reminder to non-lawyers that a reason experts may come to radically different opinions could be because they are given different evidence to consider at the outset! **It is reinforced by the new requirement (para 25) for experts to highlight where such evidential discrepancies occur.**
- ▶ **Acceptance of instructions:** as before, experts should be prompt in confirming, or otherwise, their willingness to accept the instruction to act (para 22). The associated requirement, to advise promptly if circumstances change to cast doubt over the expert's ability to complete the instructions, is expanded (para 23). Experts should say if their instructions are insufficiently clear, impose an unrealistic timeframe, or fall outside the expert's area of expertise. The potential difficulties that can arise when an expert adviser—a partisan adviser to a party—moves to the role of expert witness—instructed under CPR 35 with an overriding duty to independence and the court—are noted explicitly. The requirement for experts to stay within their area of expertise is unchanged (para 24).
- ▶ **Agreed payment terms:** in an attempt to reduce the perennial problem of experts and lawyers bickering over fees, the guidance states that experts should agree payment terms with those who instruct them (para 26). But experts are reminded that they are always required to provide cost estimates and the court has the power to limit the amount paid as part of an order for budgeted costs. It seems to us that the latter power applies only in multi-track cases and relates to costs between the parties—it does not override the fees due under the contract agreed between the expert and the solicitor.



### Withdrawal from an instruction

The guidance for experts on withdrawing from instructions is essentially unchanged (para 27). However, it no longer states that the reason for contemplating withdrawing should be “substantial and significant”. Perhaps that goes without saying!

### Asking the court for directions

The guidance on when and how an expert can take advantage of the power contained in CPR 35.14—to ask the court for directions—remains unchanged. However, an example is included of when such a request might be needed (para 28). There is also advice to include the phrase “expert's request for directions” on any request (para 29). It remains to be seen whether that will remove the confusion such requests are reported to have created hitherto in court offices.

### Access to all information

What should an expert do if it is felt that required information is being withheld? The advice has changed. Formerly, if, following discussions with those who instructed the expert, this wasn't resolved, the expert sought direction from the court. **Now, the guidance places a greater duty on the expert to identify both missing information and those cases where experts are working on a dissimilar evidence base. If such problems are identified, the expert is required simply to tell the instructing solicitor (para 30).**

**There is also a new duty upon the solicitor to specifically alert experts if any documents being sent are updated versions of material sent previously, and to note whether they have been filed with the court and/or served on the other party (para 31).**

The expert's attention is drawn to the power under CPR 35.9 for the court to require that information be disclosed by another party. In the 2007 guidance it was the responsibility of the expert to decide if the cost of obtaining the further information was proportionate. That was always a tall order for an expert with no legal training and who did not have conduct of the case! **Now new guidance requires the expert to inform the instructing solicitor of what is needed and its significance to the expert issue. It is then, presumably, for the lawyer to decide on proportionality (para 32). Any request for further information should be put to the expert's own instructing solicitor in writing, and should set out why it is needed and its importance to the expert issues (para 33).**

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