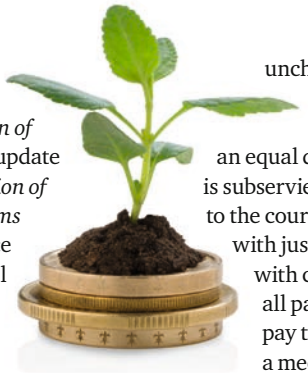
Compare & contrast (Pt 2)

Dr Chris Pamplin continues his exploration of the new guidance for experts



As we covered in the first part of this short series, *Guidance for the instruction of experts in civil claims,* the update to the 2007 *Protocol for the Instruction of Experts to give Evidence in Civil Claims* leaves much of the original guidance in place but adds some new material in areas that have changed, or been introduced, since 2007 (see "Compare & contrast (Pt 1)", NLJ, 23 January 2015, pp 19-20). This second article continues to work through the new guidance.

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

Single joint experts

The standing assumption on using single joint experts (SJEs) in small claims and fast-track cases remains (para 34), with the aim being to agree or narrow issues that are not contentious (para 35). The redeployment of a party-appointed expert as an SJE requires full disclosure of the expert's prior involvement in the case (para 36). The ability to appoint party experts to "shadow" an SJE remains, as does the inability to recover any associated costs from another party (para 37).

The exhortation to parties to agree joint instructions for an SJE stays (para 38). If that isn't possible, then separate instructions can be given but the parties should then try to agree on their disagreements and set them out in the instructions (para 39). What happens when the parties disagree on their disagreements is covered in a moment!

An SJE's right to joint and several liability for payment from all parties remains (para 40), although it is now a requirement that any order limiting an expert's fee is copied to the expert (previously the expert was merely notified of the existence of such an order).

So what's an expert to do when the parties are unable to agree on anything? The position remains unchanged. If left waiting for instructions, the expert can set a deadline (normally seven days hence), after which work will commence. If that approach means a report is written that fails to take into account instructions received after the deadline, then that is acceptable but the expert must clearly disclose that limitation (para 41).

Guidance on the conduct of the SJE remains unchanged. SJEs must keep all parties informed at all times (para 42); they have an equal duty to all the parties which is subservient to the overriding duty to the court (para 43); and meetings with just one party, eg conference with counsel, must be agreed by all parties, as well as who is to pay the expert for attending such a meeting (para 44). An SJE, like a party expert, may seek directions from the court (para 45), while the SJE report should be served on all parties simultaneously (para 46). It should be noted that even if there are multiple sets of instructions, only one report should be prepared even if it contains multiple opinions necessitated by conflicting assumptions of fact.

Expert reports

The content of the expert report is still governed by the instructions, the general obligations, CPR 35 and its practice direction, and the expert's overriding duty to the court. But the need to follow any court directions is spelt out (para 48). Objectivity and impartiality must be maintained (para 49), and the report should be addressed to the court and comply with the CPR 35 guidance on form and content (para 50). Reference to various model forms of report are extended to include the template for medical reports created by the Ministry of Justice (para 51).

The mandatory statements to be included in a report have been expanded slightly. An expert must still understand his duties and comply, and continue to comply, with these duties. In addition, though, an expert must confirm his awareness of CPR 35, its practice direction and the CJC guidance (para 52). Naturally, the statement of truth as set out in CPR 35 PD 3.3 must also appear in the report (para 53). The guidance on defining qualifications remains unchanged (para 54): the level of detail should reflect the complexity of the case.

- **Material instructions**: guidance about the mandatory statement on the substance of all material instructions remains, with the stress on transparency. If an expert is shown something that is relevant to his opinion, it must feature in the summary of instructions given (para 55).
- **Tests**: unchanged from the earlier guidance, where tests are carried out, details of the methodology, and information about any technician who conducted such tests, must be provided (para 56). However, the previous guidance on reliance on the work of others has been removed—presumably because it simply reiterated that found elsewhere in the update.
- **Facts**: facts must still be separated from opinion, and opinion must be linked to the underlying facts. Experts must distinguish those facts they know to be true from those they are asked to assume (para 57). When it comes to the facts, the guidance adds stress to the point that experts must be guided primarily by their instructions—which is a warning to experts to restrict themselves to their letter of instruction.

Experts are still required to offer multiple opinions when the material facts are in dispute. In such cases, experts should only express a view that favours one version of the facts over others if they do so based on their expertise. Exactly why they hold such a view must be explained fully in their report (para 58). Experts must cite the published sources that support their mandatory statement of the range of opinion (para 59). When no source for the range exists, experts must still say what they believe the range would be (para 60).

- **Service of the report**: new guidance is given that before filing and serving an expert report, *solicitors* must check that any witness statements and other expert reports relied upon by the expert are the final served versions (para 61).
- **Conclusions of the report**: a summary of the conclusions is mandatory and is usually put at the end of the report. However, if the complexity of the case so demands, an "executive summary" at the front of the report is permitted (para 62).
- **Sequential exchange of expert reports**: new guidance applies to the sequential exchange of reports (para 63). The defendant's expert report will usually be produced in response to the claimant's. The defendant's report should then:
  - 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 dealt with adequately in the claimant's expert report.
  - focus only on those material areas of difference with the claimant's expert's opinion. The defendant's expert report should identify those assumptions of the claimant's expert that are

considered to be reasonable (and agreed with) and those that are not.
- in particular, where the experts are addressing the financial value of heads of claim (e.g. the costs of a care regime or loss of profits), the defendant's expert report should contain a reconciliation between the claimant's expert's loss assessment and the defendant's, identifying for each assumption any conclusion different from that of the claimant's expert.

Amendment of reports

As previously, if an expert's opinion changes following a meeting of experts, then a short, signed and dated note will generally suffice. If the change of opinion is based on new evidence, however, the expert must amend the report, explaining the reasons. Furthermore, those instructing the expert must inform the other parties (para 66). While this guidance has been streamlined somewhat, it remains essentially unchanged from the 2007 version.

Discussions between experts

The court still has the power to direct discussions between experts for the purposes set out in CPR 35.12. In addition, the parties keep the ability to agree that discussions can take place between their experts at any stage. However, there is a new reminder that discussions are not mandatory unless ordered by the court (para 70).

The original guidance on the purpose of such discussions was to:

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

In 2014 the guidance is strengthened by a welcome, if stark, warning that the purpose of such discussions is "not to seek to settle the proceedings" (para 71).

New guidance at para 72 deals with an SJE meeting with a party-appointed expert (one who has been authorised by the court). In such cases, the remit of any meeting will normally be limited by the remit of the party-appointed expert.

Further new guidance at para 73 sets out that where there is sequential exchange of expert reports, with the defendant's expert report prepared in accordance with the guidance at para 61, the joint statement should focus on the areas of disagreement. The only exception accommodates the need for the claimant's expert to consider and respond to material, information and commentary included within the defendant's expert report.

The need to balance the cost of holding discussions against the value of the case remains (para 74), so telephone discussions will be the norm in anything other than higher value multi-track cases. The parties, their lawyers and experts should co-operate to produce an agenda, but in the new guidance this is restricted to multi-track cases (para 75), leaving open what happens in the vast majority of lower value cases.

The agenda should be circulated to experts and those instructing them to allow sufficient time for the experts to prepare for the discussion (para 76). The prohibition on telling experts not to reach agreement in meetings remains in force (para 77), as does the bar on the content of discussions between experts being referred to at trial unless the parties agree (para 78).

However, the 2007 guidance on the parties' lawyers only being present at discussions between experts if all the parties agree or the court so orders has, regrettably, now been removed.

Guidance on the content of the joint statement has not changed (para 78). The joint statement should set out:

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

There is, though, new guidance at para 80 which states that the joint statement should include a brief re-statement that the experts recognise their duties, as well as an express statement that the experts have not been instructed to avoid reaching agreement on any matter within their competence. As previously, the joint statement should be agreed and signed by all the parties to the discussion as soon as practicable. Sadly, there is still no explicit guidance on what an expert should do when faced with another expert who refuses to follow the guidance!

Agreements reached by experts following discussions still do not bind the parties, although this is accompanied by the warning that in refusing to be bound the party runs the risk of subsequent cost sanctions (para 82).

In the hot tub

Para 83 issues new guidance on the use of concurrent evidence: so-called "hot tubbing". It explains how the process works, and outlines its benefits, before noting that experts need to be told in advance of the trial if the court has made an order for concurrent evidence.

Attendance at court

Guidance on the duties of those instructing experts for attendance at court is reworded but, in essence, unchanged (para 84). Solicitors 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 court), the location of the court and the content of court orders; and inform experts immediately if trial dates are vacated or adjourned.

Experts are reminded that they have an obligation to attend court, and should take proper steps to ensure their availability (para 85). Guidance on the use of the witness summons to help achieve this (which does not affect the contractual obligations of the party to pay their expert) remains (para 86).

Finally, para 87 introduces to solicitors a new obligation that is highly likely to be ignored routinely. When a case has concluded, by either a settlement or trial, the solicitor should inform the instructed expert(s). Experts won't be holding their breath!

Conditional & contingency fees

The new 2014 guidance inexplicably, and unhelpfully, weakens the previous total ban on payments to experts that depend on the outcome of the case. In the 2007 guidance such terms should be neither offered nor accepted; to do so would " contravene experts' overriding duty to the court and compromise their duty of Independence". But now we have only strong discouragement (para 88). The guidance remains firmly against such fees, but we wonder why it was felt necessary to weaken the previous absolute ban.

Sanctions

An entirely new section on sanctions has been included in the 2014 guidance. Sanctions can apply to solicitors or experts (para 89). In the case of the expert, there could be recourse to a professional body (para 90). Once proceedings have started, the sanctions can include the court reducing (even to zero) the fee the expert will receive, or the expert report can be ruled inadmissible (para 91).

To finish on a high, the final section alerts experts to the more serious sanctions they could face: contempt of court proceedings, perjury proceedings or a claim against their professional indemnity insurance! NLJ

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