

# Your Witness

Newsletter of the  
UK Register of  
Expert Witnesses,  
published by  
J S Publications

## VAT on expert reports

A flurry of calls on the *Register* Helpline raised the question of whether medical experts, whose medico-legal reporting had come within the ambit of VAT for the first time in May 2007, could now stop charging VAT because of a recent tax tribunal decision. The answer is 'No!' Medico-legal reporting is still a service that attracts VAT, and any doctor who is VAT registered must continue to charge the tax. But the good news is that the decision does mean that personal injury claimants will not have to pay VAT on the cost of medical reports. That could represent a saving of hundreds of pounds now that VAT is levied at 20%.

Barratt Goff & Tomlinson (BGT), a personal injury and clinical negligence firm based in Nottingham, successfully challenged changes by HM Revenue & Customs (HMRC) on the way medical reports and records to be used in litigation are assessed for VAT. Historically, when a law firm paid for a medical expert's report it did so 'on behalf of' the client. So, the argument went, when passing on the cost to the client it should be treated as a disbursement and so fall outside the scope of VAT. This treatment had long been accepted by HMRC. However, in August 2008, HMRC asserted that because a law firm peruses the reports as an integral part of the legal services it provides, obtaining the report does not meet the (rather onerous) requirements of what can be treated as a disbursement. So VAT should be paid by the client to the law firm when the cost of the report is passed on.

BGT, assisted by an unusual intervention by the Law Society of England and Wales, told the Manchester tax tribunal that the 'use' of medical reports and records was part of the legal service provided. Indeed VAT was already charged on this as part of the tax payable on a lawyer's fees charged to the client. But 'obtaining' the reports was, they argued, a separate service carried out as an agent on behalf of the claimant, so the expense incurred was a disbursement. The tribunal accepted these arguments.

So now the expert charges VAT on his fee, the lawyer pays the VAT to the expert, the expert pays the VAT to HMRC and the lawyer claims the VAT back from the HMRC. Subsequently, the lawyer charges his client the cost of the report (nett of VAT) as a disbursement and that is outside the scope of VAT. Looked at like this, it is clear just how little value there was in adding all the extra administrative burden that comes with VAT registration to the medico-legal reporting sector. The Government can receive hardly any

revenue; indeed it may well lose revenue overall because all the doctors can now reclaim the VAT they pay out on computers, rent, etc. Ah well, so much for joined up thinking!

## 'Shaken Baby' guidance

The Crown Prosecution Service (CPS) has issued guidance on its approach to non-accidental head injury cases (NAHI, previously known as 'shaken baby' cases). This guidance explains (i) what evidence will be needed for the Crown to prove a NAHI case; (ii) what challenges may come from the defence, and how to resist them; and (iii) the importance of complying with Criminal Procedure Rules in these cases.

The Crown has always been keen on the Triad of Injuries (bleeding into the lining of the eye, bleeding beneath the dural membrane and brain damage affecting function) as a clear indication of non-accidental injury. But, since the judgment in *R -v- Cannings* [2004] EWCA Crim 01, there has been a move towards challenging the Triad. Indeed, at a recent meeting held by the Royal College of Pathologists, 'it was agreed that, based on current knowledge, the presence of "the triad", even in its "characteristic" form, should not be regarded as absolute proof of traumatic head injury in the absence of any other corroborative evidence.' Notwithstanding this, the CPS view is that attacks on the Triad be strongly resisted.

The guidance can be found on the CPS website (<http://www.cps.gov.uk>) or by searching Google for *CPS NAHI prosecution approach*.

## 'Likelihood' guidance

In the last issue (*Your Witness* 62, p4) we looked at a case that led the court to be critical of the reliance placed on an insufficiently large database, the Forensic Science Services' Footwear Database (FD). In November 2010 the CPS published some troubling guidance on this.

The CPS, pointing out rightly that the 'ruling only applies to evidence based on the Footmark Database', goes on to assert that the 'principles should not, at this stage, be applied to other database analysis'. I find this very worrying. Of course, the specific criticism of the FD relates just to that database. But the criticism has a general nature as well as a specific one. *Any* database that is too small to support the kind of statistical manipulation that was used on the FD should be caught by the principles set out in the *R -v- T* judgment, and the CPS should have the wit to see this general lesson.

The guidance can be found by searching Google for *Footwear Database Bayesian statistics*.  
*Chris Pamplin*

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# Family Procedure Rules

Finally! After a decade-long gestation, the Family Procedure Rules 2010 (SI 2010/2955) (FPR) come into force on 6 April 2011. They provide a single set of rules for family proceedings in high courts, county courts and magistrates' courts in the style of the Civil Procedure Rules (CPR). Most of the powers in the FPR are already available to the court, but their codification in a single set of rules is welcome nonetheless. They also give the court the freedom to be even more creative and pragmatic in its management of family cases.

But, whilst the FPR are modelled on the CPR, the two systems are not as similar as might be supposed. Where the CPR deal with a serial process (claim, various prescribed procedures, judgment, court order, costs application, appeal and enforcement), the FPR try to encompass a substantial array of procedural, jurisdictional, case management and evidential elements to diverse sets of family proceedings in at least three court systems. Where the CPR are, mostly, a model of clear English and consistent style, the FPR are not!

Thankfully for expert witnesses, though, that part of the FPR dealing with experts – Part 25 – for the most part simply applies the provisions of CPR Part 35 to the entirety of family proceedings.

Starting on page 6 of this issue we set out the complete text of Part 25. But before comparing FPR Part 25 with CPR Part 35, there are two minor rules to bear in mind.

- Rule 12.20 deals with any expert evidence that involves the examination of a child. It holds to the court alone the power to authorise any examination of a child.
- Part 12 of the FPR deals with most proceedings relating to children, and under chapter 7 of Part 12 (communication of information), Rule 12.74 – in terms that we shall see are similar to those in Part 25 – places the control of expert evidence firmly with the court.

## The rules in comparison

The duty to restrict expert evidence (r25.1) is identical to CPR r35.1. The interpretation of 'expert' and 'single joint expert' (SJE) in r25.2 is the same as r35.2 but with the specific exclusion of certain persons in accordance with the Adoption and Children Act 2002. The expert's overriding duty to the court (r25.3), the court's power to restrict expert evidence (r25.4) and the general requirement for expert evidence to be given in a written report (r25.5) are all identical to their CPR equivalents contained in r35.3, r35.4 and r35.5 – although, obviously, reference to the small claims, fast- and multi-track systems in civil courts has been omitted.

The provision for written questions to experts (r25.6) is almost identical to that in CPR r35.6, with the exceptions that:

- questions must be put within 10 days of service of the report (rather than the 28 days allowed under CPR)
- the requirement that questions be put only once, put within 10 days and be just for clarification can be waived *only* by the court or where a practice direction permits (in the CPR the parties can agree themselves to waive these requirements (CPR r35.6cii)).

The court's power to direct that evidence be given by an SJE (r25.7) matches CPR r35.7, but the rule on instructions to an SJE (r25.8) is expanded somewhat compared with its CPR equivalent (r35.8). Whereas in CPR any party can instruct the SJE independently, under the FPR instructions must be through a jointly agreed letter unless the court directs otherwise. If the parties cannot agree, they must write to the court, which will then compile the SJE's instructions.

The power of the court to direct a party to provide information (r25.9) differs from its CPR equivalent (r35.9) only by separating off some adoption proceedings where the court must serve the papers on the other side rather than allowing the parties to serve papers on each other.

The content of the report (r25.10) includes the familiar requirements from CPR r35.10 – that the practice direction (not yet published) must be followed and the report must contain a statement to the effect that the expert understands his duty to the court. But, in keeping with the less adversarial approach in the family courts, all instructions to experts are disclosable (under CPR 35.10 the expert has to include the substance of his instructions but, whilst the instructions are not privileged, they will not generally be disclosed).

The provision for one party to use the expert's report disclosed by another party (r25.11) is the same as r35.11. But the rules governing discussions between experts omit two key limiting factors from CPR r35.13. Under CPR, the content of the discussion between experts will not be referred to at trial unless the parties agree otherwise, and the parties cannot be forced to accept the agreement reached by the experts. Both these caveats are omitted from the FPR, making discussions between the parties much more determinative.

The expert's right to ask the court for directions (r25.13) is identical to the CPR power contained in r35.13. And finally, the rule about assessors is the same (r25.14 and r35.14), with the one exception that in the family courts the fee for the assessor is fixed by the rate payable to the deputy district judge.

## Conclusion

So, apart from a few changes to accommodate the less adversarial style and more court-controlled case management in family proceedings, there is little in Part 25 of the FPR to catch out an expert who is used to the CPR. We will consider the Part 25 Practice Direction in our next issue.

*See page 6 for the full text of the Family Procedure Rules Part 25*

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*Family Procedure Rules come into force in April 2011*

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*Part 25 deals with expert evidence*

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# Low Copy Number DNA

We have reported in previous issues of *Your Witness* (see Issue 59) on the ongoing controversy surrounding the admissibility of Low Copy Number DNA (LCN DNA) evidence – a technique where tiny quantities of DNA are amplified in order to obtain a genetic profile. Doubts centre on the risk of contamination due to the ease with which small quantities of DNA could be transferred from object to object. This, together with the durable quality of DNA, greatly increases opportunities for error and cross-contamination.

As a result of criticism in the Omagh Bombing trial, the Association of Chief Police Officers (ACPO), in consultation with the Crown Prosecution Service (CPS), wrote to Chief Constables on 21 December 2007 recommending that the use of LCN DNA analysis in criminal investigations should be suspended pending further review. Independently, the CPS commissioned its own external review of the use of low template DNA analysis (including LCN DNA) by a team headed by Professor Brian Caddy of Strathclyde University. Professor Caddy's brief was to examine low template DNA profiling techniques, including processes that seek to obtain profiles from DNA samples below 200 picograms. He concluded that, in general, the technique was sound and such evidence should be admissible subject to certain caveats.

## Court allows LCN DNA evidence

In a recent case, the court has now made it clear that it considers that LCN DNA techniques are now sufficiently established to be admissible. Furthermore, challenges to the validity of scientific methods of analysis should no longer be permitted at trials where the quantity of DNA analysed is above the 'stochastic threshold' of 100–200 picograms.

In *R -v- Reed*<sup>1</sup>, the court acknowledged that no scientific consensus yet exists as to where the reliability threshold begins, but it was satisfied on the evidence presented that it lays somewhere between 100 and 200 picograms. The court held that, in the case of samples within the 100–200 picogram range, expert evidence should be given on whether a reliable interpretation of the analysis could be made in that particular case.

The court based its decision on its often quoted view that there should be no enhanced test of admissibility for expert evidence. Expert evidence was not admissible where the scientific techniques used were insufficiently reliable to be put before a jury. If the evidence was challenged, a court must decide whether it had a sufficiently scientific basis. The court cited the Australian case of *Bonython*<sup>2</sup>, ruling that the admissibility of expert evidence was predicated on the subject matter of that evidence being a part of a body of knowledge sufficiently organised or recognised to be accepted as reliable. Accordingly, if the court is satisfied that there is a sufficiently

reliable scientific basis for the evidence, then the evidence should be admitted and any opposing views should be left to be tested in the trial.

## CrimPR supports the court's stance

The court took the view that closer control of such evidence was unnecessary because Part 33 of the Criminal Procedure Rules (CrimPR) sets out an adequate procedure for the control of expert evidence in developing areas of science. Rule 33.3(1) requires that each expert identifies where there is a range of opinion relating to matters within the expert report. The rule requires that the expert gives a summary of the range of that opinion and reasons for the conclusions he reaches. Furthermore, if the expert is unable to state his opinion without qualification, he is required to identify what that qualification is. The court also has the power to direct experts to discuss expert issues and to prepare a statement for the court on the matters on which there is agreement or disagreement.

Specifically in relation to DNA evidence, the court directed that the following procedures be adopted. The expert's report should spell out with precision each proposition to be advanced as part of an evaluation opinion, so as to ensure that the requirements of r33.3.(1) had been met. The expert's reports should then be examined closely by the parties; any disagreement identified should be brought to the attention of the court. It was expected that, in the ordinary course of events, the judge should then exercise his power to call for a statement under r33.6. The experts should then set out the basic science that was agreed and the precise issues that were not agreed. If any expert failed to observe the order for provision of the statement then, in the absence of good reasons, the trial judge should consider carefully whether he should refuse permission for that expert's evidence to be admitted.

It is perhaps surprising that the court in *Reed* should have shown such readiness to admit LCN DNA profiles within the 100–200 picogram threshold, notwithstanding the qualifications that it attached to the admissibility of such evidence. There is still substantial scientific debate on the effectiveness of such analysis, the possibilities for error and concerns over the relative ease with which such small samples can be cross-contaminated or transferred from object to object. In reaching its conclusion, the court appeared to suggest that the cases in which such evidence would be adduced were likely to be fairly uncommon. However, it is interesting to note that the techniques for LCN DNA profiling were developed originally for samples falling below 100 picograms, and that the UK has the largest per capita DNA database in the world. We suggest, therefore, that once the doors are opened to it, the use of such evidence is likely to be quite substantial.

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*Science behind  
LCN DNA judged  
reliable...*

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*... despite  
substantial  
scientific debate*

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## References

<sup>1</sup>*R -v- Reed (David)* [2010] 1 Cr App 23 (CA Crim Div)

<sup>2</sup>*Bonython* [1984] 38 SASR 45

# What to do if a solicitor hides your

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*Experts owe an overriding duty to the court...*

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An expert in the *Register* called our Helpline concerned that a party's failure to disclose his report was an attempt to wilfully withhold evidence from the court. He was considering whether he might take matters into his own hands by bringing this to the court's attention.

The expert had prepared a report for solicitors in a case of alleged negligence. In his opinion there had been no negligence, and his report reflected this. The solicitors, it seems, went shopping for, and got, an opinion more favourable to the client. In such circumstances, is the other party and the court entitled to see the first expert's (unfavourable) report? Indeed, asked our correspondent, doesn't the expert's overriding duty to the court demand its disclosure?

To deal with this question it is necessary to look first at the current state of law regarding disclosure of expert reports, rejected reports, drafts and other related documents.

## Instructions to experts

The general rule is that instructions to experts to prepare reports for the court are not privileged, and disclosure of these can be ordered. However, as a matter of course, the court will not order their disclosure where the expert has complied with his duty to state in his report:

*'... the full substance of all material instructions, whether written or oral, on the basis of which the report was written.'*<sup>1</sup>

The Civil Procedure Rules (CPR) go on to state:

*'... the court will not, in relation to those instructions (a) order disclosure of any specific document; or (b) permit any questioning in court, other than by the party who instructed the expert, unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete.'*<sup>2</sup>

It is worth mentioning that the expert's retainer is not usually construed as part of the 'instructions' and is therefore not disclosable. Consequently, the retainer should always be kept separate from the material instructions.

## Documents accompanying instructions

The term 'instructions' is extended to include any documents and materials given to the expert with the instructions that were part of the basis upon which he was asked to advise. However, it's not necessary to refer to those documents provided for background information that are immaterial to the expert's opinion. Such documents are not 'material' within the meaning of CPR r35.10(3).

## Draft reports

There is a lack of clear guidance from the courts on the precise status of draft reports. The current assumption is that these are not disclosable. In *Jackson -v- Marley Davenport Ltd*<sup>3</sup>, the Court of Appeal held that CPR r35.10 referred to the report containing the evidence that the expert

intends to give in court, and not to any earlier report or draft upon which the party does not rely. That said, however, care must be taken by solicitors not to refer to any earlier draft in the letter of instruction.

The position for the expert requires a bit more thought. Whilst he *need not* refer to any earlier report if his latest report contains his complete opinion, and that opinion is not reliant in any way on the earlier material, many experts might feel like they are doing the lawyer's work in helping to hide the existence of the earlier report. One way around this is for experts to always release their reports as drafts (throwing the word 'draft' across every page using a watermark in Word is easy enough). Only once the lawyer says the report is acceptable would a final version be supplied. This would provide experts with the *Jackson -v- Marley* protection because all earlier work would have the status of a draft. It may also help with timely payment because the lawyer may be more willing to pay on time if he has a report he is eager to exchange but cannot do so because it has 'draft' splashed across it!

## Experts who are not going to be called

The great weight of the authorities suggests that a party who wishes to substitute an expert may only do so upon condition that any privilege claimed in the first expert report is waived. This was the principle adopted by the Court of Appeal in *Gary Beck -v- Ministry of Defence*.<sup>4</sup>

The defendant in *Beck* had initially instructed an expert. For one reason or other he had 'lost confidence' in that expert and so sought permission of the court to instruct another. In such cases there is, naturally, a suspicion that the report of the first expert does not support the party's case. In *Beck*, the defendant was granted permission to change his expert by the court at first instance, but no order was made in relation to the report of the first expert. The claimant appealed on the ground that the first expert's report should have been disclosed as the inference was that the report supported the claimant's case. The Court of Appeal held that once permission had been granted to instruct a second expert, there was no good reason to withhold disclosure of the first report. However, the court stopped short of making this obligatory.

It was thought that this decision applied only to CPR Part 35 experts appointed after the issue of proceedings, and that pre-action reports retained privilege. The substantive case law on expert advisers and privilege is to be found in *Carlson -v- Townsend*.<sup>5</sup> The court in that case stated that advice received from an expert advisor was privileged because a claimant should not be deprived of the right to freely obtain and consider advice pre-action on the viability of a potential claim or to reject that advice if he does not agree with it. However, since 2007, this may no longer be the case.

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*... but does it justify unilateral disclosure by the expert?*

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# report from the court

In *Carruthers -v- MP Fireworks Limited*,<sup>6</sup> Mr Recorder Moxon Browne QC, sitting in the Bristol County Court on appeal from the order of a deputy district judge, held that the judge had been entitled to make an order for disclosure of an earlier unidentified expert advisor's report as a condition of allowing a named expert to be instructed. The claimant's argument that the court should only take this approach where a party needed permission to rely on a new expert in place of an earlier named expert for whom he had obtained permission was rejected. The judge agreed with the Deputy District Judge that:

*'... there is no relevant distinction between unidentified experts' reports obtained before an action is started, and identified reports obtained with the court's permission after the action has started'.*

Whilst the situation concerning expert reports obtained prior to proceedings remains unsure, claimants may ask their expert advisors not to put the substance of any advice in a report but, instead, to give it orally at conference. As an advisory expert, of course, the requirements under the CPR do not obtain.

## DIY - Do It Yourself or Don't Involve Yourself?

This brings us to the question of whether it could ever be justified for an expert to take matters into his own hands and disclose a report over which a lawyer claimed privilege.

Whilst an expert might feel disgruntled that his report has been rejected by a party, and notwithstanding that his report might contain weighty matters that he would like the court to consider, it would be fraught with danger if the expert were to disclose this without the permission of the party concerned. As this article has shown, the privileged status of an expert's advice abounds with grey areas that would be difficult for a lawyer to resolve, let alone an expert witness. The expert is not the person best placed to decide whether privilege attaches to his advice or report, and whether the circumstances in which it was given should render it confidential. If the expert was instructed pre-action, or if there is doubt as to whether he was retained as an expert witness or an expert advisor, the position is further complicated. The expert might not be covered by CPR 35 at all. In the case of pre-action reports, obtained without the need for the court's permission and where the expert has not been named to the other side, the court and the other parties might be wholly ignorant of the existence of the expert or his earlier report.

An expert is not called upon to decide the final outcome of a case and is not an arbiter on the facts. His report or advice is merely opinion based largely on an assumed set of facts. If the report is written by a named expert, he would not be justified in intervening in an application to instruct a fresh expert. In those circumstances,

the question of disclosure is one that will properly be considered by the court in the application to replace him. The strong likelihood is that his report will be ordered to be disclosed, in any event.

If the expert is not named, and his report was submitted pre-action but with the intention that it would be used by the court in proceedings, the question is more problematic. On balance, it seems likely that such reports will be governed by the decision in *Carlson -v- Townsend* (although, since *Carruthers*, this is not as certain as it once was). Much would depend on whether the court viewed the expert as an advisor or as a Part 35 expert, and, of course, sometimes an advisor evolves into a Part 35 expert witness. With all the uncertainty, perhaps it would be unwise for an expert who has been instructed pre-action to seek to intervene and disclose either his existence or that of his report. Certainly, such an action would not fall within the ambit of the overriding duty contained in the CPR.

## Here be dragons!

The danger for the expert in all of this is, of course, that he leaves himself open to a suggestion that he has breached privilege and may have done irreparable harm to one or other party's case. In such circumstances, he might leave himself open to an action in damages or a report to his professional disciplinary body. In the case of an expert advisor, there may also be a breach of duty of confidentiality or other express or implied term of his contractual retainer. In the latter case, there would be no immunity from suit and the expert would be very vulnerable to a claim. Furthermore, the nature of civil proceedings means that there will be few applications made to the court that do not have costs consequences. Any intervention by an expert to the court is likely to have costs consequences for someone, and it may be the expert himself who is ordered to bear the burden.

If, despite all of this, the expert feels that his report contains evidence that is so vital that its existence would have a decisive effect on the outcome of proceedings, and that those instructing him have deliberately tried to 'bury' it, he might be justified in writing a discreet letter to the judge, without going into the substance of his report or the evidence that it contains, seeking the court's permission to make a submission in relation to his evidence. This could only be countenanced where there is absolutely no doubt that the expert is a Part 35 expert and has prepared his report pursuant to the provisions of the CPR, and where there is no ambiguity in the terms of his retainer or the nature of his duty to the court. We suggest that such instances would be very rare, and that any expert considering intervening in this way must first take and consider independent legal advice.

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*Serious potential danger lies ahead*

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## References

<sup>1</sup>CPR 35.10(3), see also CrimPR 33.3(c) and FPR 25.10(3)

<sup>2</sup>CPR 35.10(4)

<sup>3</sup>*Jackson -v- Marley Davenport Ltd* [2004] EWCA Civ 122

<sup>4</sup>*Gary Beck -v- Ministry of Defence* [2003] EWCA Civ 1043

<sup>5</sup>*Carlson -v- Townsend* [2001] EWCA Civ 511

<sup>6</sup>*Andrew Carruthers -v- MP Fireworks Limited & Another* [2007] Unreported

# Family Procedure Rules – Part 25

*The Family Procedure Rules 2010 were laid before Parliament (SI 2010/2955) at the end of 2010. They are due to come into operation on 6 April 2011.*

## Family Procedure Rules Part 25...

### 25.1 Duty to restrict expert evidence

Expert evidence will be restricted to that which is reasonably required to resolve the proceedings.

### 25.2 Interpretation

- (1) A reference to an “expert” in this Part –
  - (a) is a reference to a person who has been instructed to give or prepare expert evidence for the purpose of family proceedings; and
  - (b) does not include –
    - (i) a person who is within a prescribed description for the purposes of section 94(1) of the 2002 Act (persons who may prepare a report for any person about the suitability of a child for adoption or of a person to adopt a child or about the adoption, or placement for adoption, of a child); or
    - (ii) an officer of the Service or a Welsh family proceedings officer when acting in that capacity.

(Regulation 3 of the Restriction on the Preparation of Adoption Reports Regulations 2005 (S.I. 2005/1711) sets out which persons are within a prescribed description for the purposes of section 94(1) of the 2002 Act.)

- (2) “Single joint expert” means an expert instructed to prepare a report for the court on behalf of two or more of the parties (including the applicant) to the proceedings.

### 25.3 Experts – overriding duty to the court

- (1) It is the duty of experts to help the court on matters within their expertise.
- (2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

### 25.4 Court’s power to restrict expert evidence

- (1) No party may call an expert or put in evidence an expert’s report without the court’s permission.
- (2) When parties apply for permission they must identify –
  - (a) the field in which the expert evidence is required; and
  - (b) where practicable, the name of the proposed expert.
- (3) If permission is granted it will be in relation only to the expert named or the field identified under paragraph(2).
- (4) The court may limit the amount of a party’s expert’s fees and expenses that may be recovered from any other party.

### 25.5 General requirement for expert evidence to be given in a written report

- (1) Expert evidence is to be given in a written report unless the court directs otherwise.

- (2) The court will not direct an expert to attend a hearing unless it is necessary to do so in the interests of justice.

### 25.6 Written questions to experts

- (1) A party may put written questions about an expert’s report (which must be proportionate) to –
  - (a) an expert instructed by another party; or
  - (b) a single joint expert appointed under rule 25.7.
- (2) Written questions under paragraph (1) –
  - (a) may be put once only;
  - (b) must be put within 10 days beginning with the date on which the expert’s report was served; and
  - (c) must be for the purpose only of clarification of the report, unless in any case –
    - (i) the court directs otherwise; or
    - (ii) a practice direction provides otherwise.
- (3) An expert’s answers to questions put in accordance with paragraph (1) are treated as part of the expert’s report.
- (4) Where –
  - (a) a party has put a written question to an expert instructed by another party; and
  - (b) the expert does not answer that question, the court may make use of one or both of the following orders in relation to the party who instructed the expert –
    - (i) that the party may not rely on the evidence of that expert; or
    - (ii) that the party may not recover the fees and expenses of that expert from any other party.

### 25.7 Court’s power to direct that evidence is to be given by a single joint expert

- (1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by a single joint expert.
- (2) Where the parties who wish to submit the evidence (“the relevant parties”) cannot agree who should be the single joint expert, the court may –
  - (a) select the expert from a list prepared or identified by the instructing parties; or
  - (b) direct that the expert be selected in such other manner as the court may direct.

### 25.8 Instructions to a single joint expert

- (1) Where the court gives a direction under rule 25.7(1) for a single joint expert to be used, the instructions are to be contained in a jointly agreed letter unless the court directs otherwise.
- (2) Where the instructions are to be contained in a jointly agreed letter, in default of agreement the instructions may be determined by the court on the written request of any relevant party copied to the other relevant parties.

... based on  
CPR Part 35

- (3) Where the court permits the relevant parties to give separate instructions to a single joint expert, each instructing party must, when giving instructions to the expert, at the same time send a copy of the instructions to the other relevant parties.
- (4) The court may give directions about –
  - (a) the payment of the expert’s fees and expenses; and
  - (b) any inspection, examination or assessments which the expert wishes to carry out.
- (5) The court may, before an expert is instructed, limit the amount that can be paid by way of fees and expenses to the expert.
- (6) Unless the court directs otherwise, the relevant parties are jointly and severally liable for the payment of the expert’s fees and expenses.

### **25.9 Power of court to direct a party to provide information**

- (1) Subject to paragraph (2), where a party has access to information which is not reasonably available to another party, the court may direct the party who has access to the information to prepare, file and serve a document recording the information.
- (2) In proceedings under Part 14 (procedure for applications in adoption, placement and related proceedings), –
  - (a) the court may direct the party with access to the information to prepare and file a document recording the information; and
  - (b) a court officer will send a copy of that document to the other party.

### **25.10 Contents of report**

- (1) An expert’s report must comply with the requirements set out in Practice Direction 25A.
- (2) At the end of an expert’s report there must be a statement that the expert understands and has complied with their duty to the court.
- (3) The instructions to the expert are not privileged against disclosure.  
(Rule 21.1 explains what is meant by disclosure.)

### **25.11 Use by one party of expert’s report disclosed by another**

Where a party has disclosed an expert’s report, any party may use that expert’s report as evidence at any relevant hearing.

### **25.12 Discussions between experts**

- (1) The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to –
  - (a) identify and discuss the expert issues in the proceedings; and
  - (b) where possible, reach an agreed opinion on those issues.
- (2) The court may specify the issues which the experts must discuss.
- (3) The court may direct that following a discussion between the experts they must

prepare a statement for the court setting out those issues on which –

- (a) they agree; and
  - (b) they disagree,
- with a summary of their reasons for disagreeing.

### **25.13 Expert’s right to ask court for directions**

- (1) Experts may file written requests for directions for the purpose of assisting them in carrying out their functions.
- (2) Experts must, unless the court directs otherwise, provide copies of the proposed request for directions under paragraph (1) –
  - (a) to the party instructing them, at least 7 days before they file the requests; and
  - (b) to all other parties, at least 4 days before they file them.
- (3) The court, when it gives directions, may also direct that a party be served with a copy of the directions.

### **25.14 Assessors**

- (1) This rule applies where the court appoints one or more persons under section 70 of the Senior Courts Act 1981 or section 63 of the County Courts Act 1984<sup>1</sup> as an assessor.
- (2) An assessor will assist the court in dealing with a matter in which the assessor has skill and experience.
- (3) The assessor will take such part in the proceedings as the court may direct and in particular the court may direct an assessor to –
  - (a) prepare a report for the court on any matter at issue in the proceedings; and
  - (b) attend the whole or any part of the hearing to advise the court on any such matter.
- (4) If the assessor prepares a report for the court before the hearing has begun –
  - (a) the court will send a copy to each of the parties; and
  - (b) the parties may use it at the hearing.
- (5) Unless the court directs otherwise, an assessor will be paid at the daily rate payable for the time being to a fee-paid deputy district judge of the principal registry and an assessor’s fees will form part of the costs of the proceedings.
- (6) The court may order any party to deposit in the court office a specified sum in respect of an assessor’s fees and, where it does so, the assessor will not be asked to act until the sum has been deposited.
- (7) Paragraphs (5) and (6) do not apply where the remuneration of the assessor is to be paid out of money provided by Parliament.

#### **Footnote**

<sup>1</sup> Section 63 was amended by sections 14(2) and (3) and 125(7) of, and Schedule 20 to, the Courts and Legal Services Act 1990 and by articles 6(d)(i) to (iv) of the Civil Procedure (Modification of Enactments) Order 1998 (S.I. 1998/2940).

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*Minor changes to accommodate family court approach*

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*Expect changes when Family Justice Review reports*

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