Guidance for the instruction of experts to give evidence in Civil claims 2012

1. Introduction

1.1 The purpose of this guidance is to assist litigants, those instructing experts and experts in understanding best practice with regard to compliance with Part 35 of the Civil Procedure Rules (CPR or the Rules) and the overriding objective. Experts and those who instruct them should ensure they are familiar with CPR 35 and its associated practice direction (PD or PD35).

1.2 More specifically, it is important to have regard to the objectives of paragraph 1.4 of the PD namely to:-

1.2.1 Encourage the exchange of early and full information about the expert issues involved in the perspective legal claim.

1.2.2 Enable the parties to avoid or reduce the scope of litigation by agreeing the whole or part of an expert issue before commencement of proceedings; and

1.2.3 Support the efficient management of proceedings where litigation cannot be avoided.

1.3 Additionally, experts and those instructing them should be aware that some cases may be "specialist proceedings" ("CPR49") where specific rules may apply, some cases may be governed by protocols and some courts who have published their own guidelines as supplements to the CPR. Care should, therefore, be taken to ensure familiarity with any such provisions.

1.4 The areas dealt with by this guidance relate to both the pre and post issue of court proceedings. The guidance is organised in such a way as to:-

1.4.1 Cover key points affecting litigants and others instructing experts;

1.4.2 Cover key points pertaining to experts;

1.4.3 Cover specific issues, such as single joint experts, contingency fees and sanctions.

2. The solicitors'/instructing parties' perspective

2.1 The need for experts

2.1.1 Those intending to instruct experts to give or prepare evidence for the purpose of civil proceedings should consider whether expert evidence is appropriate, taking account of the principles set out in CPR Parts 1 and 35, and in particular whether it is reasonably required to resolve the proceedings (CPR 35.1).

2.1.2 Although the court's permission is not generally required to instruct an expert, the court's permission is required before experts can be called to give evidence or their evidence can be put in (CPR 35.4).

2.2 The appointment of experts

2.2.1 Before experts are formally instructed or the court's permission to appoint named experts is sought, the following should be established:

2.2.1.1 that they have the appropriate expertise and experience for the particular instruction;

2.2.1.2 that they are familiar with the general duties of an expert;

2.2.1.3 that they 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;

2.2.1.4 whether they are available to attend the trial, if attendance is required; and

2.2.1.5 there is no potential conflict of interest for the expert.

2.2.2 Terms of appointment should be agreed at the outset and should normally include:

2.2.2.1 the capacity in which the expert is to be appointed (e.g. party appointed expert or single joint expert)*;*

2.2.2.2 the services required of the expert (e.g. provision of expert's report, answering questions in writing, attendance at meetings and attendance at court);

2.2.2.3 time for delivery of the report;

2.2.2.4 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). In this respect, the court may also require experts to provide an estimate of their charges;

2.2.2.5 travelling expenses and disbursements;

2.2.2.6 cancellation charges;

2.2.2.7 any fees for attending court;

2.2.2.8 time for making the payment;

2.2.2.9 whether fees are to be paid by a third party;

2.2.2.10 if a party is publicly funded, whether or not the expert's charges will be subject to assessment by a costs officer; and

2.2.2.11 guidance that the expert's fees and expenses may be limited by the court (note expert's fees are fixed in the Small Claims Court).

2.2.3 As to the appointment of single joint experts, see section 4 below.

2.2.4 When necessary, arrangements should be made for dealing with questions to experts and discussions between experts, including any directions given by the court, and provision should be made for the cost of this work.

2.2.5 Experts should be informed regularly about deadlines for all matters concerning them. Those instructing experts should promptly send them copies of all court orders and directions which may affect the preparation of their reports or any other matters concerning their obligations.

2.3 Instructions

2.3.1 Those instructing experts should ensure that they give clear instructions, including the following:

2.3.1.1 basic information, such as names, addresses, telephone numbers, dates of birth, dates of incidents and any relevant claims reference numbers;

2.3.1.2 the nature and extent of the expertise which is called for;

2.3.1.3 the purpose of requesting the advice or report, a description of the matter(s) to be investigated, the issues to be addressed and the identity of all parties;

2.3.1.4 the statement(s) of case (if any), those documents which form part of standard disclosure and witness statements which are relevant to the advice or report;

2.3.1.5 where proceedings have not been started, whether proceedings are being contemplated and, if so, whether the expert is asked only for advice*;*

2.3.1.6 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

2.3.1.7 where proceedings have been started, the dates of any hearings (including any Case 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 and the track to which the claim has been allocated.

2.3.2 Those instructing experts should seek to jointly agree, where possible, the details of the instructions for the experts, which should include any difference in the factual material that is to be considered by the experts.

2.3.3 As to the instruction of single joint experts, see section 4 below.

2.4 Amendment of reports

2.4.1 It may become necessary for experts to amend their reports as set out in section 3.8 below:

2.4.1.1 as a result of an exchange of questions and answers;

2.4.1.2 following agreements reached at meetings between experts; or

2.4.1.3 where further evidence or documentation is disclosed.

2.4.2 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 amend or expand reports to ensure accuracy, internal consistency, completeness and relevance to the issues and clarity. In such circumstances those instructing experts should inform other parties as soon as possible of any change of opinion resulting in an amended report.

2.5 Written questions to experts

2.5.1 See CPR 35.6 and the PD.

2.5.2 Where questions have been put to an expert, the instructing solicitor/party should consider with the expert whether the questions are properly for the

purpose of clarification of the report, are proportionate and have been asked within time. Attempts should be made to resolve problems without the need for an application to court for directions.

2.6 Discussions between experts

2.6.1 The court has powers 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.

2.6.2 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.

2.6.3 Arrangements for discussions between experts should be proportionate to the value of cases. In small claims and fast-track cases there should not normally be meetings between experts. Where discussion is justified in such cases, telephone discussion or an exchange of letters should, in the interests of proportionality, 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.

2.6.4 The parties, their lawyers and experts should co-operate to produce the agenda for any discussion between experts, although primary responsibility for preparation of the agenda should normally lie with the parties' solicitors.

2.6.5 The agenda should indicate what matters have been agreed and summarise concisely those which are in issue. It is often helpful for it 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.

2.6.6 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.

2.6.7 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.

2.6.8 Agreements between experts during discussions do not bind the parties unless the parties expressly agree to be bound by the agreement (CPR 35.12(5)). However, in view of the overriding objective, 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.

2.7 Attendance of experts at court

2.7.1 Those instructing experts should:

2.7.1.1 ascertain the availability of experts before trial dates are fixed;

2.7.1.2 keep experts updated with timetables (including the dates and times experts are to attend) and the location of the court;

2.7.1.3 give consideration, where appropriate, to experts giving evidence via a video-link; and

2.7.1.4 inform experts immediately if trial dates are vacated.

2.8 Experts should normally attend court without the need for the service of witness summonses, but on occasion they may be served to require attendance (CPR 34). The use of witness summonses does not affect the contractual or other obligations of the parties to pay experts' fees.

3. The experts' perspective

3.1 Differentiation between experts formally instructed to report and those only asked to advise

3.1.1 Part 35 and this guidance only apply where experts are instructed to give opinions which are relied on for the purposes of court proceedings, that is, where the appointed expert is to appear as an expert witness.

3.1.2 Advice which the parties do not intend to adduce in litigation is likely to be confidential; this guidance does not apply in these circumstances. 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 give or prepare evidence for use in the proceedings. The expert's role in such circumstances may be viewed as that of an expert advisor.

3.1.3 However this guidance does apply if experts who were formerly instructed only to advise, that is, acting as an expert advisor, are later instructed as an expert witness to give or prepare evidence for the purpose of civil proceedings.

3.1.4 In the remainder of this guidance, a reference to an expert means an expert witness to whom Part 35 applies.

3.2 Duties/obligations of experts

3.2.1 Experts always owe a duty to exercise reasonable skill and care to those instructing them, and to comply with any relevant professional code of ethics. However when they are instructed to give or prepare evidence for the purpose of civil proceedings in England and Wales 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.

3.2.2 Experts should be aware of the overriding objective that courts deal with cases justly. This includes dealing with cases proportionately, expeditiously and fairly (CPR 1.1). Experts are under an obligation to assist the court so as to enable them to deal with cases in accordance with the overriding objective. However the overriding objective does not impose on experts any duty to act as mediators between the parties or require them to trespass on the role of the court in deciding facts.

3.2.3 Experts should provide opinions which are independent, regardless of the pressures of litigation. In this context, a useful test of 'independence' is that the expert would express the same opinion if given the same instructions by an opposing 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.

3.2.4 Experts should confine their opinions to matters which are material to the disputes between the parties 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.

3.2.5 Experts should take into account all material facts before them at the time that they give their opinion. Their reports should set out those facts and any literature or any other 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.

3.2.6 Experts should inform those instructing them without delay of any change in their opinions on any material matter and the reason for it.

3.2.7 Experts should be aware that any failure by them 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 and even, in

extreme cases, being debarred from placing the expert's evidence before the court. The courts may also make orders for costs (under section 51 of the Senior Courts Act 1981) directly against expert witnesses who by their evidence cause significant expense to be incurred, and do so in flagrant and reckless disregard of their duties to the court.

3.3 Experts' acceptance of instructions

3.3.1 Experts should confirm without delay whether or not they accept instructions. They should also inform those instructing them (whether on initial instruction or at any later stage) without delay if:

3.3.1.1 instructions are not acceptable because, for example, they require work that falls outside their expertise, impose unrealistic deadlines, or are insufficiently clear. Thus, 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;

3.3.1.2 they consider that instructions are or have become insufficient to complete the work;

3.3.1.3 they become aware that they may not be able to fulfil any of the terms of appointment;

3.3.1.4 the instructions and/or work have, for any reason, placed them in conflict with their duties as an expert. In this respect, where an expert advisor is approached to act as an expert witness then they will need to give careful consideration as to whether they can accept a role as expert witness; or

3.3.1.5 they are not satisfied that they can comply with any orders that have been made.

3.3.2 Experts must neither express an opinion outside the scope of their field of expertise, nor accept any instructions to do so.

3.3.3 Where an expert identifies that the basis of his instruction differs from that of another expert, he should inform those instructing him.

3.3.4 Experts should agree the terms on which they are to be paid with those instructing them. Experts should be mindful that they may be required to provide estimates for the court and that their fees may be scrutinised by the court. The court may limit the amount to be paid as part of any order for costs.

3.4 Withdrawal

3.4.1 Where experts' instructions remain incompatible with their duties, whether through incompleteness, a conflict between their duty to the court and their instructions, or for any other substantial and significant reason, they may consider withdrawing from the case. However, experts should not withdraw without first discussing the position fully with those who instruct them and considering carefully 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.

3.5 Experts' right to ask court for directions

3.5.1 Experts may request directions from the court to assist them in carrying out their functions as experts (CPR 35.14), for example, if experts consider that those instructing them have not provided information which they require. Experts should normally discuss such matters with those who instruct them before making any such request. Unless the court otherwise orders, any proposed request for directions should be copied to the party instructing the expert at least seven days before filing any request to the court, and to all other parties at least four days before filing it (CPR 35.14).

3.5.2 Requests to the court for directions should be made by letter clearly marked "expert's request for directions" containing:

3.5.2.1 the title of the claim;

3.5.2.2 the claim number of the case;

3.5.2.3 the name of the expert;

3.5.2.4 full details of why directions are sought; and

3.5.2.5 copies of any relevant documentation.

3.6 The experts' access to information held by the parties

3.6.1 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 of the parties. Experts should seek to confirm this, and the status of disclosure, in an expeditious manner after accepting instructions, notifying instructing solicitors of any omissions. Experts should continue to monitor this aspect.

3.6.2 Experts, as with those who instruct them, should be specifically aware of CPR 35.9. This provides that, where one party has access to information which 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.

3.6.3 Any request for further information from the other party made by an expert should be in the form of a written letter to the expert's instructing party and should state, for each category of information sought, why the information is necessary for the evaluation of the particular aspect of the case and also the significance of the information in the context of the particular aspect of the case. Thus, a request for further information by an expert should have regard to their duty to focus on matters which are material to the disputes between the parties (see paragraph 3.2.4 above).

3.7 Contents of experts' reports

3.7.1 The content and extent of experts' reports should be governed by the scope of their instructions and general obligations, the contents of CPR 35 and PD35 and their overriding duty to the court.

3.7.2 In preparing reports, experts should maintain professional objectivity and impartiality at all times.

3.7.3 PD 35, paragraph 2 provides that experts' reports should be addressed to the court and gives detailed directions about the form and content of such reports. All experts and those who instruct them should ensure that they are familiar with these requirements.

3.7.4 Model forms of experts' reports are available from bodies such as the Academy of Experts or the Expert Witness Institute and, for example, a template for medical reports has been created by the Ministry of Justice.

3.7.5 Experts' reports must contain statements that they:

3.7.5.1 understand their duty to the court and have complied and will continue to comply with it; and

3.7.5.2 are aware of and have complied with the requirements of CPR 35 and PD 35, this guidance and the practice direction on pre-action conduct.

3.7.6 Experts' reports much also be verified by a statement of truth. The form of the statement of truth is as follows:

"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."

3.7.7 The details of experts' qualifications to be given in reports should be commensurate with the nature and complexity of the case. It may be sufficient merely to state 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 highly specialised evidence.

3.7.8 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 which solicitors place in front of experts in order to gain advice. 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.

3.7.9 Where tests of a scientific or technical nature have been carried out, experts should state:

3.7.9.1 the methodology used; and

3.7.9.2 by whom the tests were undertaken and under whose supervision, summarising their respective qualifications and experience.

Reliance on the work of others

3.7.10 Where experts rely in their reports on literature or other material and cite the opinions of others without having verified them, they must give details of those opinions relied on. It is likely to assist the court if the qualifications of the originator(s) are also stated.

3.7.11 When addressing questions of fact and opinion, experts should keep the two separate and discrete.

3.7.12 Experts must state those facts (whether assumed or otherwise) upon which their opinions are based; in this respect experts should have primary regard to their instructions (paragraph 2.3.2 above). Experts must distinguish clearly

between those facts which they know to be true and those facts which they assume.

3.7.13 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.

3.7.14 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.

3.7.15 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 which 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.

Conclusions

3.7.16 A summary of conclusions is mandatory. The summary should be at the end of the report after all the reasoning. There may be cases, however, where the benefit to the court is heightened by placing a short summary at the beginning of the report whilst giving the full conclusions at the end. For example, it can assist with the comprehension of the analysis and with the absorption of the detailed facts if the court is told at the outset of the direction in which the report's logic will flow in cases involving highly complex matters which fall outside the general knowledge of the court.

The impact of sequential exchange of experts' reports

3.7.17 Where there is sequential exchange of reports then the defendant's expert's report will be produced in response to the claimant's expert's report. In this instance, and mindful of the duties and obligations outlined above, the defendant's expert's report should:

3.7.17.1 confirm that the background to the case as set out in the claimant's expert report is agreed, or where some or all of it is not, then to identify such parts that in the defendant's expert's view require revision, setting out the revisions that he considers necessary. By way of additional illustration that the defendant's expert need not repeat information that is adequately dealt with in the claimant's expert report, where the claimant's expert accountant adequately summarises the annual financial statements of the claimant's business they need not be re-presented in the defendant's expert's report;

3.7.17.2 seek to focus only on those material areas of difference with the claimant's expert's opinion. Thus, consistent with the theme of the experts' joint statement, the defendant's expert's report should identify those assumptions (or elements thereof) of the claimant's expert that they consider reasonable (and hence agree with) and those assumptions that they do not; and

3.7.17.3 consistent with paragraph 3.7.17.2, and 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 expert's report should contain a reconciliation between the claimant's expert's loss assessment and his loss assessment, identifying, for each assumption where he concludes differently to the claimant's expert, the related financial impact.

3.8 Amendment of reports

3.8.1 Experts should not be asked to, and should not, amend, expand or alter any parts of reports in a manner which distorts their true opinion, but may be invited to amend or expand reports to ensure accuracy, internal consistency, completeness and relevance to the issues and clarity. Although experts should generally follow the recommendations of solicitors with regard to the form of reports, they should form their own independent views as to the opinions and contents expressed in their reports and exclude any suggestions which do not accord with their views.

3.8.2 It may become necessary for experts to amend their reports:

3.8.2.1 as a result of an exchange of questions and answers;

3.8.2.2 following agreements reached at meetings between experts; or

3.8.2.3 where further evidence or documentation is disclosed.

3.8.3 Where experts change their opinion following a meeting of experts, a simple signed and dated addendum or memorandum to that effect is generally sufficient. In some cases, however, albeit such a circumstance would perhaps be rare, the benefit to the court of having an amended report may justify the cost of making the amendment.

3.8.4 Where experts significantly alter their opinion, as a result of new evidence or because evidence on which they relied has become unreliable, or for any reason, they should amend their reports to reflect that fact. Amended reports should include reasons for amendments. In such circumstances those instructing experts should inform other parties as soon as possible of any change of opinion.

3.8.5 When experts intend to amend their reports, they should inform those instructing them without delay and give reasons. They should provide an

addendum or memorandum (or amended report) clearly marked as such as quickly as possible.

3.9 Written questions to experts

3.9.1 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.

3.9.2 Experts' answers to questions automatically become part of their reports. They are covered by the statement of truth and form part of the expert evidence.

3.9.3 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, consistent with paragraph 3.5.1 above.

3.10 Discussions between experts and the preparation of a joint statement

3.10.1 The purpose of discussions between experts should be, wherever possible, to:

3.10.1.1 identify and discuss the expert issues in the proceedings;

3.10.1.2 reach agreed opinions on those issues, and, if that is not possible, to narrow the issues in the case;

3.10.1.3 identify those issues on which they agree and disagree and summarise their reasons for disagreement on any issue; and

3.10.1.3 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.

3.10.2 Where there is sequential exchange of expert reports, with the defendant's expert's report prepared in accordance with the guidance at paragraphs 3.7.17.1 to 3 above, it would be expected that the experts' discussions, and hence their joint statement, would be focussed 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.

3.10.3 At the conclusion of any discussion between experts, a joint statement should be prepared setting out:

3.10.3.1 subject to paragraph 3.10.2, a list of issues that have been agreed, including, in each instance, the basis of agreement;

3.10.3.2 a list of issues that have not been agreed, including, in each instance, the basis of disagreement;

3.10.3.3 a list of any further issues that have arisen that were not included in the original agenda for discussion; and

3.10.3.4 a record of further action, if any, to be taken or recommended, including as appropriate the holding of further discussion between experts.

3.10.4 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 the experts have not been instructed to avoid reaching agreement (or otherwise defer from doing so) on any matter within the experts' competence.

3.10.5 The joint statement should be agreed and signed by all the parties to the discussion as soon as may be practicable.

3.10.6 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.

3.11 Attendance of experts at court

3.11.1 Experts instructed in cases have an obligation to attend court if called upon to do so and accordingly should ensure that those instructing them are always aware of their dates to be avoided and take all reasonable steps to be available.

3.11.2 Experts should normally attend court without the need for the service of witness summonses, but on occasion they may be served to require attendance (CPR 34). The use of witness summonses does not affect the contractual or other obligations of the parties to pay experts' fees.

4.1 Single joint experts

4.1.1 CPR 35 and PD35 deal extensively with the instruction and use of joint experts by the parties and the powers of the court to order their use (see CPR 35.7 and 35.8 and PD35, para 5).

4.1.2 The Civil Procedure Rules encourage the use of joint experts. Wherever possible a joint report should be obtained. Consideration should therefore be given by all parties to the appointment of a single joint expert in all cases where a court might direct such an appointment. Single joint experts are the norm in cases allocated to the small claims track and the fast track.

4.1.3 Where, in the early stages of a dispute, examinations and investigations, tests, site inspections, experiments, preparation of 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, at that stage, expected to be contentious as between the parties. The objective of such an appointment should be to agree or to narrow issues.

4.1.4 Experts who have previously advised a party (whether in the same case or otherwise) should only be proposed as single joint experts if other parties are given all relevant information about the previous involvement.

4.1.5 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 may not be recoverable in the case).

Joint instructions

4.1.6 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.

4.1.7 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 at the same time to the other instructing parties.

4.1.8 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:-

4.1.8.1 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

4.1.8.2 A statement as to whether any order has been made limiting the amount of experts' fees and expenses (CPR 35.8(4)(a)).

4.1.9 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 to all instructing parties for the receipt by the expert of such instructions. Unless the instructions are received within the deadline the expert may begin work. In the event that instructions are received after the deadline but before the signing off of the report the expert should consider whether it is practicable to comply with those instructions without adversely affecting the timetable set for delivery of the report and in such a manner as to comply with the proportionality principle. An expert who decides to issue a report without taking into account instructions received after the deadline should 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

4.1.10 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.

4.1.11 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.

4.1.12 Single joint experts should not attend a meeting or conference which 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 and who is to pay the experts' fees for the meeting.

4.1.13 Single joint experts may request directions from the court, as set out below.

4.1.14 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 which contain areas of conflicting fact or allegations. If conflicting instructions lead to different opinions (for example, because the instructions require experts 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

4.1.15 Single joint experts do not normally give oral evidence at trial but if they do, all parties may cross-examine them. 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.

4.2 Power of the court to direct a party to provide information

4.2.1 The court has a wide power as to how to determine such a request subject to the Overriding Objective and in particular the courts power under CPR 35.9.

4.3 Conditional and contingency fees

4.3.1 Payment of experts' fees which are contingent upon the nature of the expert evidence given in legal proceedings or upon the outcome of the case is highly undesirable. There is an overriding concern to ensure the independence and objectivity of expert evidence; any contingent arrangement risks seriously compromising this fundamental requirement, and thus undermining the proper administration of justice. Experts must not therefore be retained on such a basis except in those exceptional circumstances where the court authorises such an arrangement.

4.4 Sanctions

4.4.1 Good practice is to be encouraged and regard should be had that there are sanctions which might arise in the event of failure to comply with CPR 35, the

PD or court orders. It should be remembered that, per CPR 35.3, it is the duty of experts to help the court and that duty overrides any obligation to the party who has instructed them.

4.4.2 In the context of cases where court proceedings have not been commenced there are broadly two types of sanction. First, any misconduct of a professional instructing an expert or the expert may be subject to sanction by their professional body/regulator. Second, the court has power under CPR 35.4(4) and, more generally, under CPR 44 to impose costs sanctions which may impact the level of cost to be recovered or fees to be paid to an expert.

4.4.3 In the context of cases where proceedings have been commenced the following sanctions may apply:-

4.4.3.1 Matters of misconduct may be dealt with by the professional instructing experts or the expert's professional/regulatory body.

4.4.3.2 The court may impose cost penalties against those instructing the expert (including a wasted cost order) or the expert (such as disallowance or reduction of the experts' fee) (CPR 35.4(4) and CPR 44).

4.4.3.3 The Court may rule that an expert's report/evidence be inadmissible.

4.4.3.4 In more extreme cases, if a court is misled then 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 wrong doer.

4.4.3.5 If an expert commits perjury, criminal sanction may follow.