

This Practice Direction is made by the President of the Family Division under the powers delegated to him by the Lord Chief Justice under Schedule 2, Part 1, paragraph 2(2) of the Constitutional Reform Act 2005, and is approved by the Parliamentary Under Secretary of State, by authority of the Lord Chancellor and comes into force on xxx 2012

PRACTICE DIRECTION 25B – THE DUTIES OF AN EXPERT, THE EXPERT’S REPORT AND ARRANGEMENTS FOR AN EXPERT TO ATTEND COURT

This Practice Direction supplements FPR Part 25

Scope of this Practice Direction

1.1 This Practice Direction focuses on the duties of an expert including the contents of the expert’s report and, where an expert is to attend court, the arrangements for such attendance.

Other Practice Directions supporting FPR Part 25 deal with different aspects of experts in family proceedings. The relevant Practice Directions are-

- Practice Direction 25A (Experts - Emergencies and Pre proceedings Instructions);
- Practice Direction 25C (Children Proceedings - The Use of Single Joint Experts and the Process Leading to an Expert Being Instructed or Expert Evidence Being Used);
- Practice Direction 25D (Financial Remedy Proceedings and Other Family Proceedings (except children proceedings) - The Use of Single Joint Experts and the Process Leading to Expert Evidence Being Used); and
- Practice Direction 25E Discussions Between Experts in Family Proceedings.

1.2 Practice Direction 15B (Adults Who May Be Protected Parties) gives guidance as to what the court will do when it suspects that an adult party may not have capacity to conduct the litigation or to instruct an expert.

The meaning of “expert”

2.1 In accordance with FPR 25.2(b), “expert” means a person instructed to give or prepare expert evidence for the purpose of family proceedings. FPR 25.2(c) expressly refers to who is not an expert. For example, a children’s guardian is not an expert.

2.2 An expert includes a reference to an expert team which can include ancillary workers in addition to experts. In an expert team, an 'ancillary' worker may be, for example, a play therapist or similar who undertakes work with the child or family for the purpose of the expert assessment. It is perfectly possible that such workers will be an expert in their own right and in their own field, but it would be cumbersome to name everyone in that position in an order giving permission for an expert to be instructed or expert evidence to be used or in a letter of instruction to an expert. The purpose of the term 'expert team' is to enable a multi-disciplinary team to undertake the assessment without the order having to name everyone who may be involved. The

final expert's report must, however, give information about those persons who have taken part in the assessment and their respective roles and who is responsible for the report.

The expert's overriding duty

3.1 An expert in family proceedings has an overriding duty to the court that takes precedence over any obligation to the person from whom the expert has received instructions or by whom the expert is paid.*(from paragraph 3.1 of PD25A)*

Particular duties of the expert

4.1 An expert shall have regard to the following, among other, duties:

- (a) to assist the court in accordance with the overriding duty;
- (b) to provide advice to the court that conforms to the best practice of the expert's profession;
- (c) to answer the questions about which the expert is required to give an opinion (in children proceedings, those questions will be set out in the order of the court giving permission for expert evidence to be obtained or used);
- (d) to provide an opinion that is independent of the party or parties instructing the expert;
- (e) to confine the opinion to matters material to the issues in the case and in relation only to the questions that are within the expert's expertise (skill and experience);
- (f) where a question has been put which falls outside the expert's expertise, to state this at the earliest opportunity and to volunteer an opinion as to whether another expert is required to bring expertise not possessed by those already involved or, in the rare case, as to whether a second opinion is required on a key issue and, if possible, what questions should be asked of the second expert;
- (g) in expressing an opinion, to take into consideration all of the material facts including any relevant factors arising from ethnic, cultural, religious or linguistic contexts at the time the opinion is expressed;
- (h) to inform those instructing the expert without delay of any change in the opinion and of the reason for the change.

(based on paragraph 3.2 of PD25A)

The requirement for the court's permission

5.1 The general rule in family proceedings is that the court's permission is required to use expert evidence (FPR25.4(1)). The court is under a duty to restrict expert evidence to that which in the opinion of the court is necessary to assist the court to resolve the proceedings. In children proceedings, the court's permission is required to instruct an expert and for a child to be examined or assessed for the purpose of preparation of expert evidence for use in the proceedings (FPR25.4(2)).
(based on part paragraphs 1.6 and 1.7 of PD25 A)

Preliminary enquiries which the expert should expect to receive

6.1 In good time for the information requested to be available for the court hearing when the court will decide whether or not to give permission for the expert evidence to be used (or also in children proceedings, for the expert to be instructed) or for the advocates' meeting or discussion where one takes place before such a hearing, the solicitor for the party proposing to instruct the expert (or party responsible for instructing the expert or solicitor for the child if the instruction proposed is joint) shall approach the expert with some information about the case. The details of the information to be given to the expert are set out in Practice Direction 25C, paragraph 3.2 and Practice Direction 25D paragraph 3.2 and includes the nature of the proceedings, the questions for the expert, the time when the expert's report is likely to be required, the timing of any hearing at which the expert may have to give evidence and how the expert's fees will be funded. *(based on paragraphs 4.1 and 5.8 of PD25A)*

6.2 Children proceedings are confidential which means in those proceedings solicitors or parties raising preliminary enquiries of an expert who has not yet been instructed can only tell the expert information which he or she will need about the case to be able to answer the preliminary questions raised. *(based on part of paragraph 1.10 of PD 25A)*

Balancing the needs of the court and those of the expert

7.1 It is essential that there should be proper co-ordination between the court and the expert when drawing up the case management timetable: the needs of the court should be balanced with the needs of the expert whose forensic work is undertaken as an adjunct to his or her main professional duties. *(based on part of paragraph 4.1 of PD25A)*

The expert's response to preliminary enquiries

8.1 In good time for the court hearing when the court will decide whether or not to give permission for the expert evidence to be used (or also in children proceedings, for the expert to be instructed) or for the advocates' meeting or discussion where one takes place before that hearing, the solicitors intending to instruct the expert will need confirmation from the expert—

- (a) that acceptance of the proposed instructions will not involve the expert in any conflict of interest;
- (b) that the work required is within the expert's expertise;
- (c) that the expert is available to do the relevant work within the suggested time scale;
- (d) when the expert is available to give evidence, of the dates and times to avoid and, where a hearing date has not been fixed, of the amount of notice the expert will require to make arrangements to come to court (or to give evidence by telephone conference or video link) without undue disruption to his or her normal professional routines;

- (e) of the cost, including hourly or other charging rates, and likely hours to be spent attending experts' meetings, attending court and writing the report (to include any examinations and interviews);
- (f) of any representations which the expert wishes to make to the court about being named or otherwise identified in any public judgment given by the court.

(based on paragraph 4.2 of PD 25A)

Content of the expert's report

9.1 The expert's report shall be addressed to the court and prepared and filed **in accordance with the court's timetable** and must—

- (a) give details of the expert's qualifications and experience;
- (b) include a statement identifying the document(s) containing the material instructions and the substance of any oral instructions and, as far as necessary to explain any opinions or conclusions expressed in the report, summarising the facts and instructions which are material to the conclusions and opinions expressed;
- (c) state who carried out any test, examination or interview which the expert has used for the report and whether or not the test, examination or interview has been carried out under the expert's supervision;
- (d) give details of the qualifications of any person who carried out the test, examination or interview;
- (e) answer the questions about which the expert is to give an opinion and which relate to the issues in the case;
- (f) in expressing an opinion to the court—
 - (i) take into consideration all of the material facts including any relevant factors arising from ethnic, cultural, religious or linguistic contexts at the time the opinion is expressed, identifying the facts, literature and any other material including research material that the expert has relied upon in forming an opinion;
 - (ii) describe their own professional risk assessment process and process of differential diagnosis, highlighting factual assumptions, deductions from the factual assumptions, and any unusual, contradictory or inconsistent features of the case;
 - (iii) indicate whether any proposition in the report is an hypothesis (in particular a controversial hypothesis), or an opinion deduced in accordance with peer-reviewed and tested technique, research and experience accepted as a consensus in the scientific community;
 - (iv) indicate whether the opinion is provisional (or qualified, as the case may be), stating the qualification and the reason for it, and identifying what further information is required to give an opinion without qualification;
- (g) where there is a range of opinion on any question to be answered by the expert—
 - (i) summarise the range of opinion;

- (ii) identify and explain, within the range of opinions, any “unknown cause”, whether arising from the facts of the case (for example, because there is too little information to form a scientific opinion) or from limited experience or lack of research, peer review or support in the relevant field of expertise;
- (iii) give reasons for any opinion expressed: the use of a balance sheet approach to the factors that support or undermine an opinion can be of great assistance to the court;
- (h) contain a summary of the expert’s conclusions and opinions;
- (i) contain a statement that the expert—
 - (i) has no conflict of interest of any kind, other than any conflict disclosed in his or her report;
 - (ii) does not consider that any interest disclosed affects his or her suitability as an expert witness on any issue on which he or she has given evidence;
 - (iii) will advise the instructing party if, between the date of the expert’s report and the final hearing, there is any change in circumstances which affects the expert’s answers to (i) or (ii) above;
 - (iv) understands their duty to the court and has complied with that duty; and
 - (v) is aware of the requirements of Part 25 and this practice direction;
- (j) be verified by a statement of truth in the following form—

“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.”

(FPR Part 17 deals with statements of truth. Rule 17.6 sets out the consequences of verifying a document containing a false statement without an honest belief in its truth.)

(based on paragraph 3.3 of PD25A)

Arrangements for experts to give evidence

Preparation

10.1 Where the court has directed the attendance of an expert witness, the party who is responsible for the instruction of the expert shall, **by a date specified by the court prior to the hearing at which the expert is to give oral evidence (“the specified date”)** or, **where in care or supervision proceedings an Issues Resolution Hearing (“ the IRH”) is to be held, by the IRH**, ensure that—

- (a) a date and time (if possible, convenient to the expert) are fixed for the court to hear the expert’s evidence, substantially in advance of the hearing at which the expert is to give oral evidence and no later than a specified date prior to that hearing or, where an IRH is to be held, than the IRH;

- (b) if the expert's oral evidence is not required, the expert is notified as soon as possible;
- (c) the witness template accurately indicates how long the expert is likely to be giving evidence, in order to avoid the inconvenience of the expert being delayed at court;
- (d) consideration is given in each case to whether some or all of the experts participate by telephone conference or video link, or submit their evidence in writing, to ensure that minimum disruption is caused to professional schedules and that costs are minimised.

(based on paragraph 8.1 of PD25A)

Experts attending court

10.2 Where expert witnesses are to be called, all parties shall, **by the specified date or, where an IRH is to be held, by the IRH**, ensure that—

- (a) the parties' advocates have identified (whether at an advocates' meeting or by other means) the issues which the experts are to address;
- (b) wherever possible, a logical sequence to the evidence is arranged, with experts of the same discipline giving evidence on the same day;
- (c) the court is informed of any circumstance where all experts agree but a party nevertheless does not accept the agreed opinion, so that directions can be given for the proper consideration of the experts' evidence and opinion and of the party's reasons for not accepting the agreed opinion;
- (d) in the exceptional case the court is informed of the need for a witness summons.

(based on paragraph 8.2 of PD25A)

The Right Honourable

Sir Nicholas Wall

The President of the Family Division

Signed by authority of the Lord Chancellor:

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Parliamentary Under Secretary of State
Ministry of Justice