

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 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

This Practice Direction supplements FPR Part 25

Scope of this Practice Direction

1.1 This Practice Direction applies to financial remedy proceedings and other family proceedings except children proceedings and contains guidance on –

- (a) the use of single joint experts;
- (b) how to prepare for the hearing at which the court will consider whether or not to give permission for expert evidence to be used including-
 - (i) preliminary enquiries of experts;
 - (ii) information to be given to the court before the hearing;
- (c) the letter of instruction to the expert.

Single joint experts

2.1 Wherever possible, expert evidence should be obtained from a single joint expert instructed by both or all the parties (“SJE”). To that end, a party wishing to instruct an expert should first give the other party or parties a list of the names of one or more experts in the relevant speciality whom they consider suitable to be instructed. (*paragraph 5.1 of PD25A*)

2.2 **Within 10 business days after receipt of the list of proposed experts**, the other party or parties should indicate any objection to one or more of the named experts and, if so, supply the name(s) of one or more experts whom they consider suitable. (*paragraph 5.2 of PD25A*)

2.3 Each party should disclose whether they have already consulted any of the proposed experts about the issue(s) in question. (*paragraph 5.3 of PD25A*)

2.4 Where the parties cannot agree on the identity of the expert, each party should think carefully before instructing their own expert because of the costs implications. Disagreements about the use and identity of an expert may be better managed by the court in the context of an application for directions. (see paragraphs 2.8 and 2.9 below). (*paragraph 5.4 of PD25A*)

Agreement to instruct separate experts

2.5 If the parties agree to instruct separate experts,-

- (a) they should agree in advance that the reports will be disclosed; and
- (b) the instructions to each expert should comply, so far as appropriate, with paragraphs 4.1 and 6.1 below (*Letter of instruction*).(**paragraph 5.5 of PD25A**)

Agreement to instruct an SJE

2.6 If there is agreement to instruct an SJE, **before instructions are given** the parties should-

- (a) so far as appropriate, comply with the guidance in paragraphs 3.2 (Preliminary enquiries of the expert) and receive the expert's confirmation in response to preliminary enquiries referred to in paragraph 8.1 of Practice Direction 25B;
 - (b) have agreed in what proportion the SJE's fee is to be shared between them (at least in the first instance) and when it is to be paid; and
 - (c) if applicable, have obtained agreement for public funding.
- (**paragraph 5.6 of PD25A**)

2.7 The instructions to the SJE should comply, so far as appropriate, with paragraphs 4.1 and 6.1 below (*Letter of instruction*).(**paragraph 5.7 of PD25A**)

Seeking the court's directions for the use of an SJE

2.8 Where the parties seek the court's directions for the use of an SJE, they should comply, so far as appropriate, with paragraphs 3.2, 3.5 and 3.6 below.(**paragraph 5.8 of PD25A**)

2.9 The instructions to the SJE should comply, so far as appropriate, with paragraphs 4.1 and 6.1 below (*Letter of instruction*).(**paragraph 5.9 of PD25A**)

Preparation for the permission hearing

3.1 This section gives guidance on how to prepare for the hearing at which the court will consider whether or not to give permission for expert evidence to be used. The purpose of the preparation is to ensure that the court has the information required to enable it to exercise its powers under FPR 25.4 and 25.5.

Preliminary enquiries of the expert

3.2 In good time for the information requested to be available for the hearing at which the court will consider whether or not to give permission for expert evidence to be used, the solicitor for the party proposing to instruct the expert (or party responsible for instructing the expert, if the instruction proposed is joint) shall approach the expert with the following information—

- (a) the nature of the proceedings and the issues likely to require determination by the court;
- (b) the issues in the proceedings to which the expert evidence is to relate;

- (c) the questions about which the expert is to be asked to give an opinion and which relate to the issues in the case;
- (d) whether permission is to be asked of the court for the use of another expert in the same or any related field (that is, to give an opinion on the same or related questions);
- (e) the volume of reading which the expert will need to undertake;
- (f) whether or not it will be necessary for the expert to conduct interviews and, if so, with whom;
- (g) the likely timetable of legal steps;
- (h) when the expert's report is likely to be required;
- (i) whether and, if so, what date has been fixed by the court for any hearing at which the expert may be required to give evidence (in particular the Final Hearing); and whether it may be possible for the expert to give evidence by telephone conference or video link: see paragraphs 10.1 and 10.2 (*Arrangements for experts to give evidence*) of Practice Direction 25B;
- (j) the possibility of making, through their instructing solicitors, representations to the court about being named or otherwise identified in any public judgment given by the court;
- (k) whether the instructing party has public funding and the legal aid rates of payment which are applicable.

(paragraph 4.1 of PD25A)

Expert's response to preliminary enquiries

3.3 In good time for the hearing at which the court will consider whether or not to give permission for expert evidence to be used, the solicitors or party intending to instruct the expert must obtain the confirmations from the expert referred to in paragraph 8.1 of Practice Direction 25B. These confirmations include that the work is within the expert's expertise, the expert is available to do the work within the relevant timescale and the expert's costs. (*based on paragraph 4.2 of PD25A*)

3.4 Where parties have not agreed on the appointment of a single joint expert before the hearing at which the court will consider whether or not to give permission for expert evidence to be used, they should obtain the above confirmations in respect of all experts whom they intend to put to the court for the purposes of rule 25.11(2)(a) as candidates for the appointment. (*based on part paragraph 4.2 and 5.6 of PD25A*)

The application for the court's permission to use expert evidence

3.5 In addition to the matters specified in FPR 25.7(1)(a), an application for the court's permission to call an expert or put in evidence an expert's report must state—

- (a) the discipline, qualifications and expertise of the expert (by way of C.V. where possible);
- (b) the expert's availability to undertake the work;
- (c) the timetable for the report;
- (d) the responsibility for instruction;
- (e) whether the expert evidence can properly be obtained by only one party;

- (f) why the expert evidence proposed cannot properly be given by an expert already instructed in the proceedings;
- (g) the likely cost of the report on an hourly or other charging basis;
- (h) the proposed apportionment (at least in the first instance) of any jointly instructed expert's fee; when it is to be paid; and, if applicable, whether public funding has been approved.

(paragraph 4.3 of PD 25A)

The draft order to be attached to the application for the court's permission

3.6 FPR 25.7 provides that a draft of the order giving the court's permission to call an expert or put in evidence an expert's report is to be attached to the application for the court's permission. That draft order must set out the following matters—

- a) the issues in the proceedings to which the expert evidence is to relate;
- b) the party who is to be responsible for drafting the letter of instruction and providing the documents to the expert;
- c) the timetable within which the report is to be prepared, filed and served;
- d) the disclosure of the report to the parties and to any other expert;
- e) the organisation of, preparation for and conduct of any experts' discussion (see Practice Direction 25E-Discussions between Experts in Family Proceedings);
- f) the preparation of a statement of agreement and disagreement by the experts following an experts' discussion;
- g) making available to the court at an early opportunity the expert reports in electronic form;
- h) the attendance of the expert at court to give oral evidence (alternatively, the expert giving his or her evidence in writing or remotely by video link), whether at or for the Final Hearing or another hearing; unless agreement about the opinions given by the expert is reached by a date specified by the court prior to the hearing at which the expert is to give oral evidence.

(based on paragraph 4.4 of PD25A)

Letter of instruction

4.1 The party responsible for instructing the expert shall, **within 5 business days after the permission hearing**, prepare (in agreement with the other parties where appropriate), file and serve a letter of instruction to the expert which shall—

- (a) set out the context in which the expert's opinion is sought (including any ethnic, cultural, religious or linguistic contexts);
- (b) set out the questions which the expert is required to answer and ensuring that they -
 - (i) are within the ambit of the expert's area of expertise;
 - (ii) do not contain unnecessary or irrelevant detail;
 - (iii) are kept to a manageable number and are clear, focused and direct; and

(iv) reflect what the expert has been requested to do by the court(**derived from paragraph 4.5(b of Practice Direction 25A)**);

(c) list the documentation provided, or provide for the expert an indexed and paginated bundle which shall include—

(i) an agreed list of essential reading; and

(ii) a copy of this Practice Direction and Practice Directions 25B,25E and where appropriate Practice Direction 15B;

(d) identify any materials provided to the expert which have not been produced either as original medical (or other professional) records or in response to an instruction from a party, and state the source of that material (such materials may contain an assumption as to the standard of proof, the admissibility or otherwise of hearsay evidence, and other important procedural and substantive questions relating to the different purposes of other enquiries);

(e) identify all requests to third parties for disclosure and their responses in order to avoid partial disclosure, which tends only to prove a case rather than give full and frank information;

(f) identify the relevant people concerned with the proceedings (for example, the treating clinicians) and inform the expert of his or her right to talk to them provided that an accurate record is made of the discussions;

(g) identify any other expert instructed in the proceedings and advise the expert of their right to talk to the other experts provided that an accurate record is made of the discussions;

(h) subject to any public funding requirement for prior authority, define the contractual basis upon which the expert is retained and in particular the funding mechanism including how much the expert will be paid (an hourly rate and overall estimate should already have been obtained), when the expert will be paid, and what limitation there might be on the amount the expert can charge for the work which they will have to do. In cases where the parties are publicly funded, there may also be a brief explanation of the costs and expenses excluded from public funding by Funding Code criterion 1.3 and the detailed assessment process.

(based on paragraph 4.5 of PD25A)

Adult who is a protected party

5.1 Where the adult is a protected party, that party's representative shall be involved in any instruction of an expert, including the instruction of an expert to assess whether the adult, although a protected party, is competent to give evidence (*see Practice Direction 15B-Adults who May Be Protected Parties and Children Who May Become Protected Parties in Family Proceedings*).

(based on part of paragraph 2.6 of PD25A)

Asking the court to settle the letter of instruction to a single joint expert

6.1 Where possible, the written request for the court to consider the letter of instruction referred to in rule 25.12(2) should be set out in an e-mail to the court and copied by e-mail to the other instructing parties. The request should be sent to the relevant court or (by prior arrangement only) directly to the judge dealing with the proceedings; in the magistrates' court, the request should be sent to the legal adviser

who will refer it to the appropriate judge or justices, if necessary. The court will settle the letter of instruction, usually without a hearing to avoid delay; and will send (where practicable, by e-mail) the settled letter to the party responsible for instructing the expert for transmission forthwith to the expert, and copy it to the other instructing parties for information.

(paragraphs 4.6 and 5.5,5.7 and 5.9 of Pd25A)

The Right Honourable
Sir Nicholas Wall
The President of the Family Division

Signed by authority of the Lord Chancellor:

[_____]
Parliamentary Under Secretary of State
Ministry of Justice