

# The Academy of Experts

## FACT SHEET

2015/01 (civ)

Comments on the “Guidance for the instruction of experts in civil claims” produced by the Civil Justice Council and effective from 1st December 2014

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## Introduction

The Protocol for the Instruction of Experts to give Evidence in Civil Claims which was annexed to PD35 has been removed. In its place the Civil Justice Council (CJC) has published Guidance for the instruction of experts in civil claims as a standalone document which largely provides the same technical content as the previous Protocol. The CJC says that the changes were made primarily for the following reasons:

- the document should be 'guidance' not a 'protocol' as it covers both pre- and post- proceeding issues.
- the new guidance reflects Jackson costs reforms (eg new costs rules).
- the text was reorganised to more closely follow the sequence of the litigation process.
- an emphasis on using plainer English and simpler terminology.

There are minimal consequential changes to PD35.

## What is the effect of this?

As a Protocol annexed to the Practice Direction strict compliance was mandatory. Now it is Guidance and in theory a standalone document. The fact that the Guidance has been issued by the Civil Justice Council should of course lend weight to its importance. However its actual status is not fully clear as it is difficult to conceive how guidance can be mandatory. PD35 states that Experts must be aware of the requirements of Part 35, this practice direction and the Guidance for the Instruction of Experts in Civil Claims 2014. However in the Guidance itself Experts are required to make a declaration that they have complied with the requirements of Part 35 and PD35 and this guidance.

In reality for Experts there is no real change in the duties and requirements placed on them.

## Administrative Changes

- 1 The order in which much of the information appears is significantly different from the Protocol. Although much of the content is the same there are some notable changes to the wording.
- 2 There have been some additions; most notably 'sequential reporting' (para 63) and sanctions (paras 89-92) and also at paras 31, 61 and 87.
- 3 Some sections have been removed entirely, some make no material changes to the substance and meaning but others could be more significant such as the comments on contingency fees in para 88.
- 4 It should be also be noted that the language in the guidance does not necessarily strictly follow that in CPR.
- 5 The new guidance has no table of contents, section headings have been changed and some of the useful sub-headings have disappeared. For ease of reference we have provided a guide to the contents at the end of this document.

The following table provides a commentary on key aspects of the guidance.

Para	Text from the guidance	Commentary
4	<i>... it is required to resolve the proceedings ...</i>	The reference to CPR 35.1 is incorrect. CPR 35.1 states “Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.”
15	<i>... any failure 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 ...</i>	Experts are reminded that their delays or failure to comply might give rise to sanctions for the parties. In addition sanctions can be imposed on the expert.  Note that sanctions are dealt with in paras 89-92 and not 86-88 as shown in the guidance.
17d	<i>Parties must provide an estimate to the court of the costs of the proposed expert evidence and for each stage of the proceedings (CPR 35.4(2))</i>	<b>NEW</b> Whilst the requirement relates to the parties it will naturally impact on experts as they will be required to provide information with regard to their costs for budgeting. This follows from the Jackson Reforms.
17k	<i>... guidance that the expert’s fees and expenses may be limited by the court (note expert’s recoverable fees in the small claims track cannot exceed £750 ...</i>	It is TAE’s belief that the limitation only relates to recoverable fees rather than fees contractually agreed. See also para 26.
20	<i>... attach relevant documents ...</i>	A timely reminder has been included to those instructing experts that they must provide clear instructions and relevant documentation.
20a	<i>... and any relevant claim reference numbers ...</i>	Confirmation of best practice.
20c	<i>... the issues to be addressed ...</i>	Confirmation of P35.4 (2) (a) and the need to know the purpose of the appointment.
20g	<i>... 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, the track to which the claim has been allocated and whether there is a specific budget for the experts’ fees.</i>	Confirmation that those instructing should provide full particulars to the expert particularly in relation to the timetable.  This is a very helpful addition for experts.
21	<i>Those instructing experts should seek to agree, where practicable, the instructions for the experts, and that they receive the same factual material.</i>	<b>NEW</b> Should provide useful assistance for experts focusing on the areas to be reported on.
23a	<i>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.</i>	A useful reminder for experts.
23d	<i>Where an expert advisor is approached to act as an expert witness they will need to consider carefully whether they can accept a role as expert witness;</i>	This is a useful reminder to both experts and those instructing them about the dangers of changing expert roles.
25	<i>Where an expert identifies that the basis of his instruction differs from that of another expert, he should inform those instructing him.</i>	<b>NEW</b> This should be considered in conjunction with para 21 of the guidance.

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Para	Text from the guidance	Commentary
26	<i>Experts should be aware that they will be required to provide estimates for the court and that the court may limit the amount to be paid as part of any order for budgeted costs (CPR 35.4 (2) and (4) and 3.15).</i>	<b>NEW</b> It is TAE's understanding that this should relate to recoverable costs and not necessarily contractual fees (as in para 17.k of the guidance). However for an SJE the court may, before an expert is instructed, limit the amount that can be paid by way of fees and expenses to the expert. <i>cf</i> CPR 35.8 (4) (a)
27	<i>However, experts should not do so without first discussing the position with those who instruct them and considering 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.</i>	This gives clear guidance for experts on withdrawal from a case.
29	<i>... clearly marked "expert's requests for directions" ...</i>	Additional words have been added to make it clear how letters seeking directions from the court should be addressed.
30	<i>Experts should try to ensure that they have access to all relevant information held by the parties, and that the same information has been disclosed to each expert in the same discipline. Experts should seek to confirm this soon after accepting instructions, notifying instructing solicitors of any omissions.</i>	<b>NEW</b> This ties in with paras 20 & 21 of the guidance
31	<i>If a solicitor sends an expert additional documents before the report is finalised the solicitor must tell the expert whether any witness statements or expert reports are updated versions of those previously sent and whether they have been filed and served.</i>	<b>NEW</b> This should protect experts from not having up to date information on which to base their opinions.
33	<i>Any request for further information from the other party made by an expert should be in a letter to the expert's instructing party and should state why the information is necessary and the significance in relation to the expert issues in the case.</i>	<b>NEW</b> This confirms existing best practice.
41	<i>If instructions are received after the deadline but before the completion of the report the expert should consider whether it is practicable to comply without adversely affecting the timetable for delivery of the report and without greatly increasing the costs and exceeding any court approved budget.</i>	A timely reminder for experts to be aware of both timetable and cost budgets in relation to late instructions particularly as an SJE.
51	<i>... and a template for medical reports has been created by the Ministry of Justice.</i>	This is in addition to the reference to the Model Form of Experts Report and now refers to a template for medical reports created by the Ministry of Justice.  This is as a result of changes made to CPR 35 in October 2014 dealing with Low Value Personal Injury Claims in Road Traffic Accidents.

Para	Text from the guidance	Commentary
52a	<i>understand their duty to the court and have complied and will continue to comply with it; and</i>	Reiteration of the Judicial Committee's requirement for experts to state that they have complied and will continue to comply with their duty to the court. It should be noted this requirement is in addition to CPR 35.
52.b	<i>...are aware of and have complied with the requirements of CPR 35 and PD 35 and this guidance.</i>	The Expert's Declaration has been modified to substitute the 'guidance' for the 'protocol'.
57	<i>When addressing questions of fact and opinion, experts should keep the two separate.</i>	A general reminder to experts to keep fact and opinion separate and also to specify those which they know to be true.
61	<i>Before filing and serving an expert's report solicitors must check that any witness statements and other experts' reports relied upon by the expert are the final served versions.</i>	<b>NEW</b> A new and welcome addition to the guidance which clearly sets down the instructor's duty.
63	<i>Where there is to be sequential exchange of reports then the defendant's expert's report usually will be produced in response to the claimant's. The defendant's report should then:</i>  <i>a. confirm whether the background set out in the claimant's expert report is agreed, or identify those parts that in the defendant's expert's view require revision, setting out the necessary revisions. The defendant's expert need not repeat information that is adequately dealt with in the claimant's expert report;</i>  <i>b. focus only on those material areas of difference with the claimant's expert's opinion. The defendant's report should identify those assumptions of the claimant's expert that they consider reasonable (and agree with) and those that they do not; and</i>  <i>c. 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 report should contain a reconciliation between the claimant's expert's loss assessment and the defendant's, identifying for each assumption any different conclusion to the claimant's expert.</i>	<b>NEW</b> This is a completely new section dealing with the sequential exchange of experts' reports and provides useful guidance.
66	<i>Where experts significantly alter their opinion, as a result of new evidence or for any other reason, they must inform those who instruct them and amend their reports explaining the reasons. Those instructing experts should inform other parties as soon as possible of any change of opinion.</i>	Experts are reminded to notify those instructing them of changes of their opinion and reasons as soon as possible. It also places an obligation of those instructing experts to ensure that other parties are notified.
71	<i>They are not to seek to settle the proceedings.</i>	A reminder to both experts and those instructing them of the purpose of experts' discussions and the experts' role in them - in particular that they are not negotiators.

Para	Text from the guidance	Commentary
73	<i>Where there is sequential exchange of expert reports, with the defendant's expert's report prepared in accordance with the guidance at paragraph 63 above, the joint statement should focus 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.</i>	<b>NEW</b> This should be read in conjunction with para 63 of the guidance.
74	<i>... In small claims and fast-tracks cases there should not normally be face to face meetings between experts ...</i>	This section refers to the arrangements for discussions of experts in both small claims and fast track cases but not multi-track cases which are dealt with in para 75.
75	<i>... lawyers and experts should cooperate to produce an agenda for any discussion between experts ...</i>	This sets down the position in relation to multi-track cases and the production of an agenda for the discussion of experts.  Note:  No guidance is given for the setting of agendas in Small Claims or Fast Track cases.
80	<i>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 that experts have not been instructed to avoid reaching agreement (or otherwise defer from doing so) on any matter within the experts' competence.</i>	<b>NEW</b> Provides a helpful reminder to those instructing about attempts to limit expert discussions. TAE has produced a Joint Statement Declaration to comply with this requirement.  It should be noted that 18.8 from the previous protocol appears to have been removed relating to lawyers not being present at experts' discussions. PD35 9.4 does however state "Unless ordered by the court, or agreed by all parties, and the experts, neither the parties nor their legal representatives may attend experts discussions".
83	<i>Since April 2013 the court has had the power to order at any state that experts of like disciplines give their evidence at trial concurrently, not sequentially with their party's evidence as has been the norm hitherto: PD 35 paragraphs 11.1-11.4 (this is often known as "hot-tubbing"). The experts will then be questioned together, firstly by the judge based upon disagreements in the joint statement, and then by parties' advocates. Concurrent evidence can save time and costs, and assist the judge in assessing the difference of views between experts. Experts need to be told in advance of the trial if the court has made an order for concurrent evidence.</i>	<b>NEW</b> A new addition dealing with concurrent evidence  Note in particular the final sentence.
84	<i>... keep experts updated with timetables (including the dates and times experts are to attend), the location of the court and court orders; consider, where appropriate, whether experts might give evidence via video-link; and inform experts immediately if trial dates are vacated or adjourned.</i>	The section on attendance at court has been enhanced placing the obligation on those instructing to keep experts updated on court timetables etc.  A welcome addition.

Para	Text from the guidance	Commentary
87	<i>When a case has been concluded either by a settlement or trial the solicitor should inform the experts they have instructed.</i>	<b>NEW</b> A new addition which should be welcomed by experts. This is a very positive first step in the right direction.
88	<i>we consider that it will be a rare case indeed that the court will be prepared to consent to an expert being instructed under a contingency fee agreement.</i>	It should be noted that irrespective of the reference in the guidance it is a disciplinary offence for a TAE member to act on a contingent basis and would also be a breach of the Code of Practice for Experts.  The Expert's Declaration still requires a statement as follows "I confirm that I have not entered in to any arrangement where the amount or payment of my fees is in any way dependant on the outcome of the case".
89	<i>Solicitors and experts should be aware that sanctions might apply because of a failure to comply with CPR 35, the PD or court orders.</i>	<b>NEW</b> This and paras 90-92 of the guidance are timely reminders of the court's powers.
90	<i>Whether or not court proceedings have been commenced a professional instructing an expert, or an expert, may be subject to sanction for misconduct by their professional body/regulator.</i>	<b>NEW</b>
91.	<i>If proceedings have been started the court has the power under CPR 44 to impose sanctions:</i>  <i>a. cost penalties against those instructing the expert (including a wasted costs order) or the expert (such as disallowance or reduction of the expert's fee) (CPR 35.4(4) and CPR 44).</i>  <i>b. that an expert's report/evidence be inadmissible.</i>	<b>NEW</b>
92	<i>Experts should also be aware of other possible sanctions</i>  <i>a. In more extreme cases, if the court has been misled 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 wrongdoer.</i>  <i>b. If an expert commits perjury, criminal sanctions may follow.</i>  <i>c. If an expert has been negligent there may be a claim on their professional indemnity insurance.</i>	<b>NEW</b> A new addition explicitly reminding experts of sanctions that can be applied.

## Guide to Contents of the “Guidance for the instruction of experts in civil claims” 2014.

Although there is no formal contents page to the guidance members may find the following summary of the various sections within it to be of use.

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