

Clarifying the role of the expert witness

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NEW guidance on the instruction of experts in civil claims came into effect at the end of 2014. The purpose of the updated guidance from the Civil Justice Council is to assist litigants, those instructing experts and experts themselves to understand best practice and any relevant pre-action protocol. The guidance replaces the protocol on experts which previously formed part of practice direction 35 of the Civil Procedure Rules (CPR).

In addition, the Society of Construction Law has recently published its findings following a consultation on the role of experts in construction and engineering disputes. The consultation process is ongoing but the themes identified in it are likely to bring about changes in the way experts are instructed in construction disputes.

Who does the new guidance apply to?

It is common for expert evidence to be obtained very early in the life of a dispute, particularly by a claimant who will obtain it pre-action and usually well before it issues a letter of claim, if its case relies on it. However, the court still has to agree to the expert's evidence being adduced in a court action.

The new guidance does not apply to advice obtained from an expert before court proceedings are started, where the expert's role is that of an expert adviser not an expert witness. That advice is regarded as confidential to the instructing party.

Expert duties

The new guidance reinforces and expands upon the duties and obligations of an expert, namely that:

- Experts must be aware of their obligation to comply with the overriding objective of all civil litigation that cases must be handled justly (CPR 1.1). This includes keeping costs in proportion to the value of the claim, not doing unnecessary work and acting fairly.
- Experts always owe a duty to exercise reasonable skill and care to those instructing them and to comply with any relevant code of practice.
- They have an overriding duty to help the court on matters within their expertise (CPR 35.3).
- Their opinions must be independent. They are not to act as a hired gun. The new guidance states that a useful test of this is that the expert would express the same view even if instructed by another party. This duty overrides any obligation to the person instructing or paying them and they should not take it upon themselves to promote the point of view of the paying party.
- An expert's view should be based on all material facts before them and should set out those facts and any literature or material relied on to reach their conclusion.
- Their views should be confined to their area of expertise and should indicate where issues fall outside of that area of expertise. The guidance states that experts must not express an opinion outside of their field of expertise or "accept any instruction to do so."

Appointment and instruction

The new guidance sets out the terms of the appointment of an expert and the information which should be included and documents to be attached. For example, the statements of case (if any), documents which form part of disclosure and witness statements relevant to the advice or report.

The guidance also states that where a pre-action advisory expert is later approached to act as an expert witness "they will need to give careful consideration as to whether they can accept a role as expert witness." They need to consider whether the instructions and/

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or work have, for any reason, placed them in conflict with their duties as an expert.

When parties apply for permission to rely on expert evidence, they must provide an estimate of the costs of the proposed expert. Most notably, the guidance states that experts should be aware of the need to provide estimates and that the court may limit the amount to be paid as part of any order for budgeted costs.

Experts may apply to the court if they feel their instructing solicitors have not provided them with relevant information and should first notify those instructing them seven days before making their application to court.

Expert reports

The guidance endorses the existing requirements that experts are to maintain professional objectivity and impartiality at all times and their reports should include a statement to confirm they have complied with their duties — in particular the provisions of CPR 35 and its practice direction. In addition, 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 do so to "ensure accuracy, clarity, internal consistency, completeness and relevance to the issues." Their reports should not include any suggestions that

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do not accord to their views. A without prejudice meeting of experts, however, is the one exception, when it is permissible for the expert to change their mind and subsequently amend their report. As in the previous version of the guidance, there is an express prohibition on retaining experts under conditional fee or contingency fee agreements as this may compromise the fundamental requirement of independence and objectivity.

The guidance concludes with a section on sanctions which highlights the penalties which may be applied where an expert or their instructing party have failed to comply with their duties; notably wasted cost orders, the inadmissibility of an expert report or more seriously being in contempt of court leading to a fine and/or imprisonment.

The new guidance does not radically alter the framework applicable to experts, but it does refine their duties. It reinforces most of the key criteria for the independence of experts. The guidance is also a useful reminder of the role of expert witnesses in civil disputes and how they and those instructing them should conduct themselves.

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