

The Academy of Experts

CODE OF GUIDANCE FOR EXPERTS AND THOSE INSTRUCTING THEM

(1st June 2001 Revision)

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Part 1: Preamble and Guiding Principles

1 Preamble

- 1.1 This Code of Guidance (the 'Code') offers guidance to experts and to those instructing them in the interpretation and satisfaction of Part 35 of the Civil Procedure Rules ('the Rules'), and its associated Practice Direction.¹ It is intended to assist in the interpretation of those provisions in the interests of good practice but it does not replace them. The existence of this Code does not therefore remove the need for experts to read those documents. PD/35
- 1.2 The Code of Guidance thus applies to all experts who are, or who may be, governed by Part 35 of the Rules.² Any expert will be governed by Part 35 if he is or if, at any stage of a dispute, he becomes '*an expert who has been instructed to give or prepare evidence for the purpose of court proceedings.*'³ CPR/35
CPR35.2
- 1.3 For convenience, the Code is arranged in 4 Parts. Part 1 sets out the expert's general duties. Part 2 provides guidance to the use of experts before proceedings commence and to the need for experts generally. Part 3 addresses the selection, appointment and instruction of experts and Part 4 provides guidance to the use and conduct of experts at the proceedings stage.
- 1.4 Additional rules on the use of experts in certain specific types of proceedings are provided elsewhere in Practice Directions and Protocols annexed to the Rules.
- 1.5 Attention is drawn to the fact that some courts such as, for example, the Commercial Court, have differing CPR procedures. Experts and those instructing them should ensure appropriate compliance.⁴ CPR/49
- 1.6 Throughout this document:

¹ PD/35
² CPR/35
³ CPR/35.2
⁴ CPR/49

- (1) words importing the singular also include the plural and vice versa where the context so requires; and
- (2) words importing the masculine also include the feminine where the context so requires.

2 Duties of the Expert Generally

2.1 The expert's general duties are as follows:

- (1) The expert should provide an opinion that is independent, regardless of the exigencies of litigation. In this context, a useful test of 'independence' is that the expert would give the same opinion if given the same instructions by an opposing party. The expert should not take it upon himself to promote the point of view of the party instructing him (sometimes referred to as 'engaging in an advocacy role').
- (2) The expert should confine his opinions to matters which are material to the dispute between the parties and provide opinions in relation only to matters that lie within his expertise. Accordingly, the expert should indicate clearly where a particular question or issue put to him falls outside his expertise.
- (3) In expressing his opinion, the expert should take into consideration the whole of the material facts before him at the time the opinion is expressed. The experts should indicate those facts, literature or any other material on which he has relied in forming his opinion and indicate that his opinion is provisional (or qualified, as the case may be) where he considers that further information is required or if, for any other reason, he is not satisfied that this opinion can be expressed finally and without qualification.
- (4) The expert should inform those instructing him without delay any change in his opinions on any material matter, whatever the reason for such change of opinion.

Part 2: Conduct and Use of Experts before Proceedings Commence and the Requirement for Experts generally

3 'Part 35 expert' and 'expert advisor' distinguished

- 3.1 Where an expert has been appointed by a party for any purpose other than the giving or preparation of evidence, and it is not intended that he may later be instructed to do so, he may be termed an 'expert advisor'.
- 3.2 Part 35 of the Rules and this Code do not apply to expert advisors and their appointment. However, the conduct of an expert advisor in relation to the Rules may be relevant if a party later seeks to recover the costs of that expert under an order of the court.

4 Application of the general Protocol annexed to the Rules

- 4.1 The Rules incorporate a Protocol⁵ which gives general guidance as to pre-action conduct by way of 'a statement of understanding between legal practitioners and others about pre-action practice.'⁶ In principle, the Protocol applies to all Part 35 experts. The objectives of the Protocol are to:
- (1) Encourage the exchange of early and full information about the 'expert' issues involved in a prospective legal claim;
 - (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
 - (3) Support the efficient management of proceedings where litigation cannot be avoided.⁷
- 4.2 The purpose of this Part of the Code is to help experts and their instructing parties to further those objectives. It sets out standards for the conduct and use of experts at the stage before proceedings

PRO/0/5

PRO/0/1

⁵ PRO/0/5
⁶ PRO/0/1
⁷ PRO/1/1.4

commence.

5 Compliance and sanctions

- 5.1 If proceedings are commenced, the court will be able to treat the standards set in this Code as the normal, reasonable approach to the use of experts. The court will look at the effect of non-compliance on a party when giving directions and making orders.
- 5.2 The court will consider compliance with the Code when, for example, giving directions⁸ on such matters as: CPR/3.1(4)
- (1) Costs;⁹ CPR/44.3(5)
 - (2) Interest;
 - (3) Time limits;
 - (4) Stay of proceedings;
 - (5) Whether to order a party to pay a sum of money into court.¹⁰ CPR/3.1(5)
- 5.3 The Practice Direction - Protocols sets out the court's approach to non-compliance and the orders it may make in relation to costs and interest.¹¹ PRO/1/2.3

6 The Overriding Objective: Reasonable Requirement for Experts

- 6.1 Part 35 of the Rules imposes on an expert an overriding duty to the court that takes precedence over any obligation to the person from whom he has received instructions or by whom he is paid.¹² That duty requires the expert to assist the court in dealing with cases in accordance with the 'overriding objective.' CPR/35.3
- 6.2 The overriding objective is the key principle of the Rules and is provided for at CPR/1.1 which is set out below:
- (1) *These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.*

⁸ CPR/3.1(4)

⁹ CPR/44.3(5)

¹⁰ CPR/3.1(5)

¹¹ PRO/1/2.3

¹² CPR/35.3

- (2) *Dealing with a case justly includes, so far as practicable -*
- (a) *Ensuring that parties are on an equal footing;*
 - (b) *Saving expense;*
 - (c) *Dealing with the case in ways which are proportionate;*
 - (i) *to the amount of money involved;*
 - (ii) *to the importance of the case;*
 - (iii) *to the complexity of the issues; and*
 - (iv) *to the financial position of each party;*
 - (d) *Ensuring that it is dealt with expeditiously and fairly; and*
 - (e) *Allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*

6.3 The provision for dealing with cases in ways which are proportionate, set out in CPR/1.1(2)(c)(i) to (iv) as above, is referred to in this Code as the 'proportionality principle'.

6.4 The overriding objective does not impose on the expert any duty to act as a mediator between the parties and does not require him to trespass on the role of the court in deciding issues.

7 Limitation of Action

7.1 If, by reason of complying with any part of this Code, a claimant's claim may be time barred under any provision in the Limitation Act 1980, or any other legislation that imposes a time limit for the bringing an action, the claimant may commence proceedings without complying with this Code. In such circumstances, a claimant who commences proceedings without complying with all, or any part, of this Code must apply, giving notice to all other parties, to the court for directions as to the timetable and form of procedure to be adopted, at the same time as he requests the court to issue proceedings. The court may consider whether to order a stay of the whole or part of the proceedings pending compliance with this Code.

8 The Need for Expertise: a Checklist

8.1 The overriding objective and the proportionality principle impose, at all stages of a dispute, a duty on the parties to restrict the appointment of experts to those cases where expertise is needed:

- (1) To define and agree the issues between the parties;
- (2) To assist in the evaluation of the merits of the case (liability);
- (3) To help quantify or assess the amount of any sum in dispute (damages or an account); and
- (4) To identify the appropriate basis on which a case might be settled early and fairly (remedy).

8.2 Those contemplating whether to instruct experts at the pre-action stage will therefore consider, applying a reasonableness test in each case, whether:

- (1) The nature of the dispute can be defined and communicated without expert assistance;
- (2) The issues between the parties can be identified and agreed without expert investigation;
- (3) The other party's case, or a substantial part of it, can be accepted or rejected without expert advice;
- (4) Facts agreed to be in issue can be proved without expert evidence;
- (5) The nature of the evidence of either party is such that it can only be interpreted adequately with expert help;
- (6) Communication between the parties can be effective without expert help;
- (7) Just terms of settlement can be drafted without expert help.

9 Single Joint Experts

- 9.1 The Code encourages joint selection and appointment of experts having regard to the court's power to direct such an appointment at the proceedings stage.¹³ CPR/35.7
- 9.2 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. Important indicators of such cases are given at CPR/35.7/1. For example, cases of low value involving simple issues of fact or of damages are likely to be appropriate for the use of a single joint expert.
- 9.3 In a case involving a number of disciplines, a single joint expert in the dominant discipline may be appointed to co-ordinate a single report.¹⁴ PD/35/5
- 9.4 Where, in the early stages of a dispute, examinations, 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 objectives of such an appointment will be to agree or to narrow issues.

Part 3: The Selection, Appointment and Instruction of Experts

10 Selection of Experts

- 10.1 Where the appointment of one or more experts is justified under paragraph 5 above, the principle of proportionality requires that the expertise, training, experience and cost of the expert are commensurate with the value, importance and complexity of the case.
- 10.2 The selection of suitable experts may be assisted by reference to the professional bodies of experts and specialist directories.

¹³ CPR/35.7

¹⁴ PD/35/5

11 Basis of Appointment

- 11.1 Prior to instructing a proposed expert or to seeking the court's permission to appoint a named expert,¹⁵ the appointor will establish with the expert: CPR/35.4
- (1) Whether he has the expertise called for by the case;
 - (2) Whether he is familiar with the general duties of the expert;
 - (3) Whether he is appropriately available;
 - (4) Whether the proposed appointment is a sole or joint one;
 - (5) The details of each instructing party, if the appointment is to be a joint one;
 - (6) A description of the work required;
 - (7) 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;
 - (8) Any requirement that any part of the work is contingent upon the outcome of any earlier stage;
 - (9) Provision for the programme to be varied as the case may progress, the court may direct and as the overriding objective may require; and
 - (10) Terms of the appointment. CPR/35.1
- 11.2 Where an expert is instructed jointly by two or more parties the terms of appointment must include:
- (1) A statement that all the instructing parties will be jointly and severally liable to pay the expert's fees and, accordingly, that the expert's invoice(s) will be served simultaneously on all instructing parties;¹⁶ and CPR/35.8(5)
 - (2) A statement of whether any order has been made limiting the amount of expert's fees and expenses.¹⁷ CPR/35.8(4)(a)

¹⁵ CPR/35.4

¹⁶ CPR/35.8(5)

¹⁷ CPR/35.8(4)(a)

Conditional and Contingency Fees

- 11.3 Payments conditional or contingent upon the outcome of the case must not be offered or accepted because such terms may be seen to compromise the expert's fundamental duty of independence.

12 Instructions

- 12.1 Instructions should, in their scope, reflect the proportionality principle. They should include:
- (1) Basic relevant information;
 - (2) The principal known issues;
 - (3) The purpose of any opinion sought;
 - (4) A description of any matter to be investigated or any experiment to be undertaken.
- 12.2 The expert should also be provided with (and, if necessary, should request) sufficient material that is relevant to his consideration of the case. Such material should be clearly legible, and should be supplied to the expert appropriately sorted and fully indexed.
- 12.3 **An expert must not be given any information that is legally privileged unless it has been decided that privilege should be waived. An expert should therefore assume that his instructions do not contain any information for which privilege would be claimed.**

Sufficiency of material

- 12.4 Guidance as to the sufficiency of material may be drawn from Part 31 of the Rules that deals with disclosure. The proportionality principle will be satisfied if the instructing party:
- (1) Makes a reasonable search for documents ('documents' are anything on which information is recorded) that are relevant to the expert's appointment; and
 - (2) Provides to the expert all such documents that are found as a result of that search.
- 12.5 Whether a search for documents has been reasonable is tested against:

- (1) The number of documents involved;
 - (2) The likely nature and complexity of any proceedings that may follow the pre-action stage; CPR35.4(1)
 - (3) The ease and/or the expense of retrieval, the copying of documents and their delivery to the expert; CPR35.4(2)
CPR35.4(3)
 - (4) The likely significance of any document found.
- 12.6 Where the progress of a case requires instructions to be updated and/or varied (for example, when proceedings may have been commenced) further instructions should be issued without delay.
- 12.7 **Where a single joint expert, is appointed the parties should agree instructions wherever possible (refer paragraph 19.3 below). Failing agreement, any of the parties may give separate instructions.¹⁸**

13 The Expert's Acceptance of Instructions

- 13.1 The expert will confirm whether he accepts his instructions. Where instructions may not be acceptable because, for example, they may require of him work that falls outside his expertise, or may impose unrealistic deadlines, the expert will inform those wishing to instruct him without delay.
- 13.2 Where, at any stage, the expert considers that his instructions are or have become insufficient for him to complete his work, he will request further instructions without delay.
- 13.3 Where, at any stage, the expert becomes aware that he may not be able to fulfil any of the terms of his appointment he will inform his instructing party and seek to agree an appropriate variation to his instructions.
- 13.4 Where an expert considers that his instructions and/or work have, for any reason, placed him in conflict with his duties as an expert, he will inform those instructing him without delay.

Withdrawal

- 13.5 Where his instructions remain incompatible with his duties, whether

¹⁸ [Daniels v Walker \[2000\] 1 W.L.R. 1382](#)

through incompleteness of instructions, a conflict between his duty to the court and his instructions, or for any other substantial reason, the may consider withdrawing from the case on notice. However, where proceedings have by then already been commenced, the expert will not withdraw from the case without first having considered carefully whether it would be more appropriate to make a written request for directions from the court.¹⁹

Part 4: Conduct and Use of Experts at the Proceedings Stage

Duty to restrict expert evidence

- 14 The court's duty is to restrict expert evidence to that which is reasonably required to resolve the proceedings.²⁰ the expert's overriding duty is therefore to help the court to achieve that aim. CPR/35.1

Permission to adduce expert evidence²¹

- 14.1 As the court's permission for expert evidence to be adduced is confined to the field and to the expert nominated,²² it is personal to that expert.²³ Any variation needed in either the field of expertise or the expert named will therefore require a new application to the court and, accordingly, will require the cost of that application to be justified. CPR35.4(1)
CPR35.4(2)
CPR35.4(3)

Limitation on recoverability of experts' fees and costs

- 14.2 Any limitation by the court²⁴ of the recoverability of an expert's fees and expenses will not affect the contractual liability of the instructing party to pay that expert's fees and expenses. CPR35.4(4)
- 14.3 At the application stage, the Court may require that a party should justify and quantify the amount of the experts' fees and costs that are potentially to be recovered in the case. The expert should provide expeditious and reasonable assistance to those instructing him to enable them to comply with any such requirement.

¹⁹ See clauses 3.61 et seq. below.

²⁰ CPR/35.1

²¹ CPR35.4(1)

²² CPR35.4(2)

²³ CPR35.4(3)

²⁴ CPR/35.4(4)

15 Mandatory and Discretionary Contents of the Expert's Written Report

- 15.1 The content and extent of the expert's reports (written unless the court directs otherwise) will be governed by the scope of the expert's general obligations, his overriding duty to the court and the overriding objective.
- 15.2 For general guidance as to an appropriate form for a report, experts may refer themselves to the Model Form of Expert's Report prepared by the Judicial Committee of The Academy of Experts.
- 15.3 The Practice Direction on Experts requires that an expert's report must be addressed to the court²⁵ and must:²⁶
- PD/35/1.1
PD/35/1.2
- (1) give details of the expert's qualifications,
 - (2) give details of any literature or other material which the expert has relied on in making the report,
 - (3) say who carried out any test or experiment which the expert has used for the report and whether or not the test or experiment has been carried out under the expert's supervision,
 - (4) give the qualifications of the person who carried out any such test or experiment, and
 - (5) where there is a range of opinion on the matters dealt with in the report –
 - (i) summarise the range of opinion, and
 - (ii) give reasons for his own opinion,
 - (6) contain a summary of the conclusions reached,
 - (7) contain a statement that the expert understands his duty to the court and has complied with that duty (rule 35.10(2)), and
 - (8) contain a statement setting out the substance of all material instructions (whether written or oral). The statement should summarise the facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those

²⁵ PD/35/1.1

²⁶ PD/35/1.2

opinions are based (rule 35.10(3)).

- 15.4 An expert's report must be verified by a statement of truth as well as containing the statements required in sub-paragraphs (7) and (8) above.²⁷ The form of the statement of truth is as follows: PD35/1.3
PD35/1.4

*"I believe that the facts I have stated in this report are true and that the opinions I have expressed are correct."*²⁸

Qualifications

- 15.5 The detail of the expert's qualifications to be given in the report should be commensurate with the nature and complexity of the case. It may be sufficient merely to state the expert's qualifications in the relevant profession. However, where highly specialised expertise is called for, the expert should include the detail of the particular training and/or experience that qualifies him to provide that highly specialised evidence.
- 15.6 An expert may wish to state the number of appointments as an expert witness that he has accepted in respect of such period prior to his appointment as he considers will assist the court, identifying the number of appointments which were for a claimant and which were for a defendant.

Reliance on the work of others²⁹

PD/35/1.2(2)

- 15.7 Where an expert 'relies' in his report on 'literature or other material' and he cites, in support of his own opinion, the opinion of another without having verified it for himself he must give details of any such opinion relied on. In such a case, it may assist the court if he also states the qualifications of the originator.

Ranges of opinion³⁰

PD/35/1.2(5)

- 15.8 If the mandatory summary of the range of opinion is based on published sources, the expert should explain those sources and, where appropriate, should state the qualifications of the originator(s) of the opinions from which he differs, particularly if such opinions represent a well-established school of thought.

²⁷ PD/35/1.3

²⁸ PD/35/1.4

²⁹ PD/35/1.2(2)

³⁰ PD/35/1.2(5)

- 15.9 Where there is no available source for the range of opinion, the expert may need to express an opinion on what he believes to be the range which other experts would arrive at if asked. In those circumstances, the expert should make it clear that the range that he summarises is based on his own judgement and explain the basis of that judgement.

Layout of the report

- 15.10 The expert will normally set out a clear statement of the issues with which he is dealing in his report at the beginning of the report.
- 15.11 A summary of the expert's conclusions is mandatory.³¹ The summary should be at the end of the report after all of 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. PD/35/1.2(6)

Basis of report: material instructions and known and assumed facts

- 15.12 The expert's mandatory statement of the substance of all his material instructions³² should not be incomplete or otherwise tend to mislead. The omission from the statement of 'off-the-record' oral instructions is not permitted.³³ Although instructions are not privileged,³⁴ the court will only allow cross-examination on instructions if there are reasonable grounds to consider that the statement may be inaccurate or incomplete. Accordingly, the expert may wish to include a declaration that his statement of his instructions is complete. PD/35/1.2(8)
CPR/35.10(3)
CPR/35.10(4)
- 15.13 The expert must also provide a statement of those facts (whether assumed or otherwise) upon which his opinion is based.
- 15.14 The statement must distinguish clearly between those facts that the expert knows to be true, those facts which he has assumed, and those

³¹ PD/35/1.2(6)
³² PD/35/1.2(8)
³³ CPR/35.10(3)
³⁴ CPR/35.10(4)

facts which he has been instructed to assume.

Statements of truth and duty to the court

- 15.15 The wording of the mandatory statement of truth must not be modified;³⁵ PD/35/1.4
that statement, together with the mandatory statement that the expert CPR/35.10(2)
understands his duty to the court and has complied with that duty, must
be placed at the end of the report³⁶ and may be incorporated in an
Expert's Declaration.

Key documents and glossary

- 15.16 Where there are extensive documents on which the expert has relied, a
chronological schedule of such documents that incorporates an outline
of their factual content should be annexed to the report to help the court.
- 15.17 Copies of documents that are of key significance to the opinions in the
report should be annexed to the report where practicable. Documents
that are not of key significance should neither be scheduled nor
annexed.
- 15.18 If the report contains technical terms, the provision of a glossary may
help the court.

16 Court Attendance in Fast-track Claims

- 16.1 If a party wishes its expert to attend a hearing in a fast-track claim, the CPR/35.5(2)
burden is on that party to persuade the court that the case is so
exceptional that the overriding objective requires such attendance.³⁷

17 Written Questions to Experts: Asking Questions about Reports

- 17.1 The procedure for questions and answers is intended to facilitate the CPR/35.6(94)
helpful exchange of information by the parties after expert reports have
been served. The expert has a duty to provide answers to questions
properly put. Where he fails to do so, the court's considerable powers of
sanction against that expert's party reflect the importance of that duty.³⁸

³⁵ PD/35/1.4
³⁶ CPR/35.10(2)
³⁷ CPR/35.5(2)
³⁸ CPR/35.6(4)

- 17.2 A party served with another party's report may, if it wishes, put written questions directly to another party's expert.³⁹ Such question or questions must be put to the expert within 28 days of the service of the other party's report⁴⁰ and may be put on one occasion only.⁴¹ The only permitted purpose of a question is the clarification of the contents of that report unless the parties agree or the court orders otherwise.⁴² The party asking the questions should send a copy of the questions to the other party.⁴³
- 17.3 Questions tendered for any purpose other than the clarification of the contents of the report are not permitted unless agreed to by or on behalf of the other party or permitted by the court.
- 17.4 The number and content of permissible questions asked will reflect the proportionality principle. The party asking the questions should, where appropriate, consult its own expert to help ensure that any questions are appropriately drafted.

Answering the questions and the status of the answers

- 17.5 Unless otherwise directed by the court an expert must normally answer the questions within 28 days of their receipt but it is within the parties' discretion to extend time limits by agreement if such extension is justified.⁴⁴ The expert should copy his answers to his own instructing party. His general duties, including his overriding duty to the court, will apply to his provision of answers.
- 17.6 The expert's answers to questions automatically become part of his own report.⁴⁵ They are thus covered by his statement of truth and will form part of his expert evidence.
- 17.7 Where an expert believes that a question put to him is not properly directed to the contents of the report, or is disproportionate, or has been asked out of time, he should refer the question to those instructing him with the reason for not answering the question(s). The instructing party should endeavour to resolve the problem with the other party before it

³⁹ CPR/35.6(1)

⁴⁰ CPR/35.6(2)

⁴¹ CPR/35.6(2)(a)

⁴² CPR/35.6(2)(c)

⁴³ PD/35/4.2

⁴⁴ CPR/35.6(2)(b)

⁴⁵ CPR/35.6(3)

makes an application to the court for directions.⁴⁶ The procedure for making such an application is given in CPR/23.

Written requests for directions in relation to questions

- 17.8 Where those instructing the expert have not applied to the court in respect of a question, but where the expert still believes that the question is improper or out of time, it is open to him to make written request to the court for directions.⁴⁷ Any such written request should generally be on written notice to the instructing party or parties but may be made without such notice if warranted by the circumstances. CPR/35.14
- 17.9 The right should only be exercised where the involvement of the court is justified by the proportionality principle.
- 17.10 Notice of any written request to the Court for directions should normally be at least 4 days, but may be less in cases of particular urgency in which case as much notice as possible should be given.

Further questions

- 17.11 Whilst there is a presumption that only one exchange of questions and answers will be justified in any case, further exchanges are permissible if the court gives permission or if the other party agrees.⁴⁸ Parties should not agree to any further exchange without first forming the view that is justified under the proportionality principle. The court may subsequently consider whether any additional exchange of questions and answers, and the conduct of the parties, were justified and may exercise its discretion on costs accordingly. CPR/35.6(2)(a)
- 17.12 Where a party does not consider that any additional exchange is justified (or is unclear on that issue), it should not therefore agree, thereby leaving the other party to consider applying to the court for permission.

18 Amendment of a Report after Disclosure

- 18.1 It may become necessary for an expert to amend his report:

⁴⁶ CPR/35.6(c)(i)
⁴⁷ CPR/35.14
⁴⁸ CPR/35.6(2)(a)

- (1) As a result of an exchange of questions and answers;
 - (2) Following agreements reached at a meeting between experts; or
 - (3) Where there is new evidence.
- 18.2 An expert's answers to questions are automatically incorporated into his report, and accordingly the report should not need to be amended. If, however, the court's comprehension of the report is likely to be impaired by it being shown the report and the answers separately (for example, where an exchange of questions and answers has led the expert to alter the substance of his report to a significant extent), amendment of the report may be justified, providing any additional cost involved in making the amendment is proportionate.
- 18.3 Where an expert has modified his opinion(s) following a meeting of experts, a simple addendum or memorandum to that effect will generally suffice. In some cases, however, the benefit to the court of having an amended report may justify the cost of making the amendment.
- 18.4 Where, as a result of new evidence or as a result of the discovery that evidence on which the expert has relied has become unreliable, the expert has significantly altered his opinion(s), he must amend his report to reflect that fact. The amended report should include the reason(s) for the amendment.
- 18.5 When an expert intends to amend his report, he should inform those instructing him and provide them with his amended version (or an addendum or memorandum) clearly marked as such and as soon as possible. Those instructing the expert should notify the other party or parties of the expert's decision to amend his report so that any costs that might otherwise be incurred unnecessarily as a result of working from the unamended report may be avoided. As soon as the amended report (or the addendum or memorandum, as the case may be) is completed, those instructing the expert should serve it without delay on the other party or parties and where appropriate file a copy with the court.

19 Single Joint Expert

- 19.1 The Rules encourage the use of joint experts. Part 35 and its Practice Direction deal extensively with the instruction and use of joint experts by the parties and the powers of the court to order their use.⁴⁹ CPR/35.7 and
35.8, PD/35/5

Joint instructions: each party may give instructions to the single joint expert

- 19.2 The parties should endeavour to develop and to agree joint instructions to the greatest possible extent. In particular, the parties should endeavour to agree what documents will be included with the single joint expert's instructions and what assumptions he is asked to make.
- 19.3 Where the parties fail to agree joint instructions, their instructions to the expert should make it clear which matters remain in conflict.
- 19.4 Whether an expert has already been appointed by agreement or a court has ordered such an appointment,⁵⁰ each party may give instructions to the expert and, if it does, must simultaneously copy those instructions to the other party.⁵¹ CPR/35.7
CPR/35.8(2)
- 19.5 Should a party wish to give Supplementary Instructions to the expert they should consider proportionality and the possible effect on the timetable for the production of the report. Supplementary Instructions should not be given to the expert unless the other parties have agreed or the court has ordered that they may be so given.
- 19.6 The single joint expert should provide a single report even though he may have received instructions that contain areas of conflicting fact or allegation. To the extent that conflicting instructions lead to different opinions (for example, because the instructions require the expert to make different assumptions of fact), the report may need to contain more than one set of opinions on any issue. It will be for the court to determine the facts.

Conduct of the single joint expert

- 19.7 The single joint expert will keep each of his instructing parties informed of any material steps that he may be taking by, for example, copying all

⁴⁹ CPR/35.7 and 35.8, PD/35/5

⁵⁰ CPR/35.7

⁵¹ CPR/35.8(2)

correspondence to each party.

- 19.8 Any meeting or conference attended by a single joint expert must be proportionate to the case. Any such meeting will normally be a joint one with all his instructing parties and/or their advisers.
- 19.9 A single joint expert should not attend any meeting or conference that is not a joint one, unless all the parties have first agreed in writing:
- (1) that such a meeting may be held; and
 - (2) who will pay the expert's fees for the meeting.
- 19.10 The single joint expert will serve his report simultaneously on all his instructing parties.

Request to the court for directions

- 19.11 Where significant conflicts arise to the extent that the single joint expert believes that he is unable to comply with the proportionality principle in preparing a report within his terms of reference, he should consider whether to resign his appointment or whether to make a written request to the court for directions.⁵²
- 19.12 In such circumstances, the first step is to give notice to his instructing parties identifying the particular conflict(s) or disproportionate instruction(s) that he considers he is unable to resolve without help. The expert should request that the parties endeavour to resolve the conflict, whilst reserving his right to take legal advice at the expense of his instructing parties at any point. In the light of any reply from the parties, he should consider whether he wishes to resign the joint appointment.
- 19.13 If he does resign, the expert should serve a concise statement of his reasons to his instructing parties. Where a court has ordered his joint appointment, the expert should serve the court with the statement, copied to the parties.
- 19.14 As an alternative to resigning, the expert may decide to send a written request to the court for directions. In the normal course, submitting a request to the court should be regarded as a last resort, but, where the expert regards resignation as his only alternative, a request to the court

CPR/35.14

⁵² CPR/35.14

may be preferable and is likely to be preferable if the expert has already done a significant amount which would need to be re-commissioned if another expert were to be appointed.

- 19.15 Before making a written request for directions from the court, the expert should give written notice to his instructing parties of his request at least 4 days prior to sending it to the court.

Cross-examination

- 19.16 Where a single joint expert is called to give evidence at trial, all parties, including those instructing him, may cross-examine him.

20 Expert's Right to ask Court for Directions Generally

- 20.1 Notwithstanding the specific guidance concerning requests for directions given in sections 16 and 18 above, any expert may exercise his right to request directions of the court without notice to his instructing party or parties.⁵³ The proportionality principle may, in exceptional circumstances, justify the expert in exercising that right. CPR/35.14(2)
- 20.2 Where the making of any request is justified, the expert should make it as soon as it becomes apparent to him that it is necessary or desirable to do so.
- 20.3 A request for directions should generally be on written notice to the instructing party or parties but may be made without such notice if warranted by the circumstances.
- 20.4 Where an expert makes a request to the court for directions, he should do so by means of a letter to the court.
- 20.5 The written request must contain:
- (1) The title of the claim;
 - (2) The reference number (if allocated) of the claim;
 - (3) The full name of the Expert;
 - (4) Full details of why directions are sought.
- 20.6 The court will deal with the written request without a hearing unless it

⁵³ CPR/35.14(2)

decides otherwise.

21 Power of the Court to Direct a Party to Provide Information

- 21.1 The Rules provide that a party may apply to the court for information which is available to another party.⁵⁴ Such information may be relevant to the duties of an expert whether he is appointed jointly or otherwise. CPR/35.9
- 21.2 Where an expert is aware of the existence or likely existence of such information, he will form a view as to whether he reasonably requires it. He will consider whether the information is:
- (1) Essential; or
 - (2) Important, but not essential; or
 - (3) Neither essential nor important, but information that is likely to be useful.
- 21.3 Where an expert has formed the view that he reasonably requires certain information because it is essential, he will request those instructing him to provide it. The instructing party must then provide that information expeditiously or, if he is unable to do so, he must so advise the expert, giving the reason as to why he is unable to provide it.
- 21.4 Save in respect of a document that he considers to be essential, the Expert should assess the cost and time to any party of a document being provided and will thus form a view as to whether its provision would be proportionate in the context of the case.
- 21.5 Where an expert believes that the provision to him of an important or useful document is justified, he will address a request to his instructing party (or jointly to his instructing parties) for it to be provided, together with brief reasons as to why that provision is justified.
- 21.6 Where instructing parties have received an expert's request for information, they will endeavour to agree that it be provided by the party to which it is available.
- 21.7 Where agreement is not reached, the instructing party to whom the information is not available will apply to the court for it to be provided.

⁵⁴ CPR/35.9

22 Discussions between Experts

- 22.1 The court has powers to direct a discussion between experts for the purposes set out in the Rules.⁵⁵ The parties may also agree that a discussion take place between their experts. More than one such discussion may be justified by the case. CPR/35.12(1)
- 22.2 Where a single joint expert has been instructed but a party has, with the permission of the court, instructed its own additional Part 35 expert, there should normally be a discussion between the single joint expert and the additional Part 35 expert. Such discussion should be confined to those matters within the remit of the additional Part 35 expert or as ordered by the court. Where there is such a discussion, any party which does not have its own Part 35 expert shall be entitled to appoint an expert advisor (who should be capable of being appointed as a Part 35 expert) to participate in that discussion.
- 22.3 The purpose of all discussions between experts, and the experts' duty, is, wherever possible, to:
- (1) Narrow the issues in the case;
 - (2) To reach agreement on any expert issue;
 - (3) To identify the reasons for disagreement on any expert issue;
 - (4) To identify what action, if any, that may be taken to resolve any of the outstanding issues between the parties.

Arrangements for discussion between experts

- 22.4 Arrangements for discussions between experts should be proportionate to the case. In small claims and fast-track cases there will not normally be meetings between experts. Where discussion is justified in such cases, telephone discussion or an exchange of letters will, in the interests of proportionality, usually suffice. In multi-track cases, discussion may be face to face, but the proportionality principle may require, in a particular case, discussion to be by telephone or video conference.
- 22.5 Before a discussion takes place, the claimant's expert should prepare

⁵⁵ CPR/35.12(1)

and agree an agenda with the other parties' experts that will include a summary of agreed matters, and those in issue, stated as concisely as the case allows at that stage.

- 22.6 Before the agreed agenda for a discussion is circulated, the parties should decide whether they agree that the content of the discussion between the parties will be referred to at trial.⁵⁶ CPR/35.12(4)
- 22.7 An instructing party is not permitted to instruct its expert to limit the discussion and, in particular, must not encourage, request or instruct the expert not to reach agreement on any matter that is within the expert's competence. An expert is not permitted to accept any such instruction.
- 22.8 The agenda should be circulated to the experts and those instructing them to allow sufficient time for the experts to prepare for the discussion.
- 22.9 The parties' lawyers will not be present at any discussion between experts (whatever the form of that discussion) unless all the parties and their experts otherwise agree or a court so orders.

Conclusion of the Discussion

- 22.10 At the conclusion of any discussion between experts, a statement must be prepared that sets out:
- (1) A list of issues that have been agreed, including, in each instance, the basis of agreement;
 - (2) A list of issues that have not been agreed, including, in each instance, the basis of disagreement;
 - (3) A list of any further issue that have arisen that were not included in the original agenda for the discussion;
 - (4) A record of further action, if any, to be taken, including as appropriate the holding of further discussion between experts.
- 22.11 Wherever practicable, the statement should be signed by all the experts engaged in the discussion before leaving any face-to-face meeting. In other circumstances, a statement should be agreed and signed by all the parties to the discussion as soon after the discussion as may be

⁵⁶ CPR/35.12(4)

practicable.

23 Parties' Duty to Consider Being Bound by Agreements Reached Between Experts

- 23.1 The parties may agree to be bound by any agreement that has been reached at an experts' discussion.⁵⁷ The parties have a duty, implied by the overriding objective, to consider agreeing to be bound by agreements reached by their experts. Accordingly, where a party refuses to be so bound, it should record its reasons. CPR/35.12(5)

24 Attendance of Experts at Court

- 24.1 Those instructing an expert should obtain details of his availability before hearing dates are set and should endeavour to obtain dates on which the expert will not be available to attend court.
- 24.2 Those instructing will then notify the expert promptly of any venue, date(s) or particular slot(s) for the expert that have been fixed for any hearing which the expert will be required to attend. The expert will confirm receipt of such notification and acknowledge his obligation to attend.
- 24.3 Experts instructed in a case are expected to be available to attend court and, accordingly, will take all steps to be so available. If appropriate, consideration should be given to the expert giving his evidence and being cross-examined via a video-link.
- 24.4 Experts should be aware, and those instructing should remind them, that a witness summons may need to be served on them under CPR/34.⁵⁸ The use of a witness summons will not affect the contractual or other obligations of the parties to pay an expert's fees. CPR/34.3
- 24.5 Where intractable difficulties in an expert attending court are anticipated or encountered, those instructing will also consider whether the deposition provisions given in CPR/34⁵⁹ may assist. Where the nature of the case in relation to the overriding objective allows, those instructing will apply to the court for the requisite permission for an expert to give CPR/34.8

⁵⁷ CPR/35.12(5)

⁵⁸ CPR/34.3

⁵⁹ CPR/34.8

his evidence before the trial date.

25 Assessors

- 25.1 Except in admiralty cases, the use of assessors is infrequent and for that reason guidelines specifically for them have not been prepared. However, the general principles that apply to experts apply also to assessors.
- 25.2 The assessor will not have direct contact with the parties and his independence will be paramount.

[ends]