

THE CHANGING FACE OF THE EXPERT WITNESS



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1 *Background*

In 1900 Judge Leonard Hand observed "no one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how to do it best".¹

This discussion paper recommends procedural reform of the use of expert evidence in the Family Court of Australia. The paper will first examine the nature of expert evidence; second, provide an overview of recent procedural reforms; third, highlight common issues which arise for consideration; and finally, make recommendations for change in the Family Court.

The issue of expert evidence has been the subject of recent appraisal in both Australia and in England and Wales, and these reforms will be taken into account. While expert witnesses are currently used quite effectively and efficiently in the Family Court, it is anticipated that procedural reform, utilising the experience of other jurisdictions, will refine their use and reliability.² Moreover, the Full Court of the Family Court in a recent decision expressed the need for reform of the current system for calling expert witnesses in the family law jurisdiction.³

2 *The Nature of Expert Evidence*

It has been said that an expert's function is to "...educate or inform the court about the relevant aspects of the witness's specialty to enable the court itself to assess the evidence, which, without that tuition, the court would be unable to do."¹⁴

At common law, opinion evidence was generally inadmissible except for the opinion of witnesses with special skill or knowledge. This is reflected in the *Evidence Act (Cth) 1995*, which permits the use of opinion evidence from a person possessing "specialised knowledge based on the person's training, study or experience", provided the opinion is "wholly or substantially based on that knowledge."¹⁵

Although the majority of expert witnesses have academic and/or professional qualifications in an established faculty (for example doctors, engineers, valuers and accountants) it is not necessary for an expert to be formally educated or qualified. Notwithstanding this, a court is unlikely, for example, to accept as expert medical opinion the evidence of a witness who had not attended a university medical faculty or been registered to practice as a doctor.

The common law also limited expert opinion evidence on a subject beyond the ordinary limits of experience and knowledge possessed by the court ('the common knowledge rule') and prevented opinion evidence from being given about a fact in issue or an ultimate issue. However, the *Evidence Act (Cth) 1995* has now abolished these limitations.⁶ In Family Court property proceedings, the mathematical calculations of accountants, which may not be beyond the knowledge of the court, are generally accepted, and in parenting cases counsellors frequently provide their opinions on the ultimate issue.

3 Existing Reform Overview

There are three recent reports which engage in significant evaluation of expert evidence in Australia and in England and Wales. The most significant is the 'Access to Justice' report by Lord Woolf (the 'Woolf Report'), released in 1996.⁷ The Australian Institute of Judicial Administration report, (the 'AIJA Report') was released in 1999,⁸ and the Australian Law Reform Commission report (the 'ALRC Report') in 2000.⁹ In the Family Court, expert evidence has been the subject of consideration and recommendations by the Future Directions Committee ('Future Directions Report'),¹⁰ and has prompted subsequent meetings involving the judiciary and representatives of expert bodies.

As a result, civil litigation reforms have been implemented in England, Wales and Australia. These reforms restrict the use of experts solely instructed by parties, and encourage the greater use of single experts, court appointed experts, and expert conferences. The reforms also stress that the primary duty of an expert is to the court, and provide guidelines for the form and content of reports. The substance of the existing reform is set out below.

3.1 England and Wales

In 1994, Lord Woolf was asked to review the rules and procedures of the civil courts in England and Wales. The purpose of the review was to improve access to justice and reduce the cost of litigation, to reduce the complexity of court rules and to reduce procedural impediments to litigation.

The recommendations of the Woolf Report on expert evidence can be summarised as follows:¹¹

- Single experts (appointed jointly by the parties, or by court) should be used where there is a substantially established area of knowledge;
- The parties or the court should provide reasons when appointment of a single expert is not appropriate;
- Experts appointed by parties should produce a single report for the court indicating areas of disagreement at issue;
- All written and oral instructions should be annexed to the expert's report;

- The court should have the power to order an expert to conduct an examination and report on a particular issue, to be submitted to the court;
- If the court directs a meeting of experts, this should be held in private;
- Training courses should be provided for experts to ensure they are aware that their primary duty is to the court.

In conjunction, in England and Wales the Expert Witness Institute and the Academy of Experts have developed a code of guidance for experts aimed at facilitating communications between experts and those instructing them.

In April 1999 new Civil Procedure Rules (CPR) were introduced in England and Wales, implementing many of the recommendations made in the Woolf Report. In summary, the rules provide:¹²

- The court has a duty to restrict expert evidence to what is ‘reasonably required’ to resolve proceedings (r35.1);
- Experts have a duty to assist the court, which overrides any duty to the person/party from whom instructions are received (r35.3);
- No party may call an expert or use expert evidence without permission from the court (r35.4);
- The court can direct that evidence is given by a single expert, or by an expert jointly selected and instructed by the parties, or by the court and instructed jointly by both parties (r35.7 and r35.8). Directions for single experts precludes the parties from calling their own expert witnesses;
- The court may direct a private discussion between experts to identify issues and to reach agreement where possible (r35.12);
- An assessor may be appointed to assist the court in any matter in which they have skill and experience (r35.15);
- Expert evidence must be provided in written form, unless otherwise directed by the court (r35.5);
- An expert’s report must acknowledge the duty owed to the court and note all instructions provided to him/her (instructions are not privileged but limits apply to disclosure) (r35.10);
- A party may put written questions to the single expert or expert instructed by the other party, but only for the purposes of clarification (unless the court or other party agrees to other questions) (r35.6);

- An expert may ask the court for directions to assist them in their function (r35.14);
- The court can direct that a party must provide information not reasonably available to the other party (r35.9);
- Where a party has disclosed an expert's report, any party may use that report as evidence (r35.11);
- A party who fails to disclose an expert's report may not use that report at trial (r35.13).

There has been considerable commentary on the operation of these rules since their inception, and the consensus is that reform has largely achieved the aims in the original report. For example, the Civil Justice Reform Evaluation of the CPR, undertaken in 2001, found in regards to the expert evidence reform that "generally, the change to a single joint expert appears to have worked well."¹³ The Committee found that since the introduction of the rules, although there has been a higher proportion of trials using expert evidence, there has been a lower proportion of expert witnesses instructed by only one party. Since the reform, joint expert witnesses have been used in 41% of cases involving expert witnesses.¹⁴ Moreover, there is anecdotal evidence in favour of the new rules. The judicial perspective is well reflected by Justice William Rose's comments: "the shifting of the expert's duty from his client to the court cannot but save time and costs...My discussions with experts lead me to believe that...the reforms are broadly welcomed."¹⁵

Appendix A contains the following documents:

- 1 Part 35 of the Civil Procedure Rules; and
- 2 Practice Direction - Experts and Assessors.

3.2 Australia

FEDERAL COURT

Although the Federal Court Rules (FCR) on expert evidence are similar to the Family Court Rules, the Federal Court also has a practice direction, 'Guidelines for Expert Witnesses', issued in 1998 following consultation with the Law Council. This direction reflects some of the recommendations in the Woolf Report, as it clarifies the general duty of expert witnesses to the Court, and provides detailed requirements concerning the form and content of

reports and directions for expert conferences. These guidelines are the subject of ongoing review by the Federal Court.

Appendix B contains the following documents:

- 1 Order 34 and 34A Federal Court Rules;
- 2 Practice Direction - Guidelines for Expert Witnesses in proceedings in the Federal Court of Australia.

SUPREME COURT OF NEW SOUTH WALES

In 2000 amendments were made to the relevant rules of the New South Wales Supreme Court (SCR). A practice note was issued in April 1999, which supplements the rules for the Professional Negligence List and contains a schedule 'Expert Witness Code of Conduct' in similar terms to the Federal Court initiative. In July 2001 the Court issued a practice note on joint conferences, with the aim of assisting experts and those who engage them in the practical application of the rules.

Appendix C contains the following documents:

- 1 Part 36 and 39 of the New South Wales Supreme Court Rules;
- 2 Expert Witness Code of Conduct (Schedule K); and
- 3 Practice Note 121 - Joint Conferences of Expert Witnesses.

OTHER JURISDICTIONS

The introduction of guidelines for experts has been considered by the South Australian Supreme Court. In Queensland the Uniform Civil Procedure Rules (UCPR) have been the subject of recent amendment, with further review currently being undertaken by the rules committee. In Western Australia a recent report by the Law Reform Commission of Western Australia (LRCWA Report) made various recommendations for change following its review of the civil justice system.¹⁶

4 Common Issues

4.1 Partisanship/lack of Objectivity

The most significant issue which arises upon consideration of expert evidence is potential partisanship and lack of objectivity. There is a well-recognised tension between the objective, informative role of the expert and the adversarial system of litigation.

The most pertinent criticism of expert evidence arises from a perception that some experts are 'hired guns' acting as advocates for those who instruct them. Accordingly, "...all evidence is selective, and it is selected on the basis of what will help the party to win, not on the basis of whether it will help the court to find the facts correctly."¹⁷ The AIJA report suggests that this perception is held by some members of the judiciary, as 27% of judges surveyed considered that experts were "often biased" and 67% considered experts to be "occasionally biased."¹⁸

Furthermore, in 26% of cases the appearance of expert impartiality was considered important in the acceptance of the evidence.¹⁹ This issue was recently highlighted in the recent case of *W and W*, when the Full Court of the Family Court found that an expert witness for one party had been "extremely partisan", making it difficult for the court to accept his "professional objectivity."²⁰

Accordingly, it seems that reform of the traditional adversarial system is required to prevent "...the interests of litigants in presenting expert evidence that may win the case," prevailing "...over the interests of judges in obtaining objective evidence on technical issues as a basis for valid fact finding."²¹

4.2 Experts exceeding their area of expertise

There is concern that some experts intentionally or unintentionally express opinions that fall outside their field of expertise. It may not always be obvious to the court when an expert exceeds their expertise and if the issue is not identified, it can impede the fact-finding process.

In the AIJA Report 79% of judges who answered the survey reported that they had encountered the failure by expert witnesses to stay within the parameters of their expertise "occasionally." It was further suggested that family law hearings provide "a ready forum for the problem."²²

4.3 Clarity of Evidence

The AIJA Report indicates that most judges encounter evidence that is not in a comprehensible form. It is suggested that the Family Court would benefit from reforms designed to make evidence more "explicable and transparent" and improve its form and content.²³

4.4 Costs and Delay

The uncontrolled use of expert witnesses is costly and can add greatly to the length of the trial without significantly advancing the case for either party. A dispute between experts unwilling to concede points often leads to a trial within a trial and concerns have been expressed that litigants with financial means enjoy a strategic advantage over less financial and unrepresented litigants. From a case management perspective, it should be ensured that costs are proportionate to the subject matter in dispute, and that proceedings are conducted in a timely and economical manner.

5 *Reform Detail*

The reforms already undertaken in the above-mentioned jurisdictions will now be highlighted, and recommendations will be made where similar reform is appropriate in the Family Court.

Appendix D contains the existing Family Law Rules on expert evidence and assessors:

1 Order 30A and Order 30B of the Family Law Rules.

5.1 Definition of Expert and Expert Witness

It is important to clarify the definitions and types of expert in the reforms. In the context of provision of expert evidence, there are three types of expert witness. First, an ‘expert witness’, who is called by a party to proceedings and provides evidence for the benefit of that party. Second, a ‘single expert’, who is appointed jointly by both parties and instructed by both parties. Third, a ‘court expert’ who is appointed by the court to provide evidence in an independent capacity, and is instructed by both parties.

It is also important to clarify the difference between an expert engaged solely in an advisory capacity and an expert witness, being an expert engaged to provide opinion evidence for a party in proceedings or proposed proceedings.²⁴ This distinction is made in both the SCR and the CPR. As stated in the English *White Book Service*: "The difference is not purely semantic as an advisory expert may not be involved at all in the litigation, and their identity may not be known to the other party or to the court: whereas once a party has sought and obtained the approval of the court to rely upon the opinion evidence of an expert witness during the litigation, the CPR ‘cards on the table approach’ means that the name and status of the expert witness, and invariably the written report, becomes disclosable to the other party and to the court."²⁵ The current Family Court Rules do not clearly delineate between advisory experts and expert witnesses appointed by parties or the Court to provide evidence. This distinction is important as it affects the nature of the duty owed by the expert and issues of legal professional privilege.²⁶

RECOMMENDATION 1

Amendment of the interpretation section of Order 30A to include the following definitions:

- "**Expert**" means a person who has relevant specialised knowledge based on that person's training, study or experience.
- "**Expert witness**" means an expert who has been instructed to give or prepare independent evidence for the purpose of court proceedings.

5.2 Restrictions on Calling Expert Evidence

Reform of the CPR in England and Wales has aimed to restrict the use of expert evidence in the interests of reducing cost, delay and complexity in argument, which accordingly increases parties' access to justice. These restrictions are detailed in the subheadings below, and are mirrored in the respective recommendations.

5.2.1 REASONABLY REQUIRED TO RESOLVE PROCEEDINGS

In the CPR, expert evidence is restricted to that which is reasonably required to resolve the proceedings.²⁷ The rule indicates that both the parties and the Court should seek to minimise excessive or inappropriate use of expert evidence. As Justice Williams has stated: "A simple proposition but something that need not only be asserted but vigorously implemented. That rule provides the basis upon which the other rules are built."²⁸

RECOMMENDATION 2

Amendment of Order 30A to include the following rule:

- Duty to restrict expert evidence
- Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.

5.2.2 PERMISSION OF THE COURT

The CPR give the court total control over the use of expert evidence by preventing a party from calling an expert or using an expert's report in evidence without permission from the court.²⁹ Permission may be given in the court's own case management directions or in response to an application by a party. A party applying for permission must identify the field of expertise and where practicable, identify the particular expert. The court may limit the amount of the expert's fees and expenses that the party who wishes to rely on the expert may recover from the other party. Although the FCR and SCR do not contain such provisions, there are similar provisions in the *Uniform Civil Procedure Rules (Qld) 1999*. Rule 367 of these rules provides that the court may make any order or direction about the conduct of a proceeding as it considers appropriate. This includes directions to limit the time taken by a party presenting their case, limit the number of witnesses on a particular issue, and limit the time taken in examination, cross-examination and re-examination.³⁰

Order 30A of the Family Court Rules restricts expert evidence to some extent by requiring a party to apply for directions if he or she wishes to call two or more experts regarding the same issue, and to satisfy the Court that special circumstances exist.³¹ It is anticipated that the introduction of a permission rule similar to that contained in the CPR would prompt parties to give consideration to the issue of expert evidence early in proceedings and ensure that procedures followed and costs incurred were proportionate to the case. Under the CPR in England, if parties instruct expert witnesses without first gaining the permission of the court they risk not recovering costs. For example, in *Thomas Johnson Coker v Barkland Cleaning Company*, the Court found that although the claimant won a personal injury case, he did not recover the cost of expert evidence because it was deemed unnecessary.³²

The options available to the court in giving directions as to expert evidence would include the following:

- (a) directing that no expert evidence is to be adduced at all, or no expert evidence of a particular type or relating to a particular issue; or
- (b) limiting the number of expert witnesses which each party may call, either generally or in a given speciality; or

- (c) directing that evidence is to be given by one or more experts chosen by agreement between the parties, or where they cannot agree, chosen by a method stated by the court.

RECOMMENDATION 3

Amendment of Order 30A as follows:

COURT'S POWER TO RESTRICT EXPERT EVIDENCE

- (1) A party may not call an expert witness or put in evidence an expert witness's report without the permission/leave of the court;
- (2) A party who applies for permission/leave under sub-rule (1) must identify:
 - (a) the issue in dispute to which expert evidence may be directed;
 - (b) the field in which the party wishes to rely on expert evidence; and
 - (c) where practicable the expert in the field on whose evidence the party wishes to rely;
- (3) If permission/leave is granted under this rule it shall be in relation only to the expert witness named or the field identified under sub-rule (2);
- (4) The court may limit the amount of the expert witness's fees and expenses that the party who wishes to rely on the expert may recover from any other party.

5.2.3 EXPERT EVIDENCE TO BE WRITTEN

In the CPR, expert evidence must, where possible, be in written form.³³ This reflects the usual practice in the Family Court.

RECOMMENDATION 4

Amendment of Order 30A to include the following rule:

- General Requirement for expert evidence to be written
- Unless the court grants leave the evidence of an expert witness is to be given in a written report.

5.2.4 DISCLOSURE OF EVIDENCE BEFORE TRIAL

The CPR provides that a party who fails to disclose an expert's report may not use that report or call the expert witness to give oral evidence without the leave of the court.³⁴ In Queensland the parties must disclose in writing the name and qualifications of their experts and the substance of their evidence within 21 days after a trial is set.³⁵

In the Family Court recent trial management reforms require disclosure of expert reports before a trial is even fixed, because case management directions now require parties to file and serve affidavits from all of their witnesses, including experts, at least 14 days prior to a pre-trial conference. A trial date is only fixed at the pre-trial conference if all parties have complied with the directions contained in a trial notice issued some time before the pre-trial conference. Non-compliance by either party results in cancellation of the pre-trial conference.

It is also the practice of the Family Court not to allow parties to file and serve affidavits other than in accordance with directions, except by leave of the Court. Accordingly, recommendation 5 is consistent with existing Family Court practice.

There is a further rule set out in the CPR, which provides that a party to whom an expert's report is disclosed may use that report as evidence at trial.³⁶ This provision is mirrored in recommendation 6.

RECOMMENDATION 5

Amendment of Order 30A to include the following rule:

- Failure to Disclose Expert's Report
 - (1) Unless the court has first granted leave, a party who fails to file and serve a report of an expert witness in accordance with directions made by the court may not adduce evidence from the expert witness at the trial.

RECOMMENDATION 6

Amendment of Order 30A to include the following rule:

- Where a party has disclosed an expert witness's report, any party may use that report as evidence at the trial.

5.3 Greater Use of Court Appointed Experts

The Future Directions Report recommended the greater use of court appointed experts in the Family Court.³⁷ However, although many Australian courts have the power to appoint court experts, the AIJA Report found that the power is rarely used in most jurisdictions.³⁸ This may be due to perceived problems regarding selection and payment of experts, as well as criticisms such as:

- perception that the appointment by the court of an expert witness is contrary to the adversarial system, whereby parties have the right to call and present witnesses of their choice;
- lack of certainty that a court appointed expert will be objective;
- the role of the judge may be usurped if the expert effectively decides the case; and
- parties may incur further costs as they are likely to call their own experts to reduce these concerns.

However, the Family Court has been effectively using court appointed experts (or 'Order 30A experts') in parenting cases for many years. The power is rarely used in property or other financial cases. Order 30A enables the Court to appoint a Court expert at any stage of proceedings, on application by a party, or of its own motion. The Court may require the expert to inquire into and report on any issue of fact or opinion, other than issues involving questions of law or construction, and give directions in relation to such inquiry or report.³⁹

The court appointed expert must be a person agreed upon between the parties or, if agreement is not possible, a person nominated by the Court.⁴⁰ In parenting cases it is quite common for the parties, including the child representative, to agree on an expert. There is a right to cross-examine the expert and the parties may adduce their own independent expert evidence, limited to one expert per issue, notwithstanding that a court expert has been appointed.⁴¹

The AIJA report found that of those respondents who had appointed an expert, 97% found it "helpful" or "very helpful" for the quality of the fact finding process, and nearly half the judges thought greater use of Court-appointed experts would be helpful.⁴²

It is a matter for further discussion as to the type of financial cases in which the appointment of a court expert might be appropriate.

RECOMMENDATION 7

That greater use be made of the power to order court appointed experts in appropriate financial cases.

RECOMMENDATION 8

That the proposed guidelines for expert witnesses apply to court appointed experts.

5.4 Use of Single Experts

A significant reform implemented in the new CPR, and recommended by the ALRC and the Future Directions Committee of the Family Court, requires that expert evidence be given by a single expert selected and instructed by the parties wherever possible.⁴³ This is distinct from the court appointing an expert to be used in substitution for or in addition to party experts ('court appointed expert').⁴⁴ While it is acknowledged that some of the criticisms directed at court appointed experts could equally apply to single experts, there are also many advantages to their appointment. For example, it is likely that single experts will be more impartial, will save time and money, assist in levelling the playing field between parties with unequal resources, and increase the prospects of settlement.

There is significant commentary in the *White Book Service* as to the use of the single expert rule. The author states:

*This discretionary power may be exercised at any time. It may be anticipated that the Court is likely to direct that the evidence on a particular issue is to be given by a single joint expert where it appears to the court, on the information then available, that the issue falls within a substantially established area of knowledge and where it is not necessary for the Court to sample a range of opinion. There is no presumption in favour of appointment of a joint expert, except in cases allocated to the fast track. The object is to do away with the calling of multiple experts where, given the nature of the issue over which the parties are at odds, that is not justified.*⁴⁵

Thus, under the CPR, the appointment of single experts is appropriate only in cases where there is an established area of knowledge and there is no need to sample a range of opinion. In exercising its discretion the court will consider issues such as the effect of the additional evidence on the length of a hearing, costs proportionality, any delay in making the application and the justice of the case. The *Queen's Bench Guide* provides an example of where a single expert may not be appropriate: "...in a case where the issue for determination is as to whether a party acted in accordance with proper professional standards, it will often be of value to the court to hear the opinions of more than one expert as to the proper standard in order that the court becomes acquainted with the range of views existing upon the question and in order that the evidence can be tested in cross-examination".⁴⁶

Appointment under the CPR occurs either by application by a party, or on the court's own motion. If the parties agree, then the chosen expert is appointed accordingly. Where the parties cannot agree as to an expert, the court must facilitate appointment in some other manner as it chooses, such as requesting an expert professional body to make an appointment.⁴⁷ It is noted in the commentary that the court should not simply have a 'free hand' in appointing an expert in these circumstances, in order to avoid the disadvantages of the joint expert being perceived as a court expert.⁴⁸ Unless the court orders otherwise the parties are jointly and severally liable for the fees of the expert.⁴⁹

There is a precedent to suggest that where a party finds a single expert unsatisfactory, they may seek the permission of the court to adduce their own expert evidence. Lord Woolf stated in *Daniels v Walker*:

In a substantial case such as this, the correct approach is to regard the instruction of an expert jointly by the parties as the first step in obtaining expert evidence on a particular issue. It is hoped that in the majority of cases it will not only be the first step but the last step. If, having obtained a joint expert's report, a party, for reasons which are not fanciful, wishes to obtain further information before making a decision as to whether or not there is a particular part (or indeed the whole) of the expert's report which he or she may wish to challenge, then they should, subject to the discretion of the court, be permitted to obtain that evidence.⁵⁰

The English Family Division case of *Re A (family proceedings: expert witnesses)* [2001] 1 FLR indicates how the appointment of a single expert has worked in practice, and illustrates that the courts are ensuring that both practitioners and experts comply with the new procedure for expert witnesses. The case involved an application for costs made against a Father seeking contact with his two children. The parties had jointly instructed a Family Centre to prepare an expert report for the purpose of the Father's contact application. The father was unhappy with the outcome of the report, and had concerns about the Family Centre. Because of this, he instructed his solicitor to include a separate report from a clinical psychologist in his statement. The information about the case had been provided to the expert on an anonymous basis, permission had not been granted by the Court for the evidence, and the expert was unaware that permission was required from the Court. Wall J found that this form of instruction of an expert witness was 'wholly inappropriate', and as a result, the evidence was not allowed and the solicitors were to assume responsibility for the expert's fees.⁵¹

The 2001 evaluation of the CPR indicates that the use of single experts appears to have worked well and has contributed to a less adversarial culture, earlier settlement and reduced costs.⁵² The evaluation also suggests that lawyers and parties are displaying greater willingness to propose the appointment of a single expert, and that the procedure is best suited to simple matters involving small amounts of money where the evidence is relatively uncontroversial and the expertise involves a substantially established area of knowledge.

Although it may not be useful in family law to determine ‘appropriate’ cases for appointment of single experts by their quantum, it may however be useful to utilise the approach whereby single experts are appointed in cases where there is an established area of knowledge and there is no need to sample a range of opinion. Lord Woolf identified valuation cases as prime candidates for the single expert approach, and the ALRC reported that Family Law practitioners and judges generally agreed that, in common house and garden property cases, parties should be required to jointly instruct valuers.⁵³

It is a case management issue as to the stage of proceedings that the appointment of a single expert should be considered in the Family Court.

RECOMMENDATION 9

Amendment of Order 30A to include the following rule:

- Evidence by a Single Expert Witness
 - (1) The court may, at any stage of proceedings, on application by a party or of its own motion direct that expert evidence on a particular issue is to be given by one expert witness only.
 - (2) The expert witness shall be a person agreed upon between the parties or if agreement is not possible, a person selected by the court from a list prepared or identified by the parties or selected in such other manner as the court may direct.
- Instructions to a Single Expert Witness
 - (1) If a party gives instructions to an expert witness appointed under direction (1) the party must, at the same time, send a copy of the instructions to the other parties.
 - (2) The court may give any direction it thinks fit in relation to:
 - (a) the payment of the expert witness's remuneration and expenses; and
 - (b) any inspection, examination or experiments which the expert witness wishes to carry out.
 - (3) Unless the court otherwise orders, the parties are jointly liable to pay the reasonable remuneration and expenses incurred by an expert witness appointed under direction (1).

It is a matter for further discussion whether such a rule should go so far as the CPR to include provision that the Court may, before an expert is instructed:

- (a) limit the amount that can be paid by way of remuneration and expenses to the expert witness; and
- (b) direct that the parties pay that amount into court.

5.5 Guidelines for Experts ~ Practice Direction

All of the reforms contain guidelines or 'codes of conduct' for experts. These are contained in rules, practice directions and/or schedules to rules, and incorporate to a large extent, the common law duties and responsibilities of expert witnesses identified in an English case known as the "Ikarian Reefer."⁵⁴

Appendix E contains a copy of these duties and responsibilities.

The Future Directions report recommended that the Family Court adopt similar guidelines to those used in the Federal Court, and the judges of the Family Court endorsed this recommendation in April 2000.⁵⁵

RECOMMENDATION 10

That the Family Court introduce guidelines for expert witnesses by way of rule amendments and a practice direction.

The Federal Court practice direction states that legal practitioners should provide prospective expert witnesses with a copy of the guidelines when the expert is retained to provide a report or to give evidence.⁵⁶

The SCR go further by providing that the person engaging the expert witness 'shall' provide the expert with a copy of the code of conduct, and a report shall not be admitted into evidence unless it contains an acknowledgment that the expert has read the code and agrees to be bound by it.⁵⁷

RECOMMENDATION 11

Amendment of the interpretation section of Order 30A to include the following definition:

- '**Practice direction**' means the guidelines for expert witnesses.

RECOMMENDATION 12

Amendment of Order 30A to include the following rule:

- Provision of Guidelines to Expert Witnesses

Unless the Court otherwise orders:

- (a) at or as soon as practicable after the engagement of an expert as a witness, whether to give oral evidence or to provide a report for use as evidence, the person engaging the expert shall provide the expert with a copy of the practice direction;
- (b) an expert witness's report shall not be admitted into evidence unless it contains an acknowledgment by the expert witness that he or she has read the practice direction and agrees to be bound by it;
- (c) oral evidence shall not be received from an expert witness unless there has been served on all parties a written acknowledgment by the expert witness that he or she has read the practice direction and agrees to be bound by it.

The following discussion and recommendations for the guidelines for experts will be undertaken in 3 parts:

- Duty to the Court;
- Form of Reports; and
- Expert's Conference.

5.5.1 DUTY TO THE COURT

The existing reforms all contain similar provisions emphasising the overriding duty of the expert witness to assist the court objectively. This rule has been strictly applied under the CPR in England. In *Stevens v Gullis* and *Pile*, the Court found that if an expert disregards their duty to the court (such as by failing to follow Court instructions), then the party may not be allowed to rely on that expert evidence, even to the detriment of losing the case. Similarly, in *Storey v Dorset Community NHS Trust*, an expert's report raised irrelevant issues and made findings on liability, and was hence disregarded because it did not provide objective unbiased evidence for the purpose of helping the Court.⁵⁸

RECOMMENDATION 13

Amendment of Order 30A to include a rule as follows:

- Experts - Overriding Duty to the Court
 - (a) An expert witness has an overriding duty to help the Court impartially on matters within his or her expertise,
 - (b) This duty overrides any obligation the expert witness has to the person providing instructions or paying the expert,
 - (c) An expert witness is not an advocate for a party.

5.5.2 FORM AND CONTENT OF EXPERT REPORTS

The purpose of the existing reform on the form and content of expert reports is to ensure the disclosure of information on which the expert opinion is based. Such transparency "should concentrate the mind of those giving instructions to the expert as well as assisting the expert's focus on the quality and integrity of the report. That should have a number of important obvious consequences including enhancement of the settlement rate and narrowing of the issues."⁵⁹ The recent decision in *Makita (Australia) Pty Ltd v Sprowles* in the New South Wales Court of Appeal illustrates the need for expert's reports to be fully informed, complete, and explicitly based on the facts provided.⁶⁰

The CPR states that the material instructions on which the report is based are not privileged against disclosure. However the court will only order disclosure of instructions (written or oral) if it is satisfied that there are reasonable grounds to consider the statement of instructions to be inaccurate or incomplete. The CPR Practice Direction states that the Court can permit cross-examination of the expert on the contents of the disclosed instructions if it is in the interests of justice to do so, or if the other party consents.⁶¹

There are conflicting decisions in Australia as to when privilege over materials and communications is lost in the context of briefing experts.⁶²

RECOMMENDATION 14

Amendment of Order 30A to include a rule as follows:

- Form and Content of Expert Reports
 1. A report by an expert witness should be addressed to the court as well as the party from whom the expert has received his or her instructions.
 2. Unless the court otherwise orders, a report by an expert witness must contain:
 - (a) the expert's qualifications;
 - (b) an attachment detailing:
 - (i) a summary of relevant instructions, written or oral, given to the expert which define the scope of the report;
 - (ii) the literature or other material used in making the report;
 - (iii) the relevant facts, matters and assumptions on which the opinions in the report are based.
 - (c) any tests, experiments, examinations or other investigations on which the expert relied and identify and give details of the qualifications of the person who carried them out;
 - (d) reasons for each opinion expressed;
 - (e) where there is a range of opinion on the matters dealt with in the report, a summary of the range of opinion and the reasons for his or her own opinion;
 - (f) a summary of the conclusions reached;
 - (g) a disclosure if applicable that a particular question or issue falls outside his or her field of expertise;
 - (h) a disclosure if applicable that the report may be incomplete or inaccurate without some qualification and give details of the qualification;
 - (i) a disclosure if applicable that his or her opinion is not a concluded opinion because further research or data is required or any other reason;
 - (j) a declaration at the end of the report as follows:
 1. I have made all the inquiries which I believe are desirable and appropriate and to my knowledge there have not been any significant relevant matters omitted from this report;
 2. I believe that the facts within my personal knowledge that I have stated in this report are true and the opinions I have expressed are truly held by me;

RECOMMENDATION 14 CONTINUED

3. I have read and understand the Family Court practice direction "Guidelines for Expert Witnesses" and agree to be bound by it; and
4. I have complied with the requirements of any applicable approved expert's protocol. (delete if not applicable)
3. An expert witness who changes his or her opinion on a material matter at any time shall forthwith provide the engaging party (or that party's legal representative) with written notice to that effect which shall contain such of the information referred to above as is appropriate.
4. Where the Court appoints an expert witness, the Court is to be treated as the engaging party for the purpose of paragraph 3.
5. If an expert witness's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports.

5.5.3 EXPERT'S CONFERENCE

It is common practice in jurisdictions including the Family Court for expert witnesses to meet with a view to identifying areas of agreement and disagreement. This narrows issues for trial and reduces the time and cost of litigation. These conferences are beneficial as they often result in substantial agreement or compromise or at least bring into sharper focus the basis for the differences. They also provide an opportunity for experts to exchange information that might not otherwise be known. Extreme views and bias are difficult to conceal when experts are called upon to justify their opinions to fellow experts. Order 30A already provides that the court may give directions for a conference of experts when two or more parties call expert witnesses to give opinion evidence about the same, or a similar issue.⁶³

The standard direction in a trial notice requires that in the absence of agreement on an issue, experts are to confer no later than 7 days prior to the pre-trial conference for the purpose of identifying those parts of their evidence that are at issue in these proceedings. The direction usually requires that experts, following the conference, prepare a joint statement setting out those parts of their evidence on which they agree and disagree.

For those issues on which they disagree, each expert is also to set out in the joint statement in a brief but concise form the reasons why it is asserted that one opinion is to be preferred over the other. A copy of the joint statement is to be served on all parties, and the applicant is to lodge a copy with the Court, no later than 3 working days before the pre-trial conference. It is important to note, however, that conferences should be conducted in an appropriate manner. The English case of *Re CB and JB*⁶⁴ provides useful guidance on this issue. In setting out guidelines for the use of expert evidence, the Court stated that in the event of a conference of experts, there must be a proper agenda, the experts must identify specific questions to be answered, and the conference must be chaired and minuted.⁶⁵

To ensure that expert witnesses comply with directions for conferences, it is necessary to have guidelines which contain a brief statement on the obligations of the expert witness.

RECOMMENDATION 15

That the Family Court guidelines for expert witnesses include the following:

- Expert's Conference
 - (1) An expert witness must abide by any direction of the Court to:
 - (a) confer with any other expert witness;
 - (b) endeavour to reach agreement on material matters for expert opinion; and
 - (c) provide the Court with a joint statement specifying matters agreed and matters not agreed and the reason for any non agreement.
 - (2) An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.

While these guidelines provide a general statement to facilitate compliance with directions, more specific detail is provided in the practice note titled 'Joint Conferences of Expert Witnesses' introduced in July 2001 by the New South Wales Supreme Court.

This practice note covers a range of practical issues including the following:

- preparation for conferences including the attendance of experts, questions to be answered and materials to be placed before the experts;
- convening a conference including allocation of date, time and place, form of the meeting and clarification of issues to be discussed;
- the role of experts at the conference with specific emphasis on accepting facts and assumptions, exercising independent judgment and not assuming the role of advocates;
- conduct of the conference including the manner in which it is conducted and administrative assistance;
- requirements of the joint report;
- provision of information to the court; and
- the expert's right to apply to the court for directions.

The Practice Note is reproduced fully in Appendix C.

RECOMMENDATION 16

That the Family Court guidelines for experts incorporate similar provisions to those included in the practice note issued by the NSW Supreme Court and also include the conferral of experts during the preparation of their reports.

5.6 Written Questions to Expert Witnesses

The ALRC Report recommended that expert witnesses should be required to prepare for and answer questions prior to trial upon payment of their reasonable costs.⁶⁶ This has the potential to reduce issues at trial and in some cases, eliminate the need for the expert to give oral evidence. To this end, the CPR enable parties to ask, once only, written questions of an expert witness about their report within 28 days of service of the report, for the purpose of clarification.⁶⁷ In England, the questions allowed for 'clarification' of a report are quite broad. In *Mutch v Allen* the Court of Appeal allowed a request for the extension of the expert witness's opinion to issues not previously dealt with, providing they fell within the expert's field.⁶⁸ The answers to the particular questions were deemed necessary in order to assist "the just disposal of the dispute", although the expert was also then subject to cross-examination by both parties at trial.⁶⁹

Recommendation 17 is a hybrid of the CPR provision and the specific questions rules contained in Order 19 of the Family Law Rules. Recommendation 18 is a correlating provision for the proposed guidelines for expert witnesses.

RECOMMENDATION 17

Amendment of Order 30A to include the following rule:

- Written Questions to Expert Witnesses
 - (1) A party to proceedings may put to an expert witness, including a single expert witness and a court expert witness, written questions about his or her report.
 - (2) Unless the court or a Registrar has first granted leave the questions:
 - (a) must be put only once;
 - (b) must be put within 14 days of service of the expert's report;
 - (c) must not be vexatious, or oppressive, or require the expert witness to spend an unreasonable time to answer.
 - (d) must be for the purpose only of clarification of the report; and
 - (e) must be sent to the other parties at the same time.
 - (3) An expert witness who is asked written questions about his or her report in accordance with this rule must:
 - (a) answer the questions in writing; or
 - (b) if the expert witness objects to answering a question - state why the expert witness objects; or
 - (c) if the expert witness cannot answer the question - state why the expert witness cannot answer.
 - (4) Unless the court or a Registrar has first granted leave the answers must be given within 28 days, or such shorter time as directed, after receipt of the questions by the expert witness.
 - (5) An expert witness's answers to questions put in accordance with this rule shall be treated as part of his or her report.
 - (6) If an expert witness fails to comply with subrule (3) the court may make one or both of the following orders in relation to the party who instructed the expert witness:
 - (a) that the party may not rely on the evidence of that expert; or
 - (b) that the party may not recover the fees and disbursements of that expert witness from any other party.

RECOMMENDATION 18

That the Family Court guidelines for expert witnesses include a provision as follows:

- Questions to Expert Witnesses
 1. Questions asked for the purpose of clarifying the expert's report should be put, in writing, to the expert witness not later than 14 days after receipt of the expert witness's report.
 2. Where a party sends a written question or questions direct to an expert witness, a copy of the questions should be sent to the other party to proceedings.
 3. The party or parties instructing the expert witness must pay any fees charged by that expert witness for answering questions, however this does not affect any decision of the court as to the party who is ultimately to bear the expert witness's costs.

5.7 Right of Expert Witness to ask for Directions

Another recommendation of the Woolf Report implemented in the CPR enables an expert witness to file a written request for directions to assist them in carrying out his or her function.⁷⁰ For example, directions may be required if an expert needs more time or information or considers that inappropriate instructions are being provided. The CPR specifies that the expert must provide a copy of any proposed request for directions to his or her instructing party 7 days prior to filing, and to all other parties 4 days prior to filing. The following recommendation does not include these provisions. Whether a specified time period similar to that in the CPR should be included in the recommendation is a matter for further discussion.

RECOMMENDATION 19

Amendment of Order 30A to include a rule similar to the following:

- Right of Expert Witness to Ask Court for Directions
 1. An expert witness may, upon written request to the Court, seek directions to assist the expert witness in carrying out his or her function as an expert witness.
 2. Where the expert witness requests such directions, copies of this request must be provided to all parties to proceedings.

In addition to this right, expert witnesses must be aware they have this right to seek directions. Accordingly, it is appropriate to include a reference in the practice direction, 'Guidelines for Expert Witnesses', as stated in the following recommendation.

RECOMMENDATION 20

That the Family Court guidelines for expert witnesses include the following:

- Right of Expert Witness to Ask Court for Directions
 1. An expert witness may request directions from the Court to assist the expert witness to carry out his or her function as expert witness.
 2. Where the expert witness requests such directions, copies of this request must be provided to all parties to proceedings.

5.8 Summary before and after Cross-examination

The ALRC Report indicates that present trial practices do not always allow experts to fully communicate their opinions to the judge. The report claims that experts complain that they are not given an opportunity to explain their written reports, and are exposed immediately to cross-examination by lawyers who have no interest in assisting the judge to understand the expert's views.⁷¹

The Future Directions Committee of the Family Court recommended that consideration be given to enabling expert witnesses to summarise their opinion before cross-examination commences, or be allowed to directly explain his or her views other than by way of examination in chief, cross-examination or re-examination.⁷² An expert should also be given an opportunity to provide a summary of evidence following cross-examination, once the issues have emerged.

RECOMMENDATION 21

Amendment to Order 30A to include the following rule, and reference to the rule in the guidelines for expert witnesses:

- Summary of Expert Opinion before and after Cross-Examination
 1. An expert witness may provide a summary of his or her evidence, or directly explain his or her evidence, to the Court before cross-examination commences.
 2. An expert witness may also provide the Court with a summary of his or her evidence, or directly explain his or her evidence, after cross-examination.

5.9 Imbalance of Information

It is important to maintain, so far as possible, a level playing field in the courtroom between litigants of unequal financial or other resources. A particular problem arises when one party has an easily available source of expertise to which the other party does not have access. The CPR addresses this with a rule enabling the court to direct a party to provide information to another party.⁷³ The rule and practice direction in the CPR, and also this recommendation, concerns provision of mere 'information' from a source of expertise, as opposed to provision of an expert's actual report. The information should be set out in sufficient detail in order to enable an assessment of its value and significance.

The purpose of this provision is explained by example in the *White Book Service*: "A situation may arise wherein one party has researched and developed a technical process over a long period of time and is therefore possessed with the greatest expertise in that area. It might thus be reasonable for the court to require that party to share information as to those matters which might reasonably assist the opposing party's expert without the necessity of time-consuming and expensive research before he [or she] can form a view." It is also noted that the court would have to take into consideration any issues of commercial confidentiality which may arise.⁷⁴

Furthermore, the *White Book Service* indicates that the Court could make an order to provide information on its own motion: "If it is satisfied upon evidence before it that it was necessary to make such an order to enable the court to deal with the case justly, considering its overriding objectives of ensuring so far as is practical that the parties are on equal footing, expense could be saved and that the matter could be dealt with expeditiously."⁷⁵

RECOMMENDATION 22

Amendment of Order 30A to include a rule similar to this recommendation, and reference to the rule in the guidelines for expert witnesses:

- Power of Court to direct a party to provide information
 1. Where a party to proceedings has access to information which is not reasonably available to the other party, the court may direct the party who has access to the information to -
 - (a) prepare and file a document recording the information; and
 - (b) serve a copy of that document on the other party.

5.10 Greater use of Assessors and Referees

It has been recognised that the technical and complex nature of evidence can make it difficult for judges to understand and evaluate the conflicting evidence of expert witnesses. Examination and cross-examination processes are often insufficient for this purpose. 70% of the judges surveyed by the AIJA conceded that on occasion they had felt that they had not understood expert evidence in the cases before them.⁷⁶ In response to this issue, some courts appoint an assessor or adviser to assist and advise the judge about the effect or meaning of expert evidence to allow the judge to reach a properly informed decision. Some courts also have the power to refer the whole or part of proceedings to a referee to inquire into and report back on any matter.

Unlike expert witnesses, assessors are not sworn and cannot be cross-examined. Their advice is sought and provided to the judge in private. Furthermore, the advice is only disclosed to the parties at the end of the case in the judgment and the court is not bound by the assessor's opinion or finding contained within the advice.

The literature suggests that assessors are rarely used. The major concern is cost, lack of scrutiny or challenge by the parties, and the potential for an assessor to usurp the role of the judge. However, the majority of surveyed judges who had appointed assessors found it "helpful" or "very helpful."⁷⁷ Furthermore, both the Woolf Report and the ALRC report recommended the more extensive use of assessors in courts, particularly in cases involving complex issues. As Justice Sperling has stated:

*The main benefit in the appointment of assessors...lies in the potential for an assessor to provide clear, independent and unbiased assistance to the judge in understanding and interpreting complex technical evidence, particularly in larger matters involving a high volume of conflicting expert opinion. It is also to be expected that an expert adviser would assist the judge to identify a lack of objectivity in biased expert witnesses.*⁷⁸

Although it is rarely used, the FLR already contains a general rule for the appointment of assessors to assist the court.⁷⁹ The Adversarial Background Paper recommended that the Family Court, in consultation with the legal profession and user groups, review whether steps should be taken to encourage the increased use of assessors in appropriate categories of case.⁸⁰

RECOMMENDATION 23

That the Family Court make greater use of assessors in appropriate cases.

- That consideration be given to amendment of Order 30B, and inclusion of a correlating provision in the guidelines to give parties an opportunity to object to the appointment of a proposed assessor, to make it clear that copies of any report by an assessor will be provided to the parties, and to state that an assessor will neither give oral evidence nor be open to cross-examination.

5.11 Greater use of Panel Presentation or ‘Hot Tub’

The Federal Court has used a panel presentation or ‘hot tub’ procedure in court, whereby all of the expert witnesses provide evidence on the same occasion in a free-form manner in a discussion involving counsel, experts and the judge.

This approach involves the following:

- Expert witnesses submit written statements which they may freely modify or supplement orally at the hearing after having heard all of the other evidence;
- All of the expert witnesses are sworn in at the same time and each in turn provides an oral exposition of their expert opinion on the issues arising from the evidence;
- Each expert witness then expresses his or her view about the opinions expressed by the other experts;
- Counsel cross-examine the expert witnesses one after the other and are at liberty to put questions to all or any of the experts in respect of a particular issue and re-examination is conducted on the same basis.

This approach allows for greater scope for understanding the evidence, appreciating the differences between experts, and forming an opinion as to the appropriate outcome. The ARLC report recommended that the Family Court establish rules or practice directions setting down such procedures using the FCR as a model.⁸¹ It should be noted that Order 30A already makes reference to such a procedure and it has been used successfully in the Family Court on a number of occasions.⁸²

RECOMMENDATION 24

That the Family Court make greater use of the ‘hot tub’ procedure in appropriate cases.

6 *Training for Expert Witnesses*

The Woolf Report recommended the improvement of training of expert witnesses to provide "...a basic understanding of the legal system and their role within it," and "...enable them to present written and oral evidence effectively."⁸³

As a result the Expert Witness Institute of the United Kingdom has been formed, and together with the pre-existing Academy of Experts and Society of Expert Witnesses, has "set about changing the culture associated with the expert witness."⁸⁴ These organisations encourage professionals to become expert witnesses, ensure they understand their role, approve or certify experts using appropriate criteria and work with professional bodies to develop standards. They have also developed codes of practice and disciplinary systems for expert witnesses. The Academy of Experts has published a code, the 'CPR Code of Guidance for Experts and those Instructing Them', updated in June 2001. The Expert Witness Institute also released a set of procedures for experts in December 2001, entitled 'Code of Guidance on Expert Evidence.' Although neither code is considered definitive for use by experts and practitioners, both codes have been approved for publication by the Master of the Rolls.

Appendix F contains a copy of the CPR Code of Guidance for Experts and those Instructing Them.

Appendix G contains a copy of the Code of Guidance on Expert Evidence.

In Australia, the ALRC Report recommended that the professions develop a generic template code of practice for experts based on the Federal Court guidelines and encourage its constituent professional bodies to supplement this code with discipline specific provisions where appropriate.⁸⁵ Furthermore, in March 2000 a working party was established to prepare a similar code of guidance or protocol in respect of the expert witness rules of the NSW Supreme Court in professional negligence matters.⁸⁶ In December 2000 the Expert Witness Institute of Australia was constituted by

representatives from the professions most closely connected with the presentation of expert evidence.⁸⁷ The Constitution expresses its objectives as follows:

- (a) To create, constitute and establish a mutual organisation for experts of all professional disciplines and for persons qualified to give expert opinion evidence.
- (b) To provide support to experts who are members of the Institute in order to achieve the objectives of the Institute.
- (c) To provide training, education and support to experts who are members, whether by way of courses, seminars, conferences or otherwise to maintain and enhance high standards in expert witnesses and their status.
- (d) To act as a voice for expert witnesses who are members.
- (e) To encourage the use of experts, who are members, wherever specialised knowledge is required.
- (f) To make representations to Government, Government Departments, Authorities and to other Professional Bodies and Associations wherever appropriate in order to achieve the objectives of the Institute.
- (g) To work actively with other relevant bodies and associations to further the objectives of the Institute and to protect, support and safeguard the character and interests of experts, who are members."

While other professional bodies have similar objectives and in some cases, their own guidelines and specific training, it is anticipated that the Institute will "...perform a useful role in securing some commonality of approach and co-operation, between these organisations...so as to avoid fragmentation of effort, and so secure optimal utilisation of the funding and resources available to each."⁸⁸

7 *Postscript*

In December 2001 the Chief Justice of the Family Court chaired a meeting with Justice O’Ryan and representatives from various professions whose members frequently give expert evidence in Family Court proceedings to discuss the recommendations contained in a previously circulated discussion paper. Representatives from the Attorney General’s Department, Law Council of Australia and New South Wales Bar Association also attended the meeting. The majority of participants embraced the need for reform and provided constructive comments and suggestions on the contents of the discussion paper. This amended discussion paper reflects the outcome of those discussions.

8 Endnotes

- 1 Justice Wood, "Expert Witness – the New Era" *Conference Paper* (June 2001), para 1.
- 2 Law Council of Australia, *Issues Paper 22, Submission 197*.
- 3 *W and W* (2001) Fam CA 216.
- 4 Justice Chesterman RFD, "The Accountant as Expert Witness", *Conference Paper – Institute of Chartered Accountants* (12 March 2000), p 2.
- 5 S.79.
- 6 S.80.
- 7 Lord Woolf, *Access to Justice: Final Report to the Chancellor on the Civil Justice System in England and Wales* (July 1996).
- 8 I. Freckelton, P. Reddy and H. Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (Australian Institute of Judicial Administration, 1999).
- 9 Australian Law Reform Commission Report, *Managing Justice: A Review of the Federal Civil Justice System* (January 2000), p 418-436 and Adversarial Background Paper, *Experts 6* (January 1999).
- 10 Family Court of Australia, *Future Directions Committee Report* (July 2000), p 40-42.
- 11 *supra* n 7, Chapter 13.
- 12 *Civil Procedure Rules 1998*, Part 35 – Experts and Assessors.
- 13 The Lord Chancellor's Department Civil Justice Reform Evaluation, *Emerging Findings: An early evaluation of the Civil Justice Reforms* (March 2001), para 4.26.
- 14 *supra* n 13, para 4.20.
- 15 *supra* n 13, para 4.21.
- 16 Law Reform Commission of Western Australia, *Project 92: Review of the Criminal and Civil Justice System in Western Australia* (1999), Chapter 22.
- 17 Justice Sperling, "Expert Evidence: The Problem of Bias and Other Things", *Conference Paper - Supreme Court of New South Wales Annual Conference* (3 September 1999), and published in TJR 4 (2000) at 431.
- 18 *supra* n 8, p 25.
- 19 *supra* n 8, p 25.
- 20 *supra* n 3.
- 21 *supra* n 17, p 432.
- 22 *supra* n 8, p 34.
- 23 *supra* n 8.
- 24 *Supreme Court Rules Part 36*, r13C(1), *Civil Procedure Rules Part 35*, r35.2.
- 25 *Civil Procedure*, Volume 1 (Autumn 2001), p 664.

- 26 Justice Williams, "Accreditation and Accountability of Experts", *Conference Paper – Medico-Legal Conference* (5 August 2000). Essentially, a duty to the court arises when the expert is instructed to give or prepare evidence for proceedings. An earlier report is not governed by the same considerations but may be discoverable.
- 27 r35.1 and r35.5.
- 28 *supra n 26*.
- 29 r35.4.
- 30 See r367(1) and r367(3)(b), (e) and (f).
- 31 O30A r8. Note that S.102A of the *Family Law Act* also restricts the number of times children may be interviewed and examined by experts regarding abuse.
- 32 T.L.R., December 6, 1999, CA, in *supra n 25*, p 664.
- 33 r35.5.
- 34 r35.11 and r35.13.
- 35 *Uniform Civil Procedure Rules (Qld) 1991*, r423.
- 36 r35.11.
- 37 *supra n 10*, p 41.
- 38 *supra n 8*, p 8.
- 39 O30A r3(1).
- 40 O30A r3(2).
- 41 O30A r7.
- 42 *supra n 8*, p 101.
- 43 r35.7, *supra n 25*, p 672.
- 44 Adversarial Background Paper, *supra n 9*, Chapter 5.
- 45 *supra n 25*, p 673.
- 46 *supra n 25*, p 675.
- 47 *supra n 25*, p 673.
- 48 *supra n 25*, p 673.
- 49 r35.8(5)
- 50 [2000] 1 W.L.R. 1382, CA, in N. Fetto, "Keeping the Woolf away from your expert", *NLJ Expert Witness Supplement* (May 25) 2001, p 768, and *supra n 25*, p 675.
- 51 Penny Booth, "Expert witness in family cases", in *NLJ Expert Witness Supplement* (May 25 2001), 774-776.
- 52 *supra n 13*.
- 53 *supra n 9*, para 8.168.
- 54 (1993) 2 Lloyd's Reports 68, p 81-82.
- 55 *supra n 10*, p 41.
- 56 See introductory paragraph, Federal Court Practice Directions.

- 57 Part 36, r35.10(4).
- 58 [1999] B.L.R 394, and [2000] C.L. 13, in *supra n 25*, p 666.
- 59 Internal Memorandum from Rose J to O’Ryan J dated 26 May 2000.
- 60 [2001] NSWCA 305, as per Priestly JA, Powell JA and Heydon JA. This was a personal injury case. The Court upheld an appeal by the Defendant that the trial judge had erred in accepting the Plaintiff’s expert evidence as to the slipperiness of the stairs on which she fell and was injured.
- 61 Practice Direction – Experts and Assessors, r. 3.
- 62 P. Mendelow, "Expert Evidence: Legal Professional Privilege and Expert’s Reports", *Australian Law Journal* 75 (2001), p 258.
- 63 O30A r9(2).
- 64 (Care Proceedings: Guidelines) [1998] 2 FLR 211.
- 65 *supra n 62*, p 211-212.
- 66 *supra n 9*, para 6.90.
- 67 r35.6.
- 68 2001 All E.R. D121, in D Hall, "Under Scrutiny", *Solicitor’s Journal* (14 December) 2001, p 19.
- 69 *supra n 25*, p 672.
- 70 r35.14.
- 71 *supra n 9*, para 6.113.
- 72 *supra n 10*, p 42.
- 73 r35.9
- 74 *supra n 25*, p 677.
- 75 *supra n 25*, p 677.
- 76 *supra n 8*, para 4.4.
- 77 *supra n 8*, para 11.3.
- 78 *supra n 17*, p 447.
- 79 O30B.
- 80 Adversarial Background Paper, *supra n 9*, Recommendation 12.
- 81 *supra n 9*, para 6.122.
- 82 See O30A and the example contained thereunder.
- 83 *supra n 7*, p 150.
- 84 Justice G.Williams, "Expert Evidence: A Judge’s Assessment", *Conference Paper – Quality Surveyors Expert Witness Workshop* (21 July 2001).
- 85 *supra n 9*, para 6.101.
- 86 Chaired by Mr Alan Abadee QC, a recently retired Judge of the Supreme Court of NSW, with participants including representatives from the AMA and Law Society.
- 87 Chaired by Mr Alan Abadee QC and to comprise individual and corporate members.
- 88 *supra n 1*.

Appendix A

CIVIL PROCEDURE RULES AND PRACTICE DIRECTION

Part 35 ~ Civil Procedure Rules

EXPERTS AND ASSESSORS

DUTY TO RESTRICT EXPERT EVIDENCE

35.1 Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.

INTERPRETATION

35.2 A reference to an ‘expert’ in this Part is a reference to an expert who has been instructed to give or prepare evidence for the purpose of court proceedings.

EXPERTS – OVERRIDING DUTY TO THE COURT

35.3 (1) It is the duty of an expert to help the court on the matters within his expertise.

(2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

COURT’S POWER TO RESTRICT EXPERT EVIDENCE

35.4 (1) No party may call an expert or put in evidence an expert’s report without the court’s permission.

(2) When a party applies for permission under this rule he must identify–

- (a) the field in which he wishes to rely on expert evidence; and
- (b) where practicable the expert in that field on whose evidence he wishes to rely.

(3) If permission is granted under this rule it shall be in relation only to the expert named or the field identified under paragraph (2).

(4) The court may limit the amount of the expert’s fees and expenses that the party who wishes to rely on the expert may recover from any other party.

GENERAL REQUIREMENT FOR EXPERT EVIDENCE TO BE GIVEN IN A WRITTEN REPORT

- 35.5** (1) Expert evidence is to be given in a written report unless the court directs otherwise.
- (2) If a claim is on the fast track, the court will not direct an expert to attend a hearing unless it is necessary to do so in the interests of justice.

WRITTEN QUESTIONS TO EXPERTS

- 35.6** (1) A party may put to –
- (a) an expert instructed by another party; or
 - (b) a single joint expert appointed under rule 35.7, written questions about his report.
- (2) Written questions under paragraph (1) –
- (a) may be put once only;
 - (b) must be put within 28 days of service of the expert's report; and
 - (c) must be for the purpose only of clarification of the report, unless in any case –
 - (i) the court gives permission; or
 - (ii) the other party agrees.
- (3) An expert's answers to questions put in accordance with paragraph (1) shall be treated as part of the expert's report.
- (4) Where –
- (a) a party has put a written question to an expert instructed by another party in accordance with this rule; and
 - (b) the expert does not answer that question, the court may make one or both of the following orders in relation to the party who instructed the expert –
 - (i) that the party may not rely on the evidence of that expert; or
 - (ii) that the party may not recover the fees and expenses of that expert from any other party.

COURT'S POWER TO DIRECT THAT EVIDENCE IS TO BE GIVEN BY A SINGLE JOINT EXPERT

- 35.7** (1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by one expert only.
- (2) The parties wishing to submit the expert evidence are called 'the instructing parties'.

- (3) Where the instructing parties cannot agree who should be the expert, the court may –
 - (a) select the expert from a list prepared or identified by the instructing parties; or
 - (b) direct that the expert be selected in such other manner as the court may direct.

INSTRUCTIONS TO A SINGLE JOINT EXPERT

- 35.8** (1) Where the court gives a direction under rule 35.7 for a single joint expert to be used, each instructing party may give instructions to the expert.
- (2) When an instructing party gives instructions to the expert he must, at the same time, send a copy of the instructions to the other instructing parties.
 - (3) The court may give directions about –
 - (a) the payment of the expert's fees and expenses; and
 - (b) any inspection, examination or experiments which the expert wishes to carry out.
 - (4) The court may, before an expert is instructed –
 - (a) limit the amount that can be paid by way of fees and expenses to the expert; and
 - (b) direct that the instructing parties pay that amount into court.
 - (5) Unless the court otherwise directs, the instructing parties are jointly and severally liable for the payment of the expert's fees and expenses.

POWER OF COURT TO DIRECT A PARTY TO PROVIDE INFORMATION

- 35.9** Where a party has access to information which is not reasonably available to the other party, the court may direct the party who has access to the information to –
- (a) prepare and file a document recording the information; and
 - (b) serve a copy of that document on the other party.

CONTENTS OF REPORT

- 35.10** (1) An expert's report must comply with the requirements set out in the relevant practice direction.
- (2) At the end of an expert's report there must be a statement that –
 - (a) the expert understands his duty to the court; and
 - (b) he has complied with that duty.

- (3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.
- (4) The instructions referred to in paragraph (3) shall not be privileged against disclosure but the court will not, in relation to those instructions –
 - (a) order disclosure of any specific document; or
 - (b) permit any questioning in court, other than by the party who instructed the expert, unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete.

USE BY ONE PARTY OF EXPERT'S REPORT DISCLOSED BY ANOTHER

35.11 Where a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial.

DISCUSSIONS BETWEEN EXPERTS

- 35.12** (1) The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to –
- (a) identify and discuss the expert issues in the proceedings; and
 - (b) where possible, reach an agreed opinion on those issues.
- (2) The court may specify the issues which the experts must discuss.
- (3) The court may direct that following a discussion between the experts they must prepare a statement for the court showing –
- (a) those issues on which they agree; and
 - (b) those issues on which they disagree and a summary of their reasons for disagreeing.
- (4) The content of the discussion between the experts shall not be referred to at the trial unless the parties agree.
- (5) Where experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement.

CONSEQUENCE OF FAILURE TO DISCLOSE EXPERT'S REPORT

35.13 A party who fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally unless the court gives permission.

EXPERT'S RIGHT TO ASK COURT FOR DIRECTIONS

- 35.14** (1) An expert may file a written request for directions to assist him in carrying out his function as an expert.
- (2) An expert must, unless the court orders otherwise, provide a copy of any proposed request for directions under paragraph (1) –
- (a) to the party instructing him, at least 7 days before he files the request; and
 - (b) to all other parties, at least 4 days before he files it.
- (1) The court, when it gives directions, may also direct that a party be served with a copy of the directions.

ASSESSORS

- 35.15** (1) This rule applies where the court appoints one or more persons (an 'assessor') under section 70 of the Supreme Court Act 1981 or section 63 of the County Courts Act 1984.
- (2) The assessor shall assist the court in dealing with a matter in which the assessor has skill and experience.
- (3) An assessor shall take such part in the proceedings as the court may direct and in particular the court may –
- (a) direct the assessor to prepare a report for the court on any matter at issue in the proceedings; and
 - (b) direct the assessor to attend the whole or any part of the trial to advise the court on any such matter.
- (4) If the assessor prepares a report for the court before the trial has begun–
- (a) the court will send a copy to each of the parties; and
 - (b) the parties may use it at trial.
- (5) The remuneration to be paid to the assessor for his services shall be determined by the court and shall form part of the costs of the proceedings.
- (6) The court may order any party to deposit in the court office a specified sum in respect of the assessor's fees and, where it does so, the assessor will not be asked to act until the sum has been deposited.
- (7) Paragraphs (5) and (6) do not apply where the remuneration of the assessor is to be paid out of money provided by Parliament.

CPR Practice Direction ~ Experts and Assessors

EXPERT EVIDENCE – GENERAL REQUIREMENTS

Part 35 is intended to limit the use of oral expert evidence to that which is reasonably required. In addition, where possible, matters requiring expert evidence should be dealt with by a single expert. Permission of the court is always required either to call an expert or to put an expert's report in evidence.

- 1.1** It is the duty of an expert to help the court on matters within his own expertise: rule 35.3(1). This duty is paramount and overrides any obligation to the person from whom the expert has received instructions or by whom he is paid: rule 35.3(2).
- 1.2** Expert Evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
- 1.3** An expert should assist the court by providing objective, unbiased opinion on matters within his expertise, and should not assume the role of an advocate.
- 1.4** An expert should consider all material facts, including those which might detract from his opinion.
- 1.5** An expert should make it clear:
 - (a) when a question or issue falls outside his expertise; and
 - (b) when he is not able to reach a definite opinion, for example because he has insufficient information.
- 1.6** If, after producing a report, an expert changes his view on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.

FORM AND CONTENT OF EXPERT'S REPORTS

- 2.1** An expert's report should be addressed to the court and not to the party from whom the expert has received his instructions.
- 2.2** An expert's report must:
 - (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) contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
- (4) make clear which of the facts stated in the report are within the expert's own knowledge;
- (5) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;
- (6) where there is a range of opinion on the matters dealt with in the report –
 - (a) summarise the range of opinion, and
 - (b) give reasons for his own opinion,
- (7) contain a summary of the conclusions reached;
- (8) if the expert is not able to give his opinion without qualification, state the qualification; and
- (9) contain a statement that the expert understands his duty to the court, and has complied and will continue to comply with that duty.

2.3 An expert's report must be verified by a statement of truth as well as containing the statements required in paragraph 2.2 (8) and (9) above.

2.4 The form of the statement of truth is as follows:

'I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.'

2.5 Attention is drawn to rule 32.14 which sets out the consequences of verifying a document containing a false statement without an honest belief in its truth. (For information about statements of truth see Part 22 and the practice direction which supplements it.)

2.6 In addition, an expert's report should comply with the requirements of any approved expert's protocol.

INFORMATION

- 3** Under Part 35.9 the court may direct a party with access to information which is not reasonably available to another party to serve on that other party a document which records the information. The document served must include sufficient details of all the facts, tests, experiments and assumptions which underlie any part of the information to enable the party on whom it is served to make, or to obtain, a proper interpretation of the information and an assessment of its significance.

INSTRUCTIONS

- 4** The instructions referred to in paragraph 1.2(8) will not be protected by privilege (see rule 35.10(4)). But cross-examination of the expert on the contents of his instructions will not be allowed unless the court permits it (or unless the party who gave the instructions consents to it). Before it gives permission the court must be satisfied that there are reasonable grounds to consider that the statement in the report of the substance of the instructions is inaccurate or incomplete. If the court is so satisfied, it will allow the cross-examination where it appears to be in the interests of justice to do so.

QUESTIONS TO EXPERTS

- 5.1** Questions asked for the purpose of clarifying the expert's report (see rule 35.6) should be put, in writing, to the expert not later than 28 days after receipt of the expert's report (see paragraphs 1.2 to 1.5 above as to verification).
- 5.2** Where a party sends a written question or questions direct to an expert, a copy of the questions should, at the same time, be sent to the other party or parties.

Appendix B

FEDERAL COURT RULES AND PRACTICE DIRECTION

Order 34 ~ Federal Court Rules

COURT EXPERT

1 Application

This Part does not apply to a question or matter to be tried before a jury.

2 Appointment

- (1) Where a question for an expert witness arises in any proceedings the Court may, at any stage of the proceedings, on its own motion or on application by a party or the Registrar:
 - (a) appoint an expert as court expert to inquire into and report upon the question;
 - (b) authorise the court expert to inquire into and report upon any facts relevant to his inquiry and report on the question;
 - (c) direct the court expert to make a further or supplemental report or inquiry and report; and
 - (d) give such instructions as the Court thinks fit relating to any inquiry or report of the court expert.
- (2) In subrule (1), *expert*, in relation to any question, means a person who has such knowledge or experience of, or in connection with, that question, or questions of the character of that question, that his opinion on that question would be admissible in evidence.
- (3) Instructions pursuant to paragraph (1) (d) may include provision concerning any experiment or test for the purposes of any inquiry or report of a court expert.

3 Report

- (1) The court expert shall send his report to the Registrar, together with so many copies of the report as the Court may direct.
- (2) The Registrar shall send a copy of the report to each party interested in the question.
- (3) The report shall, unless the Court otherwise orders, be admissible in evidence on the question on which it is made, but shall not be binding on any party except to the extent to which that party agrees to be bound by it.

4 Cross-examination

Upon application made by any party within 14 days after receiving a copy of a court expert's report, the Court shall make an order for the cross-examination of the court expert by all the parties, either:

- (a) before the Court, at the trial or at some other time; or
- (b) before an examiner.

5 Remuneration

(1) The remuneration of the court expert shall be fixed by the Court and shall include:

- (a) a fee for his report; and
- (b) a proper sum for each day during which he is required to attend before the Court or before an examiner.

(2) Unless the Court otherwise orders, the parties shall be jointly and severally liable to the court expert to pay the amount fixed by the Court for his remuneration.

(3) The Court may, on application by any party or by the court expert, make orders in the proceedings for payment in or towards discharge of the liability of any party under subrule (2).

(4) Subrules (2) and (3) do not affect the powers of the Court as to costs.

6 Further expert evidence

Where, pursuant to this Order, a court expert has made a report on any question:

- (a) any party may adduce evidence of one other expert on the same question, but only if he has, at a reasonable time before the commencement of the trial, hearing or examination at which he adduces the evidence, given to the other interested parties notice of his intention to do so; but
- (b) subject to paragraph (a), a party shall not adduce evidence of any other expert on the same question, except with leave of the Court.

Order 34A ~ Federal Court Rules

EVIDENCE OF EXPERT WITNESSES

1 Application

This order does not apply to a question or matter to be tried before a jury.

2 Definitions

In this order:

expert witness means a person who is called, or is to be called, by a party to give opinion evidence, based on the person's specialised knowledge, based on the person's training, study or experience.

3 Evidence by expert witnesses

- (1) This rule applies if 2 or more parties to a proceeding call, or intend to call, expert witnesses to give opinion evidence about the same, or a similar, question.
- (2) The Court or a Judge may, on its own initiative or at the request of a party, direct:
 - (a) that the expert witnesses confer; or
 - (b) that the expert witnesses produce for use by the Court a document identifying:
 - (i) the matters and issues about which their opinions are in agreement; and
 - (ii) the matters and issues about which their opinions differ; or
 - (c) that:
 - (i) the expert witnesses give evidence at trial after all or certain factual evidence relevant to the question has been led; and
 - (ii) each party intending to call 1 or more expert witnesses close that party's case in relation to the question, subject only to adducing the evidence of the expert witnesses later in the trial; or
 - (d) that, after all or certain factual evidence has been led, each expert witness file and serve an affidavit or statement indicating:
 - (i) whether the expert witness adheres to any opinion earlier given; or
 - (ii) whether, in the light of factual evidence led at trial, the expert witness wishes to modify any opinion earlier given; or

- (e) that:
- (i) each expert witness be sworn one immediately after another; and
 - (ii) when giving evidence, an expert witness occupy a position in the courtroom (not necessarily in the witness box) that is appropriate to the giving of evidence; or
- (f) that each expert witness give an oral exposition of his or her opinion, or opinions, on the question; or
- (g) that each expert witness give his or her opinion about the opinion, or opinions, given by another expert witness; or
- (h) that the expert witnesses be cross-examined in a certain manner or sequence; or
- (i) that cross-examination, or re-examination, of the expert witnesses be conducted:
- (i) by completing the cross-examination or re-examination of an expert witness before starting the cross-examination or re-examination of another; or
 - (ii) by putting to each expert witness, in turn, each question relevant to one subject or issue at a time, until the cross-examination or re-examination of all the witnesses is completed.

Federal Court Practice Direction

GUIDELINES FOR EXPERT WITNESSES IN PROCEEDINGS IN THE FEDERAL COURT OF AUSTRALIA

Practitioners should give a copy of the following guidelines to any expert witness they propose to retain for the purpose of giving a report and giving evidence in a proceeding. The guidelines are not intended to address exhaustively all aspects of an expert's duties.

M.E.J. BLACK ~ Chief Justice

General Duty to the Court

- An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.
- An expert witness is not an advocate for a party.
- An expert witness's paramount duty is to the Court and not to the person retaining the expert.

The Form of the Expert Evidence

- An expert's written report must give details of the expert's qualifications, and of the literature or other material used in making the report.
- All assumptions made by the expert should be clearly and fully stated.
- The report should identify who carried out any tests or experiments upon which the expert relied in compiling the report, and give details of the qualifications of the person who carried out any such test or experiment.
- Where several opinions are provided in the report, the expert should summarise them.
- The expert should give reasons for each opinion.
- At the end of the report the expert should declare that "[the expert] has made all the inquiries which [the expert] believes are desirable and appropriate and that no matters of significance which [the expert] regards as relevant have, to [the expert's] knowledge, been withheld from the Court."
- There should be attached to the report, or summarised in it, the following:
 - (i) all instructions (original and supplementary and whether in writing or oral) given to the expert which define the scope of the report;
 - (ii) the facts, matters and assumptions upon which the report proceeds; and
 - (iii) the documents and other materials which the expert has been instructed to consider.
- If, after exchange of reports or at any other stage, an expert witness changes his or her view on a material matter, having read another expert's report or for any other reason, the change of view should be communicated in writing (through legal representatives) without delay to each party to whom the expert witness's report has been provided and, when appropriate, to the Court.

- If an expert's opinion is not fully researched because the expert considers that insufficient data is available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.
- The expert should make it clear when a particular question or issue falls outside his or her field of expertise.
- Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports.

Experts' Conference

- If experts retained by the parties meet at the direction of the Court, it would be improper conduct for an expert to be given or to accept instructions not to reach agreement. If, at a meeting directed by the Court, the experts cannot reach agreement on matters of expert opinion, they should specify their reasons for being unable to do so.

Appendix C

NSW SUPREME COURT RULES

EXPERT WITNESS CODE OF CONDUCT (Schedule K)

PRACTICE NOTE 121 – JOINT CONFERENCES OF EXPERT WITNESSES

NSW Supreme Court Rules ~ Part 36 Rules 13C and 13CA

[36.13C] EXPERT WITNESSES

- (1) For the purposes of this rule and rule 13CA:
"expert witness" means an expert engaged for the purpose of:
 - (a) providing a report as to his or her opinion for use as evidence in proceedings or proposed proceedings; or
 - (b) giving opinion evidence in proceedings or proposed proceedings;" the code" means the expert witness code of conduct in Schedule K.

- (2) Unless the Court otherwise orders:
 - (a) at or as soon as practicable after the engagement of an expert as a witness, whether to give oral evidence or to provide a report for use as evidence, the person engaging the expert shall provide the expert with a copy of the code;
 - (b) unless an expert witness's report contains an acknowledgment by the expert witness that he or she has read the code and agrees to be bound by it:
 - (i) service of the report by the party who engaged the expert witness shall not be valid service for the purposes of the rules or of any order or practice note; and
 - (ii) the report shall not be admitted into evidence;
 - (c) oral evidence shall not be received from an expert witness unless:
 - (i) he or she has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the code and agrees to be bound by it; and
 - (ii) a copy of the acknowledgment has been served on all parties affected by the evidence.

- (3) If an expert witness furnishes to the engaging party a supplementary report, including any report indicating that the expert witness has changed his or her opinion on a material matter expressed in an earlier report by the expert witness:
 - (a) the engaging party must forthwith serve the supplementary report on all parties on whom the engaging party has served the earlier report; and
 - (b) the earlier report must not be used in the proceedings by the engaging party, or by any party in the same interest as the engaging party on the question to which the earlier report relates, unless paragraph (a) is complied with.
- (4) This rule shall not apply to an expert engaged before this rule commences.

[36.13CA] CONFERENCE BETWEEN EXPERTS

- (1) The Court may, on application by a party or of its own motion, direct expert witnesses to:
 - (a) confer and may specify the matters on which they are to confer;
 - (b) endeavour to reach agreement on outstanding matters; and
 - (c) provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for any non agreement.
- (2) An expert so directed may apply to the Court for further directions.
- (3) The Court may direct that such conference be held with or without the attendance of the legal representatives of the parties affected, or with or without the attendance of legal representatives at the option of the parties respectively.
- (4) The content of the conference between the expert witnesses shall not be referred to at the hearing or trial unless the parties affected agree.
- (5) The parties may agree, at any time, to be bound by agreement on any specified matter. In that event, the joint report may be tendered at the trial as evidence of the matter agreed. Otherwise, the joint report may be used or tendered at the trial only in accordance with the rules of evidence and the practices of the Court.

- (6) Where, pursuant to this rule, expert witnesses have conferred and have provided a joint report agreeing on any matter, a party affected may not, without leave of the Court, adduce expert evidence inconsistent with the matter agreed.

NSW Supreme Court Rules ~ Part 39

COURT APPOINTED EXPERT AND ASSISTANCE TO THE COURT*

** Editor's note: A new Part 39 was substituted in January 2000 and appears here. It applies to persons appointed on or after 1 March 2000. The former Part 39 appears immediately after this new Part and continues to apply to persons appointed before 1 March 2000.*

[39.1] SELECTION AND APPOINTMENT

- 1 (1) Where a question for an expert witness arises in any proceedings the Court may, at any stage of the proceedings, on application by a party or of its own motion, after hearing any party affected who wishes to be heard:
- (a) appoint an expert (in this Division referred to as "the expert") to inquire into and report upon the question;
 - (b) authorise the expert to inquire into and report upon any facts relevant to the inquiry and report on the question;
 - (c) direct the expert to make a further or supplemental report or inquiry and report; and
 - (d) give such instructions (including provision concerning any examination, inspection, experiment or test) as the Court thinks fit relating to any inquiry or report of the expert.
- (2) The Court may appoint as the expert a person selected by the parties affected or a person selected by the Court or selected in a manner directed by the Court.

[39.2] CODE OF CONDUCT

- 2 (1) A copy of the expert witness code of conduct in Schedule K ("the code") shall be provided to the expert by the registrar or as the Court may direct.
- (2) A report by the expert shall not be admitted into evidence unless the report contains an acknowledgment by the expert that he or she has read the code and agrees to be bound by it.

- (3) Oral evidence shall not be received from the expert unless the Court is satisfied that he or she has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the code and agrees to be bound by it.

[39.3] REPORT

- 3
 - (1) The expert shall send his or her report to the registrar.
 - (2) The registrar shall send a copy of the report to each party affected.
 - (3) Subject to compliance with this rule, the report shall be deemed to have been admitted into evidence in the proceedings unless the Court otherwise orders.

[39.4] CROSS-EXAMINATION

- 4 Any party affected may cross-examine the expert and the expert shall attend court for examination or cross-examination if so requested on reasonable notice by the registrar or by a party affected.

[39.5] REMUNERATION

- 5
 - (1) The remuneration of the expert shall be fixed by the Court.
 - (2) Subject to subrule (3), the parties specified by the Court shall be jointly and severally liable to the expert to pay the amount fixed by the Court for his remuneration.
 - (3) The Court may direct when and by whom the expert is to be paid.
 - (4) Subrules (2) and (3) do not affect the powers of the Court as to costs.

[39.6] OTHER EXPERT EVIDENCE

- 6 Where an expert has been appointed pursuant to this Part in relation to a question arising in the proceedings, the Court may limit the number of other experts whose evidence may be adduced on that question.

[39.7] ASSISTANCE TO THE COURT

- 7 The Court may, in any proceedings other than proceedings entered in the Admiralty List or proceedings tried with a jury, obtain the assistance of any person specially qualified to advise on any matter arising in the proceedings, may act upon the adviser's opinion, and may make orders for the adviser's remuneration.

Expert Witness Code of Conduct (Schedule K)

APPLICATION OF CODE

1. This code of conduct applies to any expert engaged to:
 - (a) provide a report as to his or her opinion for use as evidence in proceedings or proposed proceedings; or
 - (b) give opinion evidence in proceedings or proposed proceedings.

GENERAL DUTY TO THE COURT

2. An expert witness has an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise.
3. An expert witness's paramount duty is to the Court and not to the person retaining the expert.
4. An expert witness is not an advocate for a party.

THE FORM OF EXPERT REPORTS

5. A report by an expert witness must (in the body of the report or in an annexure) specify:
 - (a) the person's qualifications as an expert;
 - (b) the facts, matters and assumptions on which the opinions in the report are based (a letter of instructions may be annexed);
 - (c) reasons for each opinion expressed;
 - (d) if applicable that a particular question or issue falls outside his or her field of expertise;
 - (e) any literature or other materials utilised in support of the opinions; and

- (f) any examinations, tests or other investigations on which he or she has relied and identify, and give details of the qualifications of, the person who carried them out.
- 6. If an expert witness who prepares a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.
- 7. If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
- 8. An expert witness who, after communicating an opinion to the party engaging him or her (or that party's legal representative), changes his or her opinion on a material matter shall forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect which shall contain such of the information referred to in 5 (b), (c), (d), (e) and (f) as is appropriate.
- 9. Where an expert witness is appointed by the Court, the preceding paragraph applies as if the Court were the engaging party.

EXPERTS' CONFERENCE

- 10. An expert witness must abide by any direction of the Court to:
 - (a) confer with any other expert witness;
 - (b) endeavour to reach agreement on material matters for expert opinion; and
 - (c) provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for any non agreement.
- 11. An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.

Practice Note 121 ~ Joint Conferences of Expert Witnesses

JOINT CONFERENCES OF EXPERT WITNESSES

PREAMBLE

1. The objective of this Practice Note is to facilitate compliance with any directions of the Court given pursuant to Pt36 r13CA(1), of the Supreme Court Rules (the Rules).
2. The objectives of such directions for a joint conference of experts include the following:
 - (a) The just, quick and cost effective disposal of the proceedings.
 - (b) The identification and narrowing of issues in the proceedings during preparation for such a conference and by discussion between the experts at the conference. The joint report may be tendered by consent as evidence of matters agreed and/or to identify and limit the issues on which contested expert evidence will be called.
 - (c) The consequential shortening of the trial and enhanced prospects of settlement.
 - (d) Apprising the Court of the issues for determination.
 - (e) Binding experts to their position on issues, thereby enhancing certainty as to how the expert evidence will come out at the trial. (The joint report may, if necessary, be used in cross-examination of a participating expert called at the trial who seeks to depart from what was agreed.)
 - (f) Avoiding or reducing the need for experts to attend court to give evidence.

PREPARATION FOR A CONFERENCE

3. The parties should agree on the following matters:
 - (a) The experts to attend.
 - (b) The questions to be answered.

- (c) The materials to be placed before the experts.
4. The experts to attend should be those specified in the Court's order. If none are so specified, the parties should arrange for experts to attend who have expertise pertinent to the questions to be asked. Separate conferences may be required between experts in different specialities in relation to different issues arising in the case.
 5. The questions to be answered should be those specified by the Court or those agreed by the parties as relevant and any other question which any party wishes to submit for consideration.
 6. The questions to be answered should be framed to resolve an issue or issues in the proceedings. If possible, questions should be capable of being answered Yes or No, or (if not) by a very brief response.
 7. The materials to be provided to each of the participating experts should include:
 - (a) The code (Schedule K to the Rules)
 - (b) This practice note.
 - (c) An agreed chronology, if appropriate.
 - (d) Relevant witness statements or, preferably, a joint statement of the assumptions to be made by the experts, including any competing assumptions to be made by them in the alternative (which should be specified clearly as such).
 - (e) Copies of all expert opinions already exchanged between the parties and all other expert opinions and reports upon which a party intends to rely.
 - (f) Such records and other documents as may be agreed between the parties or ordered by the Court.
 8. The participating experts should each be provided, in advance, with the questions and materials referred to in paragraph 5-7 above.

CONVENING A CONFERENCE

9. Subject to any directions given by the Court concerning the range of dates for the convening of the conference, the parties should communicate amongst themselves to fix a mutually convenient date, time and place for the conference.

10. The conference should take the form of a personal meeting. Alternatively the participants may choose to hold the conference by teleconference, videolink or similar means if a personal meeting is not practicable.
11. The experts should be given a reasonable opportunity to prepare for the conference by ensuring that before the conference the experts have:
 - (a) An opportunity to seek clarification from the instructing lawyers or the Court concerning any question put to them.
 - (b) Access to any additional materials which the parties are able to provide and which the experts consider to be relevant.
12. In order to enable the experts to have a reasonable opportunity to prepare for the occasion, the conference should not take place until the expiration of at least 14 days following the provision of the materials referred to in paragraph 5-7 above.

THE ROLE OF EXPERTS AT A CONFERENCE

13. The experts should provide their respective opinions in response to the questions asked based on the witness statements or assumptions provided. Where alternative assumptions are provided the experts should provide their respective opinions on the alternative assumptions.
14. The experts may specify in their report other questions which they believe it would be useful for them to consider.
15. Pursuant to cl 11 of the code (Schedule K), an expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement. An expert should not assume the role of advocate for any party during the course of discussions at the joint conference. If, for whatever reason, an expert is unable to reach agreement with the other experts on any matter, that expert should be free to express his or her disagreement with the other experts on that matter.

16. The experts should accept as fact the matters stated in witness statements or assumptions submitted to them. It is not their role to decide any disputed question of fact or the credibility of any witness. Where there are competing assumptions to be made in the alternative, alternative answers may have to be provided to a question or questions, specifying which of the assumptions are adopted for each answer.

CONDUCT OF THE CONFERENCE

17. The conference should be conducted in a manner which is flexible, free from undue complexity (so far as is practicable) and fair to all parties.
18. The participating experts may appoint one of their number as a chairperson. If one of them so requests and the parties agree or the court orders, some other person may be appointed to act as chairperson.
19. Secretarial or administrative assistance should be provided by the parties if so requested by the experts.
20. If the participating experts agree, one of them or a secretarial assistant may be appointed to make a note at the conference of matters agreed, matters not agreed and reasons for disagreement.
21. The conference may be adjourned and reconvened as may be thought necessary by those participating.

JOINT REPORT

22. Pursuant to Pt36 r13CA(1) and the code (Schedule K) cl 10, the report should specify matters agreed and matters not agreed and the reasons for non agreement.
23. The joint report should, if possible, be signed by all participating experts immediately at the conclusion of the conference and, otherwise, as soon as practicable thereafter.
24. Prior to signing of a joint report, the participating experts should not seek advice or guidance from the parties or their legal representatives except as provided for in this Practice Note. Thereafter, the experts may provide a copy of the report to a party or his or her legal representative and may communicate what transpired at the meeting in detail if they wish.

25. The report of the joint conference should be composed by the experts and not the representatives of the parties. The report should be set out in numbered paragraphs and should be divided into the following sections:
- (a) Statement of agreed opinion in respect of each matter calling for report.
 - (b) Statement of matters not agreed between experts with short reasons why agreement has not been reached.
 - (c) Statement in respect of which no opinions could be given eg. issues involving credibility of testimony.
 - (d) Any suggestion by the participating experts as to any other matter which they believe could usefully be submitted to them for their opinion.
 - (e) Disclosure of any circumstances by reason of which an expert may be unable to give impartial consideration to the matter.
26. The joint report, when signed by all participating experts, should be forwarded to the Court.

ROLE OF LEGAL REPRESENTATIVES

27. Legal representatives who attend a conference pursuant to an order of the Court or who are approached for advice or guidance by a participating expert should respond jointly and not individually, unless authorised to do so by the legal representatives for all other parties with an interest in the conference.
28. Such advice or guidance may be provided by
- (a) Responding to any questions in relation to the legal process applicable to the case.
 - (b) Identifying relevant documents.
 - (c) Providing further materials on request.
 - (d) Correcting any misapprehensions of fact or any misunderstanding concerning the conference process.
29. The legal representatives of the parties should perform any other role the Court may direct.

PROVISION OF INFORMATION

30. The legal representatives of the parties should inform the associate of the judge who directed the conference of the date of a conference when arranged, the names of the participating experts and the questions submitted.
31. It is not intended that the joint report provided to the Court or that information provided to the Court concerning a conference will be evidence in the proceedings unless admitted into evidence in the ordinary way (that is, by consent or by tender subject to the Rules of the Court and the rules of evidence).

DIRECTIONS

32. Pursuant to Pt36 r13CA(2), an expert directed to confer may apply to the Court for further directions. That may be done, at the expert's election, by arrangement with the associate of the judge who directed the conference. A party may also apply for further directions in relation to a directed conference.

Appendix D

FAMILY LAW RULES

Order 30A Expert Evidence

Division 1 – General

INTERPRETATION

- 1** In this Order, unless the contrary intention appears:
- court expert* means an expert appointed by the court under rule 3 of this Order;
- expert* means a person who has such knowledge or experience of, or in connection with, a question arising in proceedings that his or her opinion on the question would be admissible as evidence, but does not include a family and child counsellor or a welfare officer;
- party* includes a child's representative.

Division 3 – Court experts

APPOINTMENT OF COURT EXPERT

- 3** (1) **[Court may appoint court expert]** The court may, at any stage of proceedings, on application by a party or of its own motion:
- (a) appoint an expert as court expert to inquire into and report on any issue of fact or opinion, other than an issue involving questions of law or construction, arising in the proceedings; and
 - (b) give directions to extend or supplement, or otherwise in relation to, any such inquiry or report.
- (2) **[Parties to agree court expert]** A court expert shall be a person agreed upon between the parties or, if agreement is not possible, a person nominated by the court.
- (3) **[Authorisation of experiment or testing procedure]** A direction under paragraph (1)(b) may authorise, and make provision for the conduct of, an experiment or a testing procedure (other than a testing procedure for the purposes of section 69W of the Act) for the purposes of an inquiry or report.

REPORT

- 4 (1) **[Court expert to send report to Registrar]** A court expert shall send the report, together with as many copies of the report as the Registrar directs, to the Registrar at the filing registry for the proceedings.
- (2) **[Report in evidence]** Where the report has been received by the Registrar:
- (a) the Registrar shall send 2 copies of the report to each of the parties to the proceedings; and
 - (b) the court may:
 - (i) receive the report in evidence;
 - (ii) permit oral examination of the court expert who made the report; and
 - (iii) give such directions as to the future disposition of the report (including any copies of the report) as the court thinks fit.

CROSS-EXAMINATION

- 5 (1) **[Cross-examination of court expert]** If a party seeks to cross-examine a court expert, the party:
- (a) must arrange for the attendance of the court expert for cross-examination; and
 - (b) may issue a subpoena commanding the attendance before the court of the court expert.
- (2) **[Remuneration and expenses]** Unless the court otherwise orders, if a party arranges for the attendance of a court expert for cross-examination, the party must pay the reasonable remuneration and expenses of the court expert for the attendance.

REMUNERATION

- 6 (1) **[Dispute as to remuneration and expenses]** If a dispute arises between the parties in respect of the remuneration and expenses payable to a court expert for:
- (a) preparing a report; or
 - (b) attending at court;
- the court must determine the amount to be paid to the court expert.
- (2) **[Parties jointly liable]** Unless the court otherwise orders, the parties are jointly liable to pay a court expert for the reasonable remuneration and expenses incurred in preparing a report.

- (3) **[Court may discharge liability of party]** On application by a party or by a court expert, the court may make an order in the proceedings for payment in or towards discharge of the liability of any party under subrule (2).
- (4) **[Costs]** Subrules (2) and (3) shall not be taken to affect the court's powers as to costs.

RESPONSE TO EVIDENCE OF COURT EXPERT

- 7 Where a court expert has made a report on an issue, any party to the proceedings may, subject to this Order, adduce the evidence of one other expert on that issue but shall not adduce the evidence of 2 or more other experts except in accordance with Division 4 of this Order.

Division 4 – Limitation of expert evidence

INTENTION TO CALL 2 OR MORE EXPERTS DIRECTION BY COURT

- 8 (1) **[Application for directions]** A party intending to adduce the evidence of 2 or more experts in relation to the same issue at a hearing in proceedings shall apply to the court for directions.
- (2) **[Court may give direction on number of experts]** On the application for directions, the court may, subject to subrule (3), give a direction specifying the number of experts who may be called in relation to the same issue by a party to the proceedings.
- (3) **[No direction for 2 or more experts unless special circumstances]** The court shall not give a direction specifying that 2 or more experts may be called by a party in relation to the same issue unless the court is satisfied that there are special circumstances.

Division 5 – Conference of experts

EVIDENCE OF EXPERT WITNESSES

- 9 (1) **[Expert witnesses]** This rule applies if 2 or more parties to a proceeding call expert witnesses to give opinion evidence about the same, or a similar, question.

- (2) **[Powers of court]** The Court may give any direction it thinks fit in relation to:
- (a) the preparation by the expert witnesses (in conference or otherwise) of a joint statement of how their opinions on the question agree and differ; or
 - (b) the giving by an expert witness of an oral or written statement of:
 - (i) his or her opinion on the question; or
 - (ii) his or her opinion on the opinion of another expert on the question; or
 - (iii) whether in the light of factual evidence led at trial, he or she adheres to, or wishes to modify, any opinion earlier given; or
 - (c) the order in which the expert witnesses are to be sworn, are to give evidence, are to be cross-examined or are to be re-examined; or
 - (d) the position of witnesses in the courtroom (not necessarily in the witness box).

EXAMPLE The Court may direct that the expert witnesses be sworn one immediately after another, and that they give evidence after all or certain factual evidence has been led, or after each party's case is closed (subject only to hearing the evidence of expert witnesses) in relation to the question.

Order 30B - Assessors

COURT MAY CALL IN ASSESSORS

- 1** (1) **[Court may call on assessor(s) to assist court]** In any proceedings under the Act, the Regulations or these rules (except prescribed proceedings), the court may call on one or more assessors to assist the court in relation to any matter before the court.
- (2) **[Court not bound by assessor's opinion or finding]** If the court calls on an assessor, the court is not bound by any opinion or finding of the assessor.

PROCEDURE AT HEARINGS WITH ASSESSORS PRESENT

2 A hearing with an assessor is to be conducted as the court directs.

REMUNERATION OF ASSESSORS

3 The remuneration of an assessor is to be determined by the court, and paid by:

(a) the court; or

(b) such party, or other person, as the court orders;

and the court may order a party or other person to pay, or to give security for payment of the remuneration prior to an assessor being called on to assist the court.

Appendix E

THE "IKARIAN REEFER" PRINCIPLES

The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (*Whitehouse v Jordan* (1981) 1 WLR 246 at 256, per Lord Wilberforce).
2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd v Commercial Union Assurance Co plc* (1987) 1 Lloyd's Rep 379 at 286 per Mr Justice Garland and *Re J* (1990) FCR 193 per Mr Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.
3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J*, above).
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (*Re J*, above). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (*Derby & Co Ltd v Weldon*, *The Times*, 9 November 1990 per Lord Justice Staughton).
6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.
7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice).

Appendix F

CPR CODE OF GUIDANCE FOR EXPERTS AND THOSE INSTRUCTING THEM (ACADEMY OF EXPERTS)

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. 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.
- 1.2** The Code of Guidance thus applies to all experts who are, or who may be, governed by Part 35 of the Rules. 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.'
- 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.

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

3 Conduct and Use of Experts before Proceedings Commence and the Requirement for Experts generally

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 Protocol 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.’ 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.

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 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 directions on such matters as:

- (1) Costs;
- (2) Interest;
- (3) Time limits;
- (4) Stay of proceedings;
- (5) Whether to order a party to pay a sum of money into court.

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.

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. That duty requires the expert to assist the court in dealing with cases in accordance with the ‘overriding objective.’
- 6.2** The overriding objective is the key principle of the Rules and is provided for at CPR1.1 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.
 - (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.
- 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.
- 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.

11 Basis of Appointment

11.1 Prior to instructing a proposed expert or to seeking the court's permission to appoint a named expert, the appointor will establish with the expert:

- (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.

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; and
- (2) A statement of whether any order has been made limiting the amount of expert's fees and expenses.

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.
- 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;
 - (3) The ease and/or the expense of retrieval, the copying of documents and their delivery to the expert;
 - (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.

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.

13.5 Where his instructions remain incompatible with his duties, whether through incompleteness of instructions, a conflict between his duty to the court and his instructions, or for any other substantial reason, he 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.

PART 4 CONDUCT AND USE OF EXPERTS AT THE PROCEEDINGS STAGE

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

14.1 As the court's permission for expert evidence to be adduced is confined to the field and to the expert nominated, it is personal to that expert. 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.

14.2 Any limitation by the court of the revocability 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.

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.

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 court and must:

(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 opinions are based.

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. The form of the statement of truth is as follows:

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

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.

- 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.
- 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.
- 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.
- 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. 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.
- 15.12** The expert's mandatory statement of the substance of all his material instructions should not be incomplete or otherwise tend to mislead. The omission from the statement of 'off-the-record' oral instructions is not permitted. Although instructions are not privileged, 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.

- 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 facts which he has been instructed to assume.
- 15.15** The wording of the mandatory statement of truth must not be modified; that statement, together with the mandatory statement that the expert understands his duty to the court and has complied with that duty, must be placed at the end of the report and may be incorporated in an Expert's Declaration.
- 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 burden is on that party to persuade the court that the case is so exceptional that the overriding objective requires such attendance.

17 Written Questions to Experts: Asking Questions about Reports

- 17.1** The procedure for questions and answers is intended to facilitate the 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.

- 17.2** A party served with another party's report may, if it wishes, put written questions directly to another party's expert. Such question or questions must be put to the expert within 28 days of the service of the other party's report and may be put on one occasion only. 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. The party asking the questions should send a copy of the questions to the other party.
- 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.
- 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. 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. 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 makes an application to the court for directions. The procedure for making such an application is given in CPR/23.
- 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. 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.

- 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.
- 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. 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.
- 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:
- (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.
- 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, each party may give instructions to the expert and, if it does, must simultaneously copy those instructions to the other party.

- 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.
- 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 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.
- 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.
- 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 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.
- 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. The proportionality principle may, in exceptional circumstances, justify the expert in exercising that right.
- 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 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. Such information may be relevant to the duties of an expert whether he is appointed jointly or otherwise.
- 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.

22 Discussions between Experts

- 22.1** The court has powers to direct a discussion between experts for the purposes set out in the Rules. The parties may also agree that a discussion take place between their experts. More than one such discussion may be justified by the case.
- 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.
- 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 them 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.
- 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.
- 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 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. 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.

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. The use of a witness summons will not affect the contractual or other obligations of the parties to pay an expert's fees.

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/34 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 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.

Appendix G

CODE OF GUIDANCE ON EXPERT EVIDENCE: A Guide for Experts and those instructing them for the purpose of court proceedings (Expert Witness Institute)

Preamble

- CPR 35** In framing this Code, the Working Party has taken account of the Civil Procedure Rules (CPR) and the Practice Directions as they exist on 1 December 2001, together with any case law on their interpretation. The Code of Guidance is designed to help experts and those instructing them in all cases where CPR applies. It is intended to facilitate better communication and dealings both between the expert and the instructing party and between the parties; as such it is drawn in general terms so as to provide guidance for every court of law in the Civil Jurisdiction and in every type of civil litigation.
- CPR 35.2** Part 35 of the CPR applies in every case where an expert is instructed to give or prepare evidence for the purpose of court proceedings. Part 35 is of limited application in the
- CPR 27.2 (1)(e)** small claims court where, with some exceptions, its provisions do not apply. Assistance from an expert may be needed at various stages of a dispute and for different purposes. The expert always owes a duty to exercise reasonable skill and care to the person instructing him or her, and to comply with any relevant professional code of ethics.
- CPR 35.3(1)** However, when the expert is instructed to give or prepare evidence for the purpose of court proceedings, rather than to give advice before they have started, Part 35
- CPR 35.3(2)** applies. Under Part 35.3(1) the expert owes a duty to help the court on matters within his expertise, and this duty overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid. The extent to which the Rules may require the expert to disclose to the court, and to other parties to court proceedings, matters which would otherwise be confidential to the client and privileged from disclosure is dealt with in paragraphs 3 and 4 below.

Part I ~ Experts

1) An expert witness is under an overriding duty to help the court to deal with the case "justly". That is the overriding obligation of the court under Part 1.1(1), and it is further defined in Part 1.1(2) as follows:

"1.1(2) Dealing with a case justly includes, so far as is practicable -

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;

CPR 1.1 (2)

- (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..."

CPR 49

2) Some courts have published their own Guides which supplement the CPR for proceedings in those courts. These contain provisions affecting expert evidence and an expert witness should be familiar with them when they are relevant to his evidence.

CPR 35.10(3)

3) Any advice given by an expert before court proceedings are started is likely to be confidential to the client and privileged from disclosure to other parties. But where the expert is asked to give or prepare evidence for the purpose of court proceedings, so that

CPR 35.10(4)

Part 35 applies, s/he is required to state the substance of the instructions s/he has received. The Court has the power to order the expert to disclose what his or her instructions were.

PD 3

4) Although the point has yet to be definitively decided, the power to order disclosure may in certain circumstances extend to instructions or advice that were privileged when they were given.

5) The expert should also be aware that any failure by him to comply with the Rules or court orders or any excessive delay for which the expert is responsible may result in the party who instructed him being penalised in costs and even in extreme cases being debarred from placing the expert's evidence before the court.

Appointment

6) Those intending to instruct an expert to give or prepare evidence for the purpose of court proceedings should consider whether evidence from that expert is appropriate, taking account of the principles set out in Parts 1 and 35 of the CPR, and in particular whether:

- a) the evidence is relevant to a matter which is in dispute between the parties. An expert witness may be able to
 - (i) give relevant opinion evidence;
 - (ii) help to establish relevant facts;
 - (iii) identify the issues which require decision by the court; and
 - (iv) explore areas where agreement may be possible;

CPR 1.1(2)

b) the expert has expertise relevant to the issue on which an opinion is sought;

CPR 35.1

c) the expert has the experience, expertise and training appropriate to the value, complexity and importance of the case;

d) the objects referred to under (a) can be achieved by the appointment of a single joint expert;

e) the expert will be able to:

- (i) produce a report;
- (ii) deal with questions for or by other experts; and
- (iii) have discussions with other experts all within a reasonable time and at a cost proportionate to the matters in issue; and

f) the expert will be available to attend the trial, if his attendance is required.

7) Those instructing experts should also bear in mind:

- a) that no party can call an expert or put in evidence an expert's report without the court's permission; and

- CPR 35.4(1)** b) that the court may limit the amount of the expert's fees and expenses that the party who wishes to rely on the expert may recover from any other party.

CPR 35.4(4)

Terms of appointment

8) Terms of appointment should be agreed at the outset and should include:

- a) the basis of the expert's charges (either daily or hourly rates and an estimate of the time likely to be required, or a fee for the services);
- b) any travelling expenses and other disbursements;
- c) rates for attendance at court and provisions for payment on late notice of cancellation of a court hearing;
- d) time for delivery of report;
- e) time for making payment; and
- f) whether fees are to be paid by a third party.

When necessary, arrangements should be made for dealing with questions to experts and discussions between experts, including any directions given by the court, and provision should be made for the cost of this work.

Payment

- CPR 35.3** **9)** Payments contingent upon the nature of the expert evidence given in legal proceedings, or upon the outcome of a case, must not be offered or accepted. To do so would contravene the expert's overriding duty to the court.

Deferment of payment

10) Agreement to delay payment of an expert's fee until after the conclusion of the case is permissible as long as the amount of the fee does not depend on the outcome of the case.

Instructions

11) Those instructing experts should ensure that they give clear instructions, including the following:

- a) basic information, such as names, addresses, telephone numbers, dates of birth and dates of incidents;
- b) the nature and extent of expertise which is called for;
- c) the purpose of requesting the advice or report, a description of the matter to be investigated, the principal known issues and the identity of all parties;
- d) the statement(s) of case (if any), those documents which form part of standard disclosure and witness statements which are relevant to the advice or report;
- e) where proceedings have not been started, whether proceedings are being contemplated and, if so, whether the expert is asked only for advice; and
- f) where proceedings have been started, the date of any hearing and in which court and to which track they have been allocated.

12) Experts who do not receive clear instructions should request clarification and indicate that they are not prepared to act unless and until such clear instructions are received.

CPR 35.3 (1)

13) Experts must neither express an opinion outside the scope of their field of expertise, nor accept any instructions to do so. Experts must not accept instructions if they are not satisfied they can comply with any orders that have been made. Where an expert has already been instructed, the expert should notify those instructing him/her immediately if the expert considers s/he may not be able to comply with an order.

CPR 35.3 (2)

The Expert's Report

14) In preparing their reports, experts

- a) should maintain professional objectivity and impartiality at all times;
- b) in addressing questions of fact and opinion, should keep the two separate and discrete; and
- c) where there are facts in dispute -
 - i) should not express a view in favour of one or other disputed sets of facts, unless, because of their particular learning and experience, they perceive

CPR 35.3

- one set of facts as being improbable or less probable, in which case they may express that view, and should give reasons; and
- ii) should express separate opinions on every set of facts in dispute.

Information

- 15)** All experts' reports should contain the following information:
- CPR 35.10**
- PD 1.2**
- a) the expert's academic and professional qualifications;
 - b) a statement of the source of instructions and the purpose of the advice or report;
 - c) a chronology of the relevant events;
 - d) a statement of the methodology used, in particular what laboratory or other tests (if any) were employed, by whom and under whose supervision;
 - e) details of the documents or any other evidence upon which any aspects of the advice or report is based;
 - f) relevant extracts of literature or any other material which might assist the court in deciding the case; and a summary of conclusions reached.

Content of report

- 16)** In providing a report experts:
- CPR 35.10**
- PD 1.1**
- PD 1.2(8)**
- PD 1.2(5)**
- PD 1.2(7)**
- a) must address it to the court and not to any of the parties;
 - b) must include a statement setting out the substance of all 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 opinions are based;
 - c) where there is a range of opinion in the matters dealt with in the report, give
 - (i) a summary of the range of opinion; and
 - (ii) the reasons for his own opinion.
 - d) must express any qualification of, or reservation to, their opinion;

- CPR 35.10(2)** e) if such opinion was not formed independently, should make clear the source of the opinion;
- PD 1.3 & 1.4** f) must declare that the report has been prepared in accordance with this Code and the requirements of the Civil Procedure Rules; and
- g) must include a statement of truth, as required by Part 35, Practice.

DIRECTION 1.3.

Amendment

17) Experts

- a) must not be asked to, and must not, amend, expand or alter any part of the report in a manner which distorts the expert's true opinion; but
- b) may be invited to amend or expand a report to ensure accuracy and internal consistency, completeness, relevance to the issues and clarity.

18) Before disclosure of any report, the expert should be given the opportunity to review, and if necessary, update the contents of the report.

Procedure

19) Experts should

- a) be kept informed regularly about any deadlines for the preparation of their advice or reports;
- b) be advised promptly about any timetable for the proceedings set by the court, or any changes thereto;
- c) be provided without delay with further or updated instructions where the progress of case requires this; and
- d) be provided with any order or notice making any provision in relation to expert evidence.

20) Following completion of the report, experts should be:

- a) advised as soon as reasonably practicable of the following:
- i) whether, and if so when, the report will be disclosed to the other party; and

- ii) if so disclosed, the date of disclosure;
- b) given the opportunity to consider and comment upon other reports which deal with the same issues; and
- c) kept informed of the progress of the action, including any amendments to the statements of case relevant to the expert's opinion.

21) Experts should communicate promptly with those instructing them any change of opinion and the reasons therefor.

CPR 35.9 22) The court has power to direct a party to provide information to which it has access and which is not reasonably available to the other party. If the expert requires further information for the purposes of his information for the purposes of his report which s/he thinks may fall within this category, s/he should notify those instructing him accordingly.

PD2

CPR 35.14 23) Experts may file with the court a written request for directions to assist them in carrying out their function as experts, and they may do so without giving notice to any party.

Questions for experts

24) A party may put written questions to another party's expert about that expert's report:

- a) for the purpose of clarifying the report in accordance with Rule 35.6; and
 - b) within the time limits prescribed within Rule 35.6(2) and Practice Direction 4.1; or
 - c) otherwise as the court may direct or the parties agree. Any such questions should be answered within 28 days unless the court directs otherwise. The expert's reply shall be treated as part of the expert's report. If experts have any queries or concerns in respect of questions put by a party they should in the first instance seek clarification from those instructing them. Where a
- CPR 35.6**
- PD 4**
- CPR 35.6 (3)**

- CPR 35.6 (4)** party puts a written question to an expert instructed by another party in accordance with Rule 35.6(2) and the expert does not answer the question, the court may order that the party who instructed the expert may not rely on the evidence of that expert or that the party may not recover the expert's fees and expenses from any other party.

Conferences and discussions

25) The parties and their lawyers should seek to reach agreement about, and consider taking steps to clarify, the issues by way of:

- a) conference or discussion with experts; and/or
- b) discussion between experts for opposing parties in order to narrow the issues and identify:

CPR 35.12

- i) the extent of the agreement between experts;
- ii) the points of disagreement and the reasons for disagreement;
- iii) action, if any, which may be taken to resolve the outstanding points of disagreement; and
- iv) any issues not raised in the agenda for discussion and the extent to which these issues may be agreed.

26) The parties, their lawyers and experts should co-operate to produce concise agendas for any discussion between experts, which should, so far as possible:

- a) be circulated 28 days before the date fixed for the discussion;
- b) be agreed 7 days before the date fixed for the discussion;
- c) consist of questions which are clearly stated and apply, where necessary, the correct legal test;
- d) consist of questions which, by their nature, are closed, that is to say, capable of being answered "yes" or "no"; and
- e) include questions which enable the experts to state the reasons for their agreement or disagreement.

27) The discussion may take place face to face or by any other appropriate means proportionate to the circumstances of the case and the Court track. Lawyers will not normally be present at such discussions. If lawyers do attend they should not normally intervene save to answer questions put to them by the experts or to advise them on the law.

CPR 35.12 (5) 28) If there has been a discussion, a statement of the areas of and the reasons for agreement and disagreement should be prepared and agreed. This should be done at the meeting

CPR 35.12 (4) or, in the event of discussion at a distance, promptly between the experts, usually before the discussion is concluded. This statement may have to be produced to the court, but shall not be binding on the parties. A copy of the statement should be provided to the parties. The content of the discussion between the experts may not be referred to in court unless the parties expressly agree. The parties should consider making such an agreement and record it or any failure to agree in the statement.

29) Those instructing experts must not give, and experts must not accept, instructions not to reach agreement at such discussions on areas within the competence of experts.

Attendance at trial

30) The parties should consider whether the use of available audio-visual facilities might avoid unnecessary attendance at court by the experts without compromising a party's presentation of its case.

31) Those instructing experts should inform them promptly whether attendance at trial will be required, and if so inform them of the date and venue fixed for the hearing of the case. In applying to fix dates for the trial, those instructing experts should, as far as possible, take account of the availability of experts.

32) Experts must take all steps to ensure availability to attend court but should be alerted to the fact that a solicitor may need to serve a witness summons in the event of difficulties.

CPR 35.5 (2) 33) If a party wishes its expert to attend a hearing in a fast-track claim, the burden is on that party to persuade the court that the case is so exceptional that the overriding objective requires such attendance.

Part II - Single Joint Experts

CPR 35.7 34) The court has the power to direct the appointment of a
CPR 35.8 single joint expert selected by the parties. The court may
CPR 35.7 (1) also select the expert to be appointed, if the parties
CPR 35.7 (2) cannot agree who it should be, and may give directions
CPR 35.8(3)(a) regarding the amount and payment of the expert's fees.

35) The spirit as well as the letter of Parts 35.7 and 35.8 call upon the parties to consider from the outset of the proceedings whether appointment of a single joint expert is appropriate (paragraph 6(d) above). The courts encourage such appointments particularly in cases where the sums involved are not large and the issues are not complex.

36) The appointment of a single joint expert does not prevent a party from instructing his own expert to advise him.

37) A party may propose the appointment as single joint expert of an expert who has already advised him in the case, but this may mean disclosing to the other party any privileged or confidential information the expert has received and any advice s/he has given.

PD 5 38) Parties should bear in mind that a single joint expert may be appointed to deal with some but not all of the issues requiring expert evidence, with a view to promoting agreement on those issues and of narrowing the scope of expert evidence. 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.

CPR 35.8 (1) 39) The parties may send separate instructions to a single joint expert, but if they do, they must provide a copy to the other party. Wherever possible the instructions should be agreed, and they should be in writing. Instructions should comply strictly with the provisions relating to parties' experts. In the event of any meeting with the single joint expert an opportunity must be offered to the other parties and their legal representatives to attend the meeting.

CPR 35.8 (2)

CPR 35.3 40) The single joint expert owes the same duties of professional competence as does an expert instructed by one of the parties, and the same overriding obligation to the court. The conduct of the single joint expert should be determined by the principles of fairness and transparency. The expert should not communicate with or meet either party independently of the others. The expert's report should comply strictly with the provisions relating to those of parties' experts set out under paragraphs 14 to 16 above, and the expert may be questioned and must provide answers in the same manner as set out in paragraph 24 above.

41) If the single joint expert is unable to prepare a report within the terms of reference of both parties the expert should, as a first step, seek the help of the parties to resolve the conflict. If this is unsuccessful, the single joint expert may seek directions from the court.

42) The single joint expert may also seek further information and directions from the court as set out in paragraphs 22 and 23 above.