

**Guidance for the instruction of
experts in civil claims in the
High Court**

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Guidance for the instruction of experts in civil claims in the High Court

Introduction

The purpose of this guidance is to assist litigants, those instructing experts and experts to understand best practice in complying with the overriding objective and a copy of or link to this guidance should be provided upon instruction. The overriding objective is currently set out at Order 1 rule 1A of the Rules of the Court of Judicature (NI) 1980, experts and those who instruct them should ensure they are familiar with the overriding objective.

1. The following Practice Directions also deal with the instruction of experts and this guidance should be read in conjunction with the relevant Practice Directions accessible at the links below:
 - **Practice Direction 02/2021 - Protocol for Clinical Negligence Litigation in the High Court and Practice Direction for Experts | Judiciary NI**
 - **Practice Direction 07/2014 - Expert Declaration | Judiciary NI**
 - **Practice Direction 01/2022 - Commercial Hub | Judiciary NI'**
2. Those instructing experts, and the experts, must also have regard to the objectives underpinning the Practice Directions to:
 - (i) encourage the exchange of early and full information about the expert issues involved in the prospective claim;
 - (ii) enable the parties to avoid or reduce the scope of the litigation by agreeing the whole or part of an expert issue before proceedings are started;
 - (iii) support the efficient management of proceedings where litigation cannot be avoided.
3. Additionally, experts and those instructing them should be aware that some cases will be governed by the specific Practice Directions, and some may be "specialist proceedings" where specific rules may apply.
4. Expert witnesses should follow best practice as set out in the Code of Practice for Experts issued by the Academy of Experts and the Expert Witness Institute.

The need for experts: selecting and instructing experts

5. Those intending to instruct experts to give or prepare evidence for the purpose of civil proceedings should consider whether expert evidence is necessary, taking account of the principles set out in the overriding objective to include:
 - (i) ensuring that the parties are on an equal footing;
 - (ii) saving expense;
 - (iii) dealing with the case in ways which are proportionate to the amount of money involved;
 - (iv) the importance of the case;
 - (v) the complexity of the issues;
 - (vi) financial position of each party;
 - (vii) ensuring that it is dealt with expeditiously and fairly;
 - (viii) allocating to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases;
 - (ix) if an expert is to be secured by means of a prior authority from the Legal Services Agency the request should be made to the Agency in a timely manner recognising on occasions the Agency may seek three competitive quotes.

Duties and obligations of experts

6. Experts always owe a duty to exercise reasonable skill and care to those instructing them, and to comply with any relevant professional code. However, when they are instructed to give or prepare evidence for civil proceedings, they have an overriding duty to help the court on matters within their expertise. This duty overrides any obligation to the person instructing or paying them. Experts must not serve the exclusive interest of those who retain them.
7. Experts should be aware of the overriding objective that courts deal with cases justly and that they are under an obligation to assist the court in this respect. This includes dealing with cases proportionately (keeping the work and costs in proportion to the value and importance of the case to the parties), expeditiously and fairly.
8. Experts must provide opinions that are independent, regardless of the pressures of litigation. A useful test of 'independence' is that the expert would express the same opinion if given the same instructions by another party.

Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of legal advisor or mediator.

9. Experts should confine their opinions to matters which are material to the disputes and provide opinions only in relation to matters which lie within their expertise. Experts should indicate without delay where particular questions or issues fall outside their expertise.
10. Experts should take into account all material facts before them. Their reports should set out those facts and any literature or material on which they have relied in forming their opinions. They should indicate if an opinion is provisional, or qualified, or where they consider that further information is required or if, for any other reason, they are not satisfied that an opinion can be expressed finally and without qualification.
11. Experts should inform those instructing them without delay of any change in their opinions on any material matter and the reasons for this.
12. Experts should be aware that any failure to comply with the Rules or court orders, or any excessive delay for which they are responsible, may result in the parties who instructed them being penalised in costs, or debarred from relying upon the expert evidence.

The appointment of experts

13. Before experts are instructed it should be established whether the experts:
 - (i) have the appropriate expertise and experience for the particular instruction;
 - (ii) are familiar with the general duties of an expert;
 - (iii) can produce a report, deal with questions and have discussions with other experts within a reasonable time, and at a cost proportionate to the matters in issue;
 - (iv) are available to attend the trial, if attendance is required;
 - (v) have no potential conflict of interest.
14. Terms of appointment should be agreed at the outset and should normally include:
 - (i) the capacity in which the expert is to be appointed (e.g. party appointed expert or single joint expert);

- (ii) the services required of the expert (e.g. provision of an expert's report, answering questions in writing, attendance at meetings and attendance at court);
 - (iii) time for delivery of the report;
 - (iv) the basis of the expert's charges (e.g. daily or hourly rates and an estimate of the time likely to be required, or a fixed fee for the services);
 - (v) travelling expenses and disbursements;
 - (vi) whether any cancellation charges apply and the terms for them;
 - (vii) any fees for attending court;
 - (viii) time for making the payment;
 - (ix) whether fees are to be paid by a third party; if a party is publicly funded; whether the expert's charges will be subject to assessment.
15. When necessary, arrangements should be made for dealing with questions to experts and discussions between experts, including any directions given by the court.
16. Experts should be kept informed about deadlines for all matters concerning them. Those instructing experts should send them promptly copies of all court orders and directions that may affect the preparation of their reports or any other matters concerning their obligations.

Instructions

17. Those instructing experts should ensure that they give clear instructions and attach any relevant documents, including the following:
- (i) basic information, such as names, addresses, telephone numbers, dates of incidents and any relevant claim reference numbers;
 - (ii) the nature of the expertise required;
 - (iii) the purpose of the advice or report, a description of the matter(s) to be investigated, the issues to be addressed and the identity of all parties;
 - (iv) the letter of claim and pleadings in the case (if any), discoverable documentation and expert reports that are relevant to the advice or report;

- (v) where proceedings have been started, the dates of any hearings (including any pre-trial reviews), the dates fixed by the court or agreed between the parties for the exchange of experts' reports and any other relevant deadlines to be adhered to.

Acceptance of instructions

- 18. Experts should confirm without delay whether they accept their instructions.
- 19. They should also inform those instructing them (whether on initial instruction or at any later stage) without delay if:
 - (i) instructions are not acceptable because, for example, they require work that falls outside their expertise, impose unrealistic deadlines, or are insufficiently clear. Experts who do not receive clear instructions should request clarification and may indicate that they are not prepared to act unless and until such clear instructions are received;
 - (ii) they consider that instructions are insufficient to complete the work;
 - (iii) they become aware that they may not be able to fulfil any of the terms of appointment;
 - (iv) the instructions and/or work have, for any reason, placed them in conflict with their duties as an expert;
 - (v) they are not satisfied that they can comply with any orders that have been made;
 - (vi) they for any reason are unable to provide the report or appear at court.
- 20. Experts must neither express an opinion outside the scope of their field of expertise, nor accept any instructions to do so.
- 21. Experts should agree the terms on which they are to be paid with those instructing them.

Experts' Withdrawal

- 22. Where experts' instructions are incompatible with their duties, through incompleteness, a conflict between their duty to the court and their instructions, or for any other reason, the experts may consider withdrawing from the case. However, experts should not do so without first discussing the position with those who instruct them. If experts do withdraw, they must give formal written notice to those instructing them.

Experts' access to information held by the parties

23. Experts should try to ensure that they have access to all relevant information by the parties, and should, as soon as is reasonably practicable, inform those instructing them that they require access to this information to enable them to properly fulfil their role as an expert witness.

Single joint experts

24. Consideration should be given to the feasibility of instructing a single joint expert and where such instruction is considered to be appropriate by one or more of the parties in the case, the parties should engage in constructive discussions to explore this issue further.

Joint instructions

25. Where a single joint expert is instructed, the parties must agree joint instructions. Each party may not give separate instructions or seek to make contact with the expert without notice to the opposing party.

Conduct of the single joint expert

26. Single joint experts should keep all instructing parties informed of any material steps that they may be taking by, for example, copying all correspondence to those instructing them.
27. Single joint experts have an overriding duty to the court. They are the parties' appointed experts and therefore owe an equal duty to all parties. They should maintain independence, impartiality and transparency at all times.
28. Single joint experts should not attend a meeting or conference that is not a joint one, unless all the parties have agreed in writing or the court has directed that such a meeting may be held.
29. Single joint experts should serve their reports simultaneously on all instructing parties.

Cross-examination of the single joint expert

30. For the avoidance of doubt single joint experts who are required to give oral evidence at the hearing of the case may be questioned by any of the parties.

Experts' reports

31. The content of experts' reports should be governed by their instructions and general obligations, any court directions and the experts' overriding duty to the court.
32. In preparing reports, experts should maintain professional objectivity and impartiality at all times.
33. Experts' reports should be addressed to the court and give detailed directions about their form and content. All experts and those who instruct them should ensure that they are familiar with these requirements.
34. A Model Form of Expert's Report has been produced by The Academy of Experts (Home - The Academy of Experts) and the Expert Witness Institute.
35. Experts' reports must contain an expert's declaration (Annex A).
36. Experts' reports must also be verified by a statement of truth. The form of the statement of truth is:

"I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer."

37. The details of experts' qualifications in reports should be commensurate with the nature and complexity of the case. It may be sufficient to state any academic and professional qualifications. However, where highly specialised expertise is called for, experts should include the detail of particular training and/or experience that qualifies them to provide that specialised evidence.
38. The mandatory statement of the substance of all material instructions should not be incomplete or otherwise tend to mislead. The imperative is transparency. The term "instructions" includes all material that solicitors send to experts. These should be listed, with dates, in the report or an appendix. The omission from the statement of 'off-the-record' oral instructions is not permitted. Courts may allow cross-examination about the instructions if there are reasonable grounds to consider that the statement may be inaccurate or incomplete.
39. Where tests of a scientific or technical nature have been carried out, experts should state:

- (i) the methodology used;
 - (ii) by whom the tests were undertaken and under whose supervision;
 - (iii) summarising their respective qualifications and experience.
40. When addressing questions of fact and opinion, experts should keep the two separate. Experts must state those facts (whether assumed or otherwise) upon which their opinions are based; experts should have primary regard to their instructions (paragraphs 17-21). Experts must distinguish clearly between those facts that they know to be true and those facts which they assume.
41. Where there are material facts in dispute experts should express separate opinions on each hypothesis put forward. They should not express a view in favour of one or other disputed version of the facts unless, as a result of particular expertise and experience, they consider one set of facts as being improbable or less probable, in which case they may express that view and should give reasons for holding it.

Prior to service of reports

42. Before filing and serving an expert's report solicitors must check that any other experts' reports relied upon by the expert are the final served versions.

Conclusions of reports

43. A summary of conclusions is mandatory. Generally, the summary should be at the end of the report after the reasoning. There may be cases, however, where the court would find it helpful to have a short summary at the beginning, with the full conclusions at the end. For example, in cases involving highly complex matters which fall outside the general knowledge of the court the judge may be assisted in the comprehension of the facts and analysis if the report explains at the outset the basis of the reasoning.

Sequential exchange of experts' reports

44. Where there is to be sequential exchange of reports then the defendant's expert's report usually will be produced in response to the plaintiff's. The defendant's report should then:
- (i) confirm whether the background set out in the plaintiff's expert report is agreed, or identify those parts that in the defendant's expert's view require revision, setting out the necessary revisions. The defendant's expert need not repeat information that is adequately dealt with in the plaintiff's expert report;

- (ii) focus only on those material areas of difference with the plaintiff's expert's opinion. The defendant's report should identify those assumptions of the plaintiff's expert that they consider reasonable (and agree with) and those that they do not;
- (iii) in particular where the experts are addressing the financial value of heads of claim (for example, the costs of a care regime or loss of profits), the defendant's report should contain a reconciliation between the plaintiff's expert's loss assessment and the defendant's, identifying for each assumption any different conclusion to the plaintiff's expert.

Amendment of reports

- 45. Experts should not be asked to amend, expand or alter any parts of reports in a manner which distorts their true opinion, but may be invited to do so to ensure accuracy, clarity, internal consistency, completeness and relevance to the issues. Although experts should generally follow the recommendations of solicitors with regard to the form of reports, they should form their own independent views on the opinions and contents of their reports and not include any suggestions that do not accord with their views.
- 46. Where experts change their opinion following a meeting of experts, a signed and dated note to that effect is generally sufficient. Where experts significantly alter their opinion, as a result of new evidence or for any other reason, they must inform those who instruct them and amend their reports explaining the reasons or provide an explanatory supplementary report. Those instructing experts should inform other parties as soon as possible of any change of opinion.

Discussions between experts

- 47. The court may direct that discussions between experts take place. Parties may also agree that discussions take place between their experts at any stage.
- 48. The purpose of discussions between experts should be, wherever possible to:
 - (i) identify and discuss the expert issues in the proceedings;
 - (ii) reach agreed opinions on those issues, and, if that is not possible, narrow the issues;
 - (iii) identify those issues on which they agree and disagree and summarise their reasons for disagreement on any issue;
 - (iv) identify what action, if any, may be taken to resolve any of the outstanding issues between the parties;

They are not to seek to settle the proceedings.

49. Where there is sequential exchange of expert reports, with the defendant's expert's report prepared in accordance with the guidance at paragraph 44, the joint statement should focus upon the areas of disagreement, save for the need for the plaintiff's expert to consider and respond to material, information and commentary included within the defendant's expert's report.
50. Arrangements for discussions between experts should be proportionate to the value of cases. Discussion may be face to face but the practicalities or the proportionality principle may require discussions to be by telephone or video-conference.
51. The parties, their lawyers and experts should co-operate to produce an agenda for any discussion between experts, although primary responsibility for preparation of the agenda should normally lie with the parties' solicitors.
52. The agenda should indicate what has been agreed and summarise concisely matters that are in dispute. It is often helpful to include questions to be answered by the experts. If agreement cannot be reached promptly or a party is unrepresented, the court may give directions for the drawing up of the agenda. The agenda should be circulated to experts and those instructing them to allow sufficient time for the experts to prepare for the discussion.
53. Those instructing experts must not instruct experts to avoid reaching agreement (or to defer doing so) on any matter within the experts' competence. Experts are not permitted to accept such instructions.
54. At the conclusion of any discussion between experts, a joint statement should be prepared setting out:
 - (i) issues that have been agreed and the basis of that agreement;
 - (ii) issues that have not been agreed and the basis of the disagreement;
 - (iii) any further issues that have arisen that were not included in the original agenda for discussion;
 - (iv) a record of further action, if any, to be taken or recommended, including if appropriate a further discussion between experts.
55. The joint statement should include a brief re-statement that the experts recognise their duties (or a cross-reference to the relevant statements in their respective reports). The joint statement should also include an express statement that the experts have not been instructed to avoid reaching

agreement (or otherwise defer from doing so) on any matter within the experts' competence.

56. The joint statement should be agreed and signed by all the parties to the discussion as soon as practicable.
57. Agreements between experts during discussions do not bind the parties unless the parties expressly agree to be bound. However, parties should give careful consideration before refusing to be bound by such an agreement and be able to explain their refusal should it become relevant to the issue of costs. The court may direct that experts give their evidence at trial concurrently, not sequentially with their party's evidence as has been the norm hitherto: (this is often known as "hot tubbing"). The experts will then be questioned together, firstly by the judge based upon disagreements in the joint statement, and then by the parties' legal representative. Concurrent evidence can save time and costs and assist the judge in assessing the difference of views between experts. Experts need to be told in advance of the trial if the court has made an order for concurrent evidence.

Attendance of experts at court

58. Those instructing experts should ascertain the availability of experts before trial dates are fixed, keep experts updated with timetables (including the dates and times experts are to attend), the location of the court and court orders. They should also consider, where appropriate, whether experts might give evidence via video-link and inform experts immediately if trial dates are vacated or adjourned.
59. Experts have an obligation to attend court and should ensure that those instructing them are aware of their dates to avoid and that they take all reasonable steps to be available.
60. Experts should normally attend court without the need for a witness summons, but on occasion they may be served to require their attendance. The use of witness summonses does not affect the contractual or other obligations of the parties to pay experts' fees.
61. When a case has been concluded either by a settlement or trial the solicitor should inform the experts they have instructed.

Experts and conditional contingency fees

62. Payment of experts' fees contingent upon the nature of the expert evidence or upon the outcome of the case is strictly forbidden.

Sanctions

63. Failure to comply with the Rules of the Court, any Practice Direction, or the directions of the court may result in sanctions being imposed by the court and/or the professional body to which the expert belongs. Sanctions can include:
- (i) a wasted costs order being imposed;
 - (ii) being found in contempt of court;
 - (iii) criminal sanctions if an expert is found to have committed perjury;
 - (iv) claim being made on the expert's professional indemnity insurance if they have been negligent.

Annex A

EXPERT'S DECLARATION

I [Insert Full Name] DECLARE THAT:

1. I understand that my duty in providing written reports and giving evidence is to help the Court, and that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied and will continue to comply with my duty.
2. I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.
3. I know of no conflict of interest of any kind, other than any which I have disclosed in my report.
4. I do not consider that any interest which I have disclosed affects my suitability as an expert witness on any issues on which I have given evidence.
5. I will advise the party by whom I am instructed if, between the date of my report and the trial, there is any change in circumstances which affects my answers to points 3 and 4 above.
6. I have shown the sources of all information I have used.
7. I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.
8. I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.
9. I have not, without forming an independent view, included or excluded anything which has been suggested to me by others, including my instructing lawyers.
10. I will notify those instructing me immediately and confirm in writing if, for any reason, my existing report requires any correction or qualification.

I understand that:

- a) my report will form the evidence to be given under oath or affirmation;

- b) questions may be put to me in writing for the purposes of clarifying my report and that my answers shall be treated as part of my report and covered by my statement of truth;
- c) the court may at any stage direct a discussion to take place between experts for the purpose of identifying and discussing the expert issues in the proceedings, where possible reaching an agreed opinion on those issues and identifying what action, if any, may be taken to resolve any of the outstanding issues between the parties;
- d) the court may direct that, following a discussion between the experts, that a statement should be prepared showing those issues which are agreed and those issues which are not agreed, together with a summary of the reasons for disagreeing;
- e) I may be required to attend court to be cross-examined on my report; and
- f) I am likely to be the subject of public adverse criticism by the judge if the court concludes that I have not taken reasonable care in trying to meet the standards set out above.

STATEMENT OF TRUTH

I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

Signature

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Date

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