



WILL YOU BE MY EXPERT?

A review of the new Protocol for the instruction of Experts

On 5 September 2005 the Institute Justice Council's Protocol for the instruction of Experts to give evidence in civil claims came into force.

This Protocol replaces the Code of Guidance on Expert evidence and is aimed at giving Experts and those who instruct them clear guidance on how Experts should comply with the Civil Procedure Rules Part 35 and the practice direction relating to this. CPR 35 relates to the instruction of Experts. This Protocol is not meant to replace CPR 35 but merely to assist with its interpretation.

This Protocol should be observed when anyone is instructed as an Expert even though proceedings may not as yet have been instituted. The Protocol also applies to the pre-action Protocol process which is a procedure aimed at encouraging the early exchange of expert information relating to the claim.

Under CPR 35, it is made clear that an Expert's duty, and which is considered to be an overriding duty, is to the Court even though an expert is appointed by one party to the claim and his fees are paid by that party.

The new Protocol states under paragraph 4.1 that Experts will always have a duty to exercise reasonable skill and care to those instructing them and to comply with any relevant professional code of ethics. However, when an Expert is instructed to prepare evidence for the purposes of Court proceedings, then the Expert comes under that additional duty to help the court on matters within their Expertise. This duty supersedes any obligation they have to the person paying their fees.

The Protocol goes on to state that an Expert should only provide his opinion in relation to a matter which lies within his expertise. He should take into account all material facts available at the time he provides his opinion and this should be thought out in his report.

The Protocol is detailed and sets out what an Expert should expect from those instructing him and similarly detail is given as to what should be set out in the expert's report.

Each report must contain a statement of truth. The wording is as follows:

“I confirm that insofar as the facts given 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 that I have expressed represent my true and complete professional opinion.”

This wording is mandatory and should not be amended.

Paragraph 4.7 states that if they fail to comply with CPR or any Court Orders, or cause expensive delay which could result in those who instruct them being penalised



in costs then, the Courts may make cost orders payable directly by that Expert. This is a potent weapon to use.

The Protocol also deals with the instruction of single joint Experts. Again, a single joint Expert has an overriding duty to the Court. However, as the single joint Expert's fees are paid jointly by the parties, he is also required to keep all the instructing parties informed of any material steps that he may take whilst acting as a single joint Expert.

This Protocol clearly sets out how an Expert is to act following his instructions. It does not matter whether proceedings have been issued, or whether the pre-action Protocol process is being followed but an Expert must always have in mind the requirement to be independent and that his over-riding objective is to assist the Court if proceedings are issued.

Author: Sarah Shemmings

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Email: sas@shemmingsllp.co.uk