

## Factsheet 59: Experts in Family Proceedings

Last updated: September 2008

The family justice system exists to help families resolve disputes. If disputes or problems should arise, the system tries to enable them to be resolved quickly and with the minimum of pain caused to those involved. If at all possible, the parties are encouraged to resolve their disputes out of court, e.g. through mediation, because they are more likely to adhere to an agreement if they themselves have had a role in formulating it.

When disputes do come to court, the cases are dealt with by magistrates and judges who are specially trained to deal with the family-related issues. These disputes often involve very difficult and sensitive circumstances, e.g. relationship breakdown or child contact.

Judges and magistrates work to make the circumstances of the family dispute less adversarial, and hearings can often be quite informal with, for example, all parties sitting around a table. The key points for experts to remember when involved in such proceedings are openness, transparency and independence.

On 1 April 2008 a new practice direction took effect for experts in family proceedings relating to children. The guidance supersedes that contained in Appendix C to the Protocol of June 2003 (Judicial Case Management in Public Law Children Act Cases) and in the Practice Direction to Part 17 (Experts) of the Family Procedure (Adoption) Rules 2005. Its content is reproduced at the end of this factsheet.

### Types of proceeding

Family proceedings relating to children under the Children Act 1989 are divided into three categories:

- **Private** law proceedings – most commonly disputes between separated parents over their children (residency, contact, etc.)
- **Public** law proceedings – cases concerned with the temporary or permanent removal of a child from its family into the care of a local authority (the applicant)
- **Adoption** proceedings – either private or public.

The use of experts is much more common in public law proceedings.

An enquiry can come from a solicitor acting on behalf of:

- the parents
- the child
- the local authority
- another interested party, most usually the Children and Family Court Advisory Support Service (CAFCASS).

All care proceedings start in the Family Proceedings Court based at a magistrates court. Complex cases involving expert evidence and other medical issues are usually transferred up to the county court or high court.

### Guiding principles

There are three important points worth noting...

1. The proceedings are **non-adversarial** – the court is wholly concerned with the welfare of the child or children involved in the proceedings.
2. The proceedings are **confidential**. All documents in family proceedings are confidential to the court. It is a contempt of court to disclose them to anyone not party to the proceedings without the court's permission. The judge decides what issues require expert evidence, and the instructions the expert should be given.
3. Litigation **privilege does not apply**. If a party commissions a report from an expert witness, the report must

be disclosed to the judge and all other parties, regardless of its content. There are no exceptions.

### Expert evidence

Expert evidence (usually medical) is often crucial in a difficult case involving a child. Indeed, it is usually determinative of a child's future. The court places much reliance on the professional integrity of the expert witnesses.

It should be remembered that...

- the general duties of experts in civil proceedings apply
- the expert witness is appointed to **assist the judge** in reaching the right decision for the child or children involved, regardless of the instructing party
- the expert witness owes a duty to the court and to the child involved in the case, not to the commissioning party
- an expert opinion is required on any relevant matter on which the expert is qualified to give expert evidence. An expert should never stray outside his area of expertise.
- the expert witness reports to the court, and gives his evidence to the court
- there is no such thing as an 'off the record' discussion for an expert instructed in family proceedings. Anything he is told during his investigations must be reported and disclosed to the court and all the parties involved.
- whatever the expert does or says will be disclosed, e.g. attendance notes (a solicitor's note of a telephone conversation), letters, e-mails, etc.
- quite often, criminal and family proceedings can arise from the same set of facts, e.g. if a child has been sexually abused by a parent
- the more serious or improbable the allegation of abuse, the more convincing must be the evidence required to prove the allegation
- decisions are made 'on the balance of probabilities', the same standard of proof as in civil cases
- hearsay evidence is also admissible

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- the expert is in court to assist the court, not to decide the case or an issue in the case
- an expert is free to give an opinion about any issue in the case, including those that the determination of which fall within the court's remit. However an opinion must be related to a matter that falls within the expert's area of expertise.
- an expert should exercise caution when giving firm opinions about events having taken place – the expert may not have all the relevant information.
- Any face to face meetings must be scheduled to ensure that sufficient time is allowed for full discussions. There should not be undue time constraints.
- Often the child's lawyer chairs the meeting. He is perceived to have a clear and unpartisan view of the case. In meetings involving complex medical issues, it may be that a medical doctor co-chairs the meeting.
- Party lawyers should not normally attend since their presence will do nothing to help cooperation. They are unlikely to remain silent observers.

### **Expert instruction**

The expert's instruction comes direct from the court. It should be followed closely. An expert should be proactive if there are any concerns about the instruction. He should talk to the instructing solicitor, who may then approach the court seeking a variation in the brief.

### **Expert report**

The expert report will be disclosed to:

- the court
- the other parties involved and
- any other experts instructed in the case.

The expert report:

- must be objective and unbiased
- must address clearly the issues the expert has been instructed to consider
- must be thorough, well reasoned and properly researched
- must carefully explain the methodologies employed.

### **Expert meetings pre-hearing**

Experts are encouraged to meet before the hearing to determine areas of agreement and disagreement. A key aim of an expert meeting is to reduce or eliminate the need for oral expert evidence. If evidence cannot be agreed between the experts in advance of the hearing, then oral expert evidence will be required.

- Expert meetings are held on direction from the court.
- The agenda and the questions to be addressed (which should be as simple and straightforward as possible) are formulated by the lawyers in the case and the judge in advance of the expert meeting. If agreement cannot be reached, the court will set the questions and the agenda.
- Expert meetings are hugely helpful in most instances, saving court time and substantially reducing costs. But they must be focused, well conducted and clarify the issues.
- Expert meetings should be cooperative.
- A meeting is only necessary if there is something for the experts to discuss. If all experts are in agreement and there is nothing in a report that requires amplification, there should be no need for a meeting.
- If experts are geographically far apart, then discussions to determine areas of agreement and narrow down areas of disagreement can be had by video link, telephone or fax.
- All meetings should follow an agenda, answer specific questions, be well chaired and be competently minuted.

- Expert meetings should take place well before the hearing so that, should agreement be reached and the experts therefore be unlikely to be required to appear in court, diaries can be rearranged.
- Not all experts involved in the case will necessarily be required to attend an expert meeting. Since the meeting will follow an agenda and specific questions will be considered, only those experts who can give pertinent opinion should attend.
- A record should be kept of the meeting, promptly distilling into a schedule the points of agreement and disagreement. All those present should sign the document.

### **Pre-hearing conferences with counsel**

Pre-hearing conferences with counsel are quite acceptable, but the expert must not be coached for an opinion that best suits their client's case.

### **Joint instructions**

Openness and even-handed communication are the key skills required of a jointly appointed expert. A joint instruction can:

- increase cooperation from the parties
- save time
- save money.

An expert is appointed jointly by all the parties to the proceedings, i.e. the child, the parents and, where relevant, the local authority.

The court is keen to avoid multiple physical or psychiatric examinations of a child by several experts. If it allows just one examination, then only a single jointly appointed expert will be permitted.

Alternatively, if an issue arises requiring a specific scientific test to be performed, e.g. a blood test for drugs, joint instruction will enable the costs to be shared between the parties.

The lead solicitor – usually the solicitor instructed by the child's guardian on behalf of the child – will brief and instruct the expert witness.

The lead solicitor should:

- deal with any enquiries from the expert, e.g. further documentation required
- keep the expert up to date with case developments
- make arrangements for any expert meetings
- where possible ensure that the trial, and in particular the giving of oral evidence, is timetabled to fit the expert's availability

- ensure that the expert is paid on time.

The expert should refer all enquiries to the lead solicitor.

### **In court**

If an expert is asked to attend court, it is likely that his report remains in contention with one or more of the parties.

On arrival at court, a jointly appointed expert should not converse with any of the parties, unless there is good reason for so doing.

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## **Practice Direction: Experts in Family Proceedings relating to Children**

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The Practice Direction below is made by the President of the Family Division under the powers delegated to him by the Lord Chief Justice under Schedule 2, Part 1, paragraph 2(2) of the Constitutional Reform Act 2005, and is approved by the Lord Chancellor.

### **1. Introduction**

1.1 This Practice Direction deals with the use of expert evidence and the instruction of experts in family proceedings relating to children, and comes into force on 1 April 2008. The guidance supersedes, for such proceedings, that contained in Appendix C (the Code of Guidance for Expert Witnesses in Family Proceedings) to the Protocol of June 2003 (Judicial Case Management in Public Law Children Act Cases) and in the Practice Direction to Part 17 (Experts) of the Family Procedure (Adoption) Rules 2005<sup>1</sup> ('FP(AR) 2005') with effect on and from 1 April 2008.

Where the guidance refers to 'an expert' or 'the expert', this includes a reference to an expert team.

1.2 For the purposes of this guidance, the phrase 'family proceedings relating to children' is a convenient description. It is not a legal term of art and has no statutory force. In this guidance it means<sup>2</sup>:

- placement and adoption proceedings, or
- family proceedings held in private which:
  - relate to the exercise of the inherent jurisdiction of the High Court with respect to children,
  - are brought under the Children Act 1989 in any family court, or
  - are brought in the High Court and county courts and 'otherwise relate wholly or mainly to the maintenance or upbringing of a minor'.

### **Aims of the guidance**

1.3 The guidance aims to provide the court in family proceedings relating to children with early information to determine whether an expert or expert evidence will assist the court to:

- identify, narrow and where possible agree the issues between the parties;
- provide an opinion about a question that is not within the skill and experience of the court;
- encourage the early identification of questions that need to be answered by an expert; and
- encourage disclosure of full and frank information between the parties, the court and any expert instructed.

1.4 The guidance does not aim to cover all possible eventualities. Thus it should be complied with so far as consistent in all the circumstances with the just disposal of the matter in accordance with the rules and guidance applying to the procedure in question.

### **Permission to instruct an expert or to use expert evidence**

1.5 In family proceedings relating to children, the court's permission is required to instruct an expert. Such

proceedings are confidential and, in the absence of the court's permission, disclosure of information and documents relating to such proceedings risks contravening the law of contempt of court or the various statutory provisions protecting this confidentiality. Thus, for the purposes of the law of contempt of court, information relating to such proceedings (whether or not contained in a document filed with the court or recorded in any form) may be communicated only to an expert whose instruction by a party has been permitted by the court.<sup>3</sup> Additionally, in proceedings under the Children Act 1989, the court's permission is required to cause the child to be medically or psychiatrically examined or otherwise assessed for the purpose of the preparation of expert evidence for use in the proceedings; and, where the court's permission has not been given, no evidence arising out of such an examination or assessment may be adduced without the court's permission.<sup>4</sup>

1.6 In practice, the need to have the court's permission to disclose information or documents to an expert – and, in Children Act 1989 proceedings, to have the child examined or assessed – means that in proceedings relating to children the court strictly controls the number, fields of expertise and identity of the experts who may be first instructed and then called.

1.7 Before permission is obtained from the court to instruct an expert in family proceedings relating to children, it will be necessary for the party wishing to instruct an expert to make enquiries designed so as to provide the court with information about that expert which will enable the court to decide whether or not to give permission. In practice, enquiries may need to be made of more than one expert for this purpose. This will in turn require each expert to be given sufficient information about the case to enable that expert to decide whether or not he or she is in a position to accept instructions. Such preliminary enquiries, and the disclosure of anonymised information about the case which is a necessary part of such enquiries, will not require the court's permission and will not amount to a contempt of court: see sections 4.1 and 4.2 (Preliminary Enquiries of the Expert and Expert's Response to Preliminary Enquiries).

1.8 Section 4 (Preparation for the relevant hearing) gives guidance on applying for the court's permission to instruct an expert, and on instructing the expert, in family proceedings relating to children. The court, when granting permission to instruct an expert, will also give directions for the expert to be called to give evidence, or for the expert's report to be put in evidence: see section 4.4 (Draft Order for the relevant hearing).

**When should the court be asked for permission?**

- 1.9 The key event is ‘the relevant hearing’, which is any hearing at which the court’s permission is sought to instruct an expert or to use expert evidence. Both expert issues should be raised with the court – and, where appropriate, with the other parties – as early as possible. This means:
- in public law proceedings under the Children Act 1989, by or at the Case Management Conference: see the Practice Direction: Guide to Case Management in Public Law Proceedings, paragraphs 13.7, 14.3 and 25(29) which contains the definition of public law proceedings for the purposes of that practice direction;
  - in private law proceedings under the Children Act 1989, by or at the First Hearing Dispute Resolution Appointment: see the Private Law Programme (9 November 2004), section 4 (Process);
  - in placement and adoption proceedings, by or at the First Directions Hearing: see FP(A)R 2005 rule 26 and the President’s Guidance: Adoption: the New Law and Procedure (March 2006), paragraph 23.

**2. General matters**

**Scope of the Guidance**

- 2.1 This guidance does not apply to cases issued before 1 April 2008, but in such a case the court may direct that this guidance will apply either wholly or partly. This is subject to the overriding objective for the type of proceedings, and to the proviso that such a direction will neither cause further delay nor involve repetition of steps already taken or of decisions already made in the case.
- 2.2 This guidance applies to all experts who are or have been instructed to give or prepare evidence for the purpose of family proceedings relating to children in a court in England and Wales.

**Pre-application instruction of experts**

- 2.3 When experts’ reports are commissioned before the commencement of proceedings, it should be made clear to the expert that he or she may in due course be reporting to the court and should therefore consider himself or herself bound by this guidance. A prospective party to family proceedings relating to children (for example, a local authority) should always write a letter of instruction when asking a potential witness for a report or an opinion, whether that request is within proceedings or pre-proceedings (for example, when commissioning specialist assessment materials, reports from a treating expert or other evidential materials); and the letter of instruction should conform to the principles set out in this guidance.

**Emergency and urgent cases**

- 2.4 In emergency or urgent cases – for example, where, before formal issue of proceedings, a without-notice application is made to the court during or out of business hours; or where, after proceedings have been issued, a previously unforeseen need for (further) expert evidence arises at short notice - a party may wish to call expert evidence without having complied with all or any part of this guidance. In such circumstances, the party wishing to call the expert evidence must apply forthwith to the court – where possible or appropriate, on notice to the other

parties – for directions as to the future steps to be taken in respect of the expert evidence in question.

**Orders**

- 2.5 Where an order or direction requires an act to be done by an expert, or otherwise affects an expert, the party instructing that expert – or, in the case of a jointly instructed expert, the lead solicitor – must serve a copy of the order or direction on the expert forthwith upon receiving it.

**Adults who may be protected parties**

- 2.6 The court will investigate as soon as possible any issue as to whether an adult party or intended party to family proceedings relating to children lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings. An adult who lacks capacity to act as a party to the proceedings is a protected party and must have a representative (a litigation friend, next friend or guardian ad litem) to conduct the proceedings on his or her behalf.
- 2.7 Any issue as to the capacity of an adult to conduct the proceedings must be determined before the court gives any directions relevant to that adult’s role in the proceedings.
- 2.8 Where the adult is a protected party, his or her representative should be involved in any instruction of an expert, including the instruction of an expert to assess whether the adult, although a protected party, is competent to give evidence. The instruction of an expert is a significant step in the proceedings. The representative will wish to consider (and ask the expert to consider), if the protected party is competent to give evidence, their best interests in this regard. The representative may wish to seek advice about ‘special measures’. The representative may put forward an argument on behalf of the protected party that the protected party should not give evidence.
- 2.9 If at any time during the proceedings there is reason to believe that a party may lack capacity to conduct the proceedings, then the court must be notified and directions sought to ensure that this issue is investigated without delay.

**Child likely to lack capacity to conduct the proceedings on when he or she reaches 18**

- 2.10 Where it appears that a child is:
- a party to the proceedings and not the subject of them;
  - nearing his or her 18th birthday, and
  - considered likely to lack capacity to conduct the proceedings when he or she attains the age of 18,
- the court will consider giving directions for the child’s capacity in this respect to be investigated.

**3. The Duties of Experts**

**Overriding Duty**

- 3.1 An expert in family proceedings relating to children has an overriding duty to the court that takes precedence over any obligation to the person from whom the expert has received instructions or by whom the expert is paid.

**Particular Duties**

- 3.2 Among any other duties an expert may have, an expert shall have regard to the following duties:

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- 1) to assist the court in accordance with the overriding duty;
- 2) to provide advice to the court that conforms to the best practice of the expert's profession;
- 3) to provide an opinion that is independent of the party or parties instructing the expert;
- 4) to confine the opinion to matters material to the issues between the parties and in relation only to questions that are within the expert's expertise (skill and experience);
- 5) where a question has been put which falls outside the expert's expertise, to state this at the earliest opportunity and to volunteer an opinion as to whether another expert is required to bring expertise not possessed by those already involved or, in the rare case, as to whether a second opinion is required on a key issue and, if possible, what questions should be asked of the second expert;
- 6) in expressing an opinion, to take into consideration all of the material facts including any relevant factors arising from ethnic, cultural, religious or linguistic contexts at the time the opinion is expressed;
- 7) to inform those instructing the expert without delay of any change in the opinion and of the reason for the change.

### Content of the Expert's Report

3.3 The expert's report shall be addressed to the court and prepared and filed in accordance with the court's timetable and shall:

- 1) give details of the expert's qualifications and experience;
- 2) contain a statement setting out the substance of all material instructions (whether written or oral) summarising the facts stated and instructions given to the expert which are material to the conclusions and opinions expressed in the report;
- 3) identify materials that have not been produced either as original medical or other professional records or in response to an instruction from a party, as such materials may contain an assumption as to the standard of proof, the admissibility or otherwise of hearsay evidence, and other important procedural and substantive questions relating to the different purposes of other enquiries (for example, criminal or disciplinary proceedings);
- 4) identify all requests to third parties for disclosure and their responses in order to avoid partial disclosure which tends only to prove a case rather than give full and frank information;
- 5) make clear which of the facts stated in the report are within the expert's own knowledge;
- 6) state who carried out any test, examination or interview which the expert has used for the report and whether or not the test, examination or interview has been carried out under the expert's supervision;
- 7) give details of the qualifications of any person who carried out the test, examination or interview;
- 8) in expressing an opinion to the court:
  - (a) take into consideration all of the material facts including any relevant factors arising from ethnic, cultural, religious or linguistic contexts at the time the opinion is expressed, identifying the facts, literature and any other material including research material that the expert has relied upon in forming an opinion;
  - (b) describe their own professional risk assessment process and process of differential diagnosis,

highlighting factual assumptions, deductions from the factual assumptions, and any unusual, contradictory or inconsistent features of the case;

(c) highlight whether a proposition is an hypothesis (in particular a controversial hypothesis), or an opinion deduced in accordance with peer-reviewed and -tested technique, research and experience accepted as a consensus in the scientific community;

(d) indicate whether the opinion is provisional (or qualified, as the case may be), stating the qualification and the reason for it, and identifying what further information is required to give an opinion without qualification;

9) where there is a range of opinion on any question to be answered by the expert:

(a) summarise the range of opinion;

(b) highlight and analyse within the range of opinion an 'unknown cause', whether on the facts of the case (for example, there is too little information to form a scientific opinion) or because of limited experience, lack of research, peer review or support in the field of expertise which the expert professes;

(c) give reasons for any opinion expressed: the use of a balance sheet approach to the factors that support or undermine an opinion can be of great assistance to the court;

10) contain a summary of the expert's conclusions and opinions;

11) contain a statement that the expert understands his or her duty to the court and has complied and will continue to comply with that duty;

12) contain a statement that the expert:

(a) has no conflict of interest of any kind, other than any conflict disclosed in his or her report;

(b) does not consider that any interest disclosed affects his or her suitability as an expert witness on any issue on which he or she has given evidence;

(c) will advise the instructing party if, between the date of the expert's report and the final hearing, there is any change in circumstances which affects the expert's answers to (a) or (b) above;

13) be verified by a statement of truth in the following form:

*'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.'*

## 4. Preparation for the relevant hearing

### Preliminary Enquiries of the Expert

4.1 In good time for the information requested to be available for the relevant hearing or for the advocates' meeting or discussion where one takes place before the relevant hearing, the solicitor for the party proposing to instruct the expert (or lead solicitor or solicitor for the child if the instruction proposed is joint) shall approach the expert with the following information:

1) the nature of the proceedings and the issues likely to require determination by the court;

2) the questions about which the expert is to be asked to give an opinion (including any ethnic, cultural, religious

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or linguistic contexts);

3) the date when the court is to be asked to give permission for the instruction (or if - unusually - permission has already been given, the date and details of that permission);

4) whether permission is to be asked of the court for the instruction of another expert in the same or any related field (that is, to give an opinion on the same or related questions);

5) the volume of reading which the expert will need to undertake;

6) whether or not permission has been applied for or given for the expert to examine the child;

7) whether or not it will be necessary for the expert to conduct interviews - and, if so, with whom;

8) the likely timetable of legal and social work steps;

9) when the expert's report is likely to be required;

10) whether and, if so, what date has been fixed by the court for any hearing at which the expert may be required to give evidence (in particular the Final Hearing).

It is essential that there should be proper co-ordination between the court and the expert when drawing up the case management timetable: the needs of the court should be balanced with the needs of the expert whose forensic work is undertaken as an adjunct to his or her main professional duties, whether in the National Health Service or elsewhere.

The expert should be informed at this stage of the possibility of making, through his or her instructing solicitor, representations to the court about being named or otherwise identified in any public judgment given by the court.

### **Expert's Response to Preliminary Enquiries**

4.2 In good time for the relevant hearing or for the advocates' meeting or discussion where one takes place before the relevant hearing, the solicitors intending to instruct the expert shall obtain confirmation from the expert:

1) that acceptance of the proposed instructions will not involve the expert in any conflict of interest;

2) that the work required is within the expert's expertise;

3) that the expert is available to do the relevant work within the suggested time scale;

4) when the expert is available to give evidence, of the dates and times to avoid and, where a hearing date has not been fixed, of the amount of notice the expert will require to make arrangements to come to court (or to give evidence by video link) without undue disruption to his or her normal professional routines;

5) of the cost, including hourly or other charging rates, and likely hours to be spent, attending experts' meetings, attending court and writing the report (to include any examinations and interviews);

6) of any representations which the expert wishes to make to the court about being named or otherwise identified in any public judgment given by the court.

Where parties have not agreed on the appointment of a single joint expert before the relevant hearing, they should obtain the above confirmations in respect of all experts whom they intend to put to the court as candidates for the appointment.

### **The proposal to instruct an expert**

4.3 Any party who proposes to ask the court for permission to instruct an expert shall, by 11 a.m. on the business day before the relevant hearing, file and serve a written proposal to instruct the expert in the following detail:

1) the name, discipline, qualifications and expertise of the expert (by way of C.V. where possible);

2) the expert's availability to undertake the work;

3) the relevance of the expert evidence sought to be adduced to the issues in the proceedings and the specific questions upon which it is proposed that the expert should give an opinion (including the relevance of any ethnic, cultural, religious or linguistic contexts);

4) the timetable for the report;

5) the responsibility for instruction;

6) whether or not the expert evidence can properly be obtained by the joint instruction of the expert by two or more of the parties;

7) whether the expert evidence can properly be obtained by only one party (for example, on behalf of the child);

8) why the expert evidence proposed cannot be given by social services undertaking a core assessment or by the Children's Guardian in accordance with their respective statutory duties;

9) the likely cost of the report on an hourly or other charging basis: where possible, the expert's terms of instruction should be made available to the court;

10) the proposed apportionment (at least in the first instance) of any jointly instructed expert's fee; when it is to be paid; and, if applicable, whether public funding has been approved.

### **Draft Order for the relevant hearing**

4.4 Any party proposing to instruct an expert shall, by 11 a.m. on the business day before the relevant hearing, submit to the court a draft order for directions dealing in particular with:

1) the party who is to be responsible for drafting the letter of instruction and providing the documents to the expert;

2) the issues identified by the court and the questions about which the expert is to give an opinion;

3) the timetable within which the report is to be prepared, filed and served;

4) the disclosure of the report to the parties and to any other expert;

5) the organisation of, preparation for and conduct of an experts' discussion;

6) the preparation of a statement of agreement and disagreement by the experts following an experts' discussion;

7) making available to the court at an early opportunity the expert reports in electronic form;

8) the attendance of the expert at court to give oral evidence (alternatively, the expert giving his or her evidence in writing or remotely by video link), whether at or for the Final Hearing or another hearing; unless agreement about the opinions given by the expert is reached at or before the Issues Resolution Hearing ('IRH') or, if no IRH is to be held, by a specified date prior to the hearing at which the expert is to give oral evidence ('the specified date').

## **5. Letter of Instruction**

- 5.1 The solicitor instructing the expert shall, within 5 business days after the relevant hearing, prepare (in agreement with the other parties where appropriate), file and serve a letter of instruction to the expert which shall:
- 1) set out the context in which the expert's opinion is sought (including any ethnic, cultural, religious or linguistic contexts);
  - 2) set out the specific questions which the expert is required to answer, ensuring that they:
    - (a) are within the ambit of the expert's area of expertise;
    - (b) do not contain unnecessary or irrelevant detail;
    - (c) are kept to a manageable number and are clear, focused and direct; and
    - (d) reflect what the expert has been requested to do by the court.

The Annex to this guidance sets out suggested questions in letters of instruction to (1) child mental health professionals or paediatricians, and (2) adult psychiatrists and applied psychologists, in Children Act 1989 proceedings;

3) list the documentation provided, or provide for the expert an indexed and paginated bundle which shall include:

- (a) a copy of the order (or those parts of the order) which gives permission for the instruction of the expert, immediately the order becomes available;
- (b) an agreed list of essential reading; and
- (c) a copy of this guidance;

4) identify materials that have not been produced either as original medical (or other professional) records or in response to an instruction from a party, as such materials may contain an assumption as to the standard of proof, the admissibility or otherwise of hearsay evidence, and other important procedural and substantive questions relating to the different purposes of other enquiries (for example, criminal or disciplinary proceedings);

5) identify all requests to third parties for disclosure and their responses, to avoid partial disclosure, which tends only to prove a case rather than give full and frank information;

6) identify the relevant people concerned with the proceedings (for example, the treating clinicians) and inform the expert of his or her right to talk to them provided that an accurate record is made of the discussions;

7) identify any other expert instructed in the proceedings and advise the expert of his or her right to talk to the other experts provided that an accurate record is made of the discussions;

8) subject to any public funding requirement for prior authority, define the contractual basis upon which the expert is retained and in particular the funding mechanism including how much the expert will be paid (an hourly rate and overall estimate should already have been obtained), when the expert will be paid, and what limitation there might be on the amount the expert can charge for the work which he or she will have to do. In cases where the parties are publicly funded, there should also be a brief explanation of the costs and expenses excluded from public funding by Funding Code criterion 1.3 and the detailed assessment process.

### **Asking the court to settle the letter of instruction to a joint expert**

5.2 Where the court has directed that the instructions to the expert are to be contained in a jointly agreed letter and the terms of the letter cannot be agreed, any instructing party may submit to the court a written request, which must be copied to the other instructing parties, that the court settle the letter of instruction. Where possible, the written request should be set out in an e-mail to the court, preferably sent directly to the judge dealing with the proceedings (or, in the Family Proceedings Court, to the legal adviser who will forward it to the appropriate judge or justices), and be copied by e-mail to the other instructing parties. The court will settle the letter of instruction, usually without a hearing to avoid delay; and will send (where practicable, by e-mail) the settled letter to the lead solicitor for transmission forthwith to the expert, and copy it to the other instructing parties for information.

### **Keeping the expert up to date with new documents**

5.3 As often as may be necessary, the expert should be provided promptly with a copy of any new document filed at court, together with an updated document list or bundle index.

## **6. The Court's control of expert evidence: consequential issues**

### **Written Questions**

6.1 Any party wishing to put written questions to an expert for the purpose of clarifying the expert's report must put the questions to the expert not later than 10 business days after receipt of the report.

The court will specify the timetable according to which the expert is to answer the written questions.

### **Experts' Discussion or Meeting: Purpose**

6.2 By the specified date, the court may - if it has not already given such a direction - direct that the experts are to meet or communicate:

- 1) to identify and narrow the issues in the case;
- 2) where possible, to reach agreement on the expert issues;
- 3) to identify the reasons for disagreement on any expert question and what, if any, action needs to be taken to resolve any outstanding disagreement or question;
- 4) to explain or add to the evidence in order to assist the court to determine the issues;
- 5) to limit, wherever possible, the need for the experts to attend court to give oral evidence.

### **Experts' Discussion or Meeting: Arrangements**

6.3 In accordance with the directions given by the court, the solicitor or other professional who is given the responsibility by the court ('the nominated professional') shall - within 15 business days after the experts' reports have been filed and copied to the other parties - make arrangements for the experts to meet or communicate. Where applicable, the following matters should be considered:

- 1) where permission has been given for the instruction of experts from different disciplines, a global discussion may be held relating to those questions that concern all or

most of them;

- 2) separate discussions may have to be held among experts from the same or related disciplines, but care should be taken to ensure that the discussions complement each other so that related questions are discussed by all relevant experts;
- 3) 5 business days prior to a discussion or meeting, the nominated professional should formulate an agenda including a list of questions for consideration. The agenda should contain only those questions which are intended to clarify areas of agreement or disagreement. Questions which repeat questions asked in the letter of instruction or which seek to rehearse cross-examination in advance of the hearing should be rejected as likely to defeat the purpose of the meeting.

The agenda may usefully take the form of a list of questions to be circulated among the other parties in advance. The agenda should comprise all questions that each party wishes the experts to consider. The agenda and list of questions should be sent to each of the experts not later than 2 clear business days before the discussion;

- 4) the nominated professional may exercise his or her discretion to accept further questions after the agenda with list of questions has been circulated to the parties. Only in exceptional circumstances should questions be added to the agenda within the 2-day period before the meeting. Under no circumstances should any question received on the day of or during the meeting be accepted. Strictness in this regard is vital, for adequate notice of the questions enables the parties to identify and isolate the issues in the case before the meeting so that the experts' discussion at the meeting can concentrate on those issues;
- 5) the discussion should be chaired by the nominated professional. A minute must be taken of the questions answered by the experts, and a Statement of Agreement and Disagreement must be prepared which should be agreed and signed by each of the experts who participated in the discussion. The statement should be served and filed not later than 5 business days after the discussion has taken place;
- 6) in each case, whether some or all of the experts participate by telephone conference or video link to ensure that minimum disruption is caused to professional schedules and that costs are minimised.

#### **Meetings or conferences attended by a jointly instructed expert**

- 6.4 Jointly instructed experts should not attend any meeting or conference which 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, and it is agreed or directed who is to pay the expert's fees for the meeting or conference. Any meeting or conference attended by a jointly instructed expert should be proportionate to the case.

#### **Court-directed meetings involving experts in public law Children Act cases**

- 6.5 In public law Children Act proceedings, where the court gives a direction that a meeting shall take place between the local authority and any relevant named experts for the purpose of providing assistance to the local authority in the formulation of plans and proposals for the child, the

meeting shall be arranged, chaired and minuted in accordance with the directions given by the court.

### **7. Positions of the Parties**

7. Where a party refuses to be bound by an agreement that has been reached at an experts' discussion or meeting, that party must inform the court and the other parties in writing, within 10 business days after the discussion or meeting or, where an IRH is to be held, not less than 5 business days before the IRH, of his reasons for refusing to accept the agreement.

### **8. Arrangements for Experts to give evidence**

#### **Preparation**

- 8.1 Where the court has directed the attendance of an expert witness, the party who is responsible for the instruction of the expert shall, by the specified date or, where an IRH is to be held, by the IRH, ensure that:
  - 1) a date and time (if possible, convenient to the expert) are fixed for the court to hear the expert's evidence, substantially in advance of the hearing at which the expert is to give oral evidence and no later than a specified date prior to that hearing or, where an IRH is to be held, than the IRH;
  - 2) if the expert's oral evidence is not required, the expert is notified as soon as possible;
  - 3) the witness template accurately indicates how long the expert is likely to be giving evidence, in order to avoid the inconvenience of the expert being delayed at court;
  - 4) consideration is given in each case to whether some or all of the experts participate by telephone conference or video link, or submit their evidence in writing, to ensure that minimum disruption is caused to professional schedules and that costs are minimised.

#### **Experts attending Court**

- 8.2 Where expert witnesses are to be called, all parties shall, by the specified date or, where an IRH is to be held, by the IRH, ensure that:
  - 1) the parties' advocates have identified (whether at an advocates' meeting or by other means) the issues which the experts are to address;
  - 2) wherever possible, a logical sequence to the evidence is arranged, with experts of the same discipline giving evidence on the same day;
  - 3) the court is informed of any circumstance where all experts agree but a party nevertheless does not accept the agreed opinion, so that directions can be given for the proper consideration of the experts' evidence and of the party's reasons for not accepting the agreed opinion;
  - 4) in the exceptional case the court is informed of the need for a witness summons.

### **9. Action after the Final Hearing**

- 9.1 Within 10 business days after the Final Hearing, the solicitor instructing the expert shall inform the expert in writing of the outcome of the case, and of the use made by the court of the expert's opinion.
- 9.2 Where the court directs preparation of a transcript, it may also direct that the solicitor instructing the expert shall send a copy to the expert within 10 business days after receiving the transcript.

9.3 After a Final Hearing in the Family Proceedings Court, the (lead) solicitor instructing the expert shall send the expert a copy of the court's written reasons for its

decision within 10 business days after receiving the written reasons.

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## Annex<sup>5</sup>

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### Questions in letters of instruction to child mental health professional or paediatrician in Children Act 1989 proceedings

#### A. The Child(ren)

1. Please describe the child(ren)'s current health, development and functioning (according to your area of expertise), and identify the nature of any significant changes which have occurred

- Behavioural
- Emotional
- Attachment organisation
- Social/peer/sibling relationships
- Cognitive/educational
- Physical
  - Growth, eating, sleep
  - Non-organic physical problems (including wetting and soiling)
  - Injuries
  - Paediatric conditions

2. Please comment on the likely explanation for/aetiology of the child(ren)'s problems/difficulties/injuries

- History/experiences (including intrauterine influences, and abuse and neglect)
- Genetic/innate/developmental difficulties
- Paediatric/psychiatric disorders

3. Please provide a prognosis and risk if difficulties not addressed above.

4. Please describe the child(ren)'s needs in the light of the above

- Nature of care-giving
- Education
- Treatment

in the short and long term (subject, where appropriate, to further assessment later).

#### B. The parents/primary care-givers

5. Please describe the factors and mechanisms which would explain the parents' (or primary care-givers') harmful or neglectful interactions with the child(ren) (if relevant)

6. What interventions have been tried and what has been the result?

7. Please assess the ability of the parents or primary care-givers to fulfil the child(ren)'s identified needs now.

8. What other assessments of the parents or primary care-givers are indicated

- Adult mental health assessment
- Forensic risk assessment

- Physical assessment
- Cognitive assessment

9. What, if anything, is needed to assist the parents or primary care-givers now, within the child(ren)'s time scales and what is the prognosis for change

- Parenting work
- Support
- Treatment/therapy

#### C. Alternatives

10. Please consider the alternative possibilities for the fulfilment of the child(ren)'s needs.

- What sort of placement
- Contact arrangements

Please consider the advantages, disadvantages and implications of each for the child(ren).

### Questions in letters of instruction to adult psychiatrists and applied psychologists in Children Act 1989 proceedings

1. Does the parent/adult have - whether in his/her history or presentation - a mental illness/disorder (including substance abuse) or other psychological/emotional difficulty and, if so, what is the diagnosis?

2. How do any/all of the above (and their current treatment if applicable) affect his/her functioning, including interpersonal relationships?

3. If the answer to Q1 is yes, are there any features of either the mental illness or psychological/emotional difficulty or personality disorder which could be associated with risk to others, based on the available evidence base (whether published studies or evidence from clinical experience)?

4. What are the experiences/antecedents/aetiology which would explain his/her difficulties, if any, (taking into account any available evidence base or other clinical experience)?

5. What treatment is indicated, what is its nature and the likely duration?

6. What is his/her capacity to engage in/partake of the treatment/therapy?

7. Are you able to indicate the prognosis for, time scales for achieving, and likely durability of, change?

8. What other factors might indicate positive change?

(It is assumed that this opinion will be based on collateral information as well as interviewing the adult).

*The Right Honourable Sir Mark Potter  
The President of the Family Division*

### Footnotes to the Practice Direction

<sup>1</sup>SI 2005/2795.

<sup>2</sup>Following rule 10.20A(1) of the Family Proceedings Rules 1991, SI 1991/1247 ('FPR 1991') which defines the application of rule 10.20A (Communication of information relating to proceedings). Compare the definition of 'relevant proceedings' in section 93(3) of the Children Act 1989 (Rules of court), applied in the equivalent rule 23A (Confidentiality of documents) of the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395 ('FPC(ChA)R 1991').

<sup>3</sup>FPR 1991 rule 10.20A(2)(vii); FPC(ChA)R 1991 rule 23A(1)(c)(vii); FP(A)R 2005 rule 78(1)(c)(vii).

**EXPERT SUPPORT SERVICES FROM THE UK REGISTER OF EXPERT WITNESSES**

<sup>4</sup>FPR 1991 rule 4.18(1) and (3); FPC(ChA)R 1991 rule 18(1) and (3).

<sup>5</sup>Drafted by the Family Justice Council.

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