

## **EXPERT EVIDENCE**

*Summary: This circular provides guidance on the District Court's approach to the use of expert evidence in civil trials. It cross references the various requirements as regards expert evidence in the District Court Rules, Practice Directions and other Circulars.*

### **1. Introduction**

The *District Court Rules 2005* ("2005 DCR") do not change the basic application of O 36A of the *Rules of the Supreme Court*. Specifically:

- (a) a party wishing to adduce medical evidence in actions for personal injuries must comply with the disclosure obligations in RSC O36A r 2; and
- (b) a party wishing to adduce other expert evidence must seek the leave of the Court pursuant to RSC O36A r 3.

The solicitor for a party entering an action for trial in the District Court must certify that RSC O36A has been complied with (2005 DCR rule 37, Form 1).

### **2 Usual Orders for Provision of Expert Evidence**

In an application pursuant to O36A the usual orders made are as follows:

- "1. The parties do have leave to adduce expert evidence at the trial of the action;
- 2. by [date] the [party] shall:
  - (a) serve on [party] a copy of the report of any expert witness, the substance of which it intends to rely on at the trial, or
  - (b) disclose in writing to the [party] the substance of any expert evidence that it intends to adduce at the trial;
- 3. by [date] the [party] shall:
  - (a) serve on [party] a copy of the report of any expert witness, the substance of which it intends to rely on at the trial, or
  - (b) disclose in writing to the [party] the substance of any expert evidence that it intends to adduce at the trial;

### 3. Content of expert's reports

2005 DCR rule 48A provides that persons giving expert evidence in the District Court must comply with any Code of Conduct issued by the Court. There is an exception for a medical expert report prepared for the purpose of a personal injuries action.

The Code of Conduct is Annexure C to the Consolidated Civil Practice Direction.

The Court is aware that certain experts, both medical and non-medical, are well known to practitioners such that there is a practice of not insisting that the expert provide a full statement of his or her qualifications or experience in each and every report. Thus the Code of Conduct sets out a practice of providing a summary of the expert's qualifications and experience (clause 3.2). This is complemented by 2005 DCR rule 45E which provides a mechanism for a party to obtain from the other party more detailed information qualifications and experience of the witness.

### 4 Conferral between experts

Where experts' reports have been exchanged, and it is apparent that the experts disagree on some material points, there is often an advantage in having the experts confer to see if those differences can be narrowed. In that case, where it becomes apparent that there is disagreement between the experts, the parties can seek on application to the Court, or the Court on its own motion can make, order that the experts confer (see 2005 DCR rule 24(2)(f)). The usual form of order in that regard is as follows:

- “1. The experts named in the table below, in the presence of the parties' solicitors, shall meet and confer on a “without prejudice basis” for the purposes of identifying the differences between them and resolving as many of those differences as possible.

<b>Name</b>	<b>Party calling</b>
	Plaintiff
	First Defendant
	Second Defendant

2. within 7 days of the conferral being held the solicitors for the parties do file and serve a report:
  - (a) confirming that the conference was held as ordered;
  - (b) recording the substance of any resolution or narrowing the point of difference between the experts resulting from the conference.”

In appropriate circumstances, the Court can order that the conference take place in the presence of a Registrar of the Court.

## **5 Scott Schedules and expert evidence**

Where the substance of the Scott Schedule is likely to be based on expert evidence (for example, rectification costs based on the report of a builder), the parties should seek to align the drafting of the Scott Schedule with the exchange of experts' reports. Circular to Practitioners CIV 2007/3 sets out the Court's practice in relation to Scott Schedules.

Practitioners are encouraged to seek case management orders which allow the Scott Schedule to be drafted in a logical sequence around the exchange of expert evidence. In this way, experts should be able to prepare their reports and comment on draft Scott Schedules at the same time.

### **5. Indexes of expert's reports**

2005 DCR rule 45E provides that the parties must file and serve indexes to expert reports prior to the Listing Conference. In view of the rule, Registrars will no longer order the filing of indexes to expert reports when listing the Listing Conference unless the timetable for filing the indexes is to be varied from that in the 2005 DCR.

The Court has prescribed the form of the Index to Experts Reports in Annexure D to the Consolidated Civil Practice Direction.

Annexure A to this Circular contains an example of a completed index. Practitioners are encouraged to use the comments field to flag reports which they consider can be tendered by consent without the need to call the witness. The party should also include in the comments field any special logistical requirements, for example, the fact that an application will be made for the expert's evidence to be taken by video link.

2005 DCR rule 45E(4) and (5) provide a mechanism for a party to obtain information about the qualifications and experience of an expert witness whose report is in the index filed by another party.

2005 DCR rule 45E(6) provides that, except with the leave of the Court, no party may tender an expert report that is not in the index.

The attention of practitioners is drawn to the Consolidated Civil Practice Direction which provides that if a party decides they are not going to call at trial an expert witness, they must immediately give notice of that fact to each other party and consult before cancelling any arrangements made for the witness to attend the trial.

**MICHAEL GETHING**  
**Principal Registrar**

**Annexure A - Sample plaintiff index of experts' reports**

[Usual court document heading]

<b>Witness</b>	<b>Reports/ Notes</b>	<b>Issues</b>	<b>Comments (including any special requirements)</b>
Dr Antony	12.5.04 17.5.04 18.6.04 18.7.04 10.3.05 10.6.05 10.9.05 11.4.06 11.6.06	General as to symptoms – usual GP	
Dr Cassius	13.5.05	Extent of injuries generally, including timing of symptoms	Substitute for usual GP. Seek to tender by consent without calling witness.  If to be called, propose to apply for evidence to be taken by video.
Dr Macbeth	11.6.03	Extent of back injury	Results of MRI scans. Seek to tender by consent without calling witness.
Dr Hamlet	12.4.05 14.7.06 12.4.06	Extent of psychological injury	
Mr Othello	12.12.03 4.7.04 12.3.05	Extent of back injury	Now based in Sydney. Propose to apply to have evidence taken by video link.