Division 7.1.4—Instructions and disclosure of expert's report

7.12 Application of Division 7.1.4

This Division does not apply to a market appraisal or an opinion as to value in relation to property obtained by a party for the purposes of a procedural hearing or conference.

7.13 Instructions to expert witness

(1) This rule applies to any expert witness, whether a single expert witness or an expert witness engaged by only one party or some parties.

(2) A party who instructs an expert witness to give an opinion for a proceeding or an anticipated proceeding must:
  (a) ensure the expert witness has a copy of the most recent version of, and has read, Divisions 7.1.4, 7.1.5 and 7.1.6 of these Rules; and
  (b) obtain a written report from the expert witness.

(3) All instructions to an expert witness must be in writing and must include:
  (a) a request for a written report; and
  (b) advice that the report may be used in an anticipated or actual proceeding; and
  (c) the issues about which the opinion is sought; and
  (d) a description of any matter to be investigated, or any experiment to be undertaken or issue to be reported on; and
  (e) full and frank disclosure of information and documents that will help the expert witness to perform the expert witness's function.

(4) If a single expert witness is appointed, the parties must give the expert an agreed statement of facts on which to base the report.

(5) However, if a single expert witness is appointed and the parties do not agree on a statement of facts:
  (a) unless the court directs otherwise, each of the parties must give to the expert a statement of facts on which to base the report; and
  (b) the court may give directions about the form and content of the statement of facts to be given to the expert.

7.14 Mandatory disclosure of expert's report

(1) A party who has obtained an expert's report for a parenting proceeding, whether before or after the start of the proceeding, must give each other party a copy of the report:
  (a) if the report is obtained before the proceeding starts—at least 2 days before the first court date; or
  (b) if the report is obtained after the proceeding starts—within 7 days after the party obtains the report.

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(2) The party who discloses an expert's report must disclose any supplementary report and any notice amending the report under subrule 7.18(5).

(3) If an expert's report has been disclosed under this rule, any party may seek to tender the report as evidence.

(4) Legal professional privilege does not apply in relation to an expert's report that must be disclosed under this rule.

7.15 Provision of information about fees

A party who has instructed an expert witness must, if requested by another party, give each other party details of any fee or benefit received, or receivable, by or for the expert witness, for the preparation of the report and for services provided, or to be provided, by or for the expert witness in connection with the expert witness giving evidence for the party to the proceeding.

7.16 Application for provision of information

(1) This rule applies if the court is satisfied that:
   (a) a party (the ***disclosing party***) has access to information or a document that is not reasonably available to the other party (the ***requesting party***); and
   (b) the provision of the information or a copy of the document is necessary to allow an expert witness to carry out the expert witness's function properly.

(2) The requesting party may apply for an order that the disclosing party:
   (a) file and serve a document specifying the information in enough detail to allow the expert witness to properly assess its value and significance; and
   (b) give a copy of the document to the expert witness.

Note: An expert witness may request that the court make an order under this rule (see rule 7.19).

7.17 Failure to disclose report

A party who fails to give a copy of an expert's report to another party or the independent children's lawyer (if any) must not use the report or call the expert witness to give evidence at a hearing or trial, unless the other party and the independent children's lawyer (if any) consent to the report being used or the expert witness being called, or the court orders otherwise.

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Division 7.1.5—Expert witness's duties and rights

7.18 Expert witness's duty to the court

(1) An expert witness has a duty to assist the court with matters that are within the expert witness's knowledge and capability.

(2) The expert witness's duty to the court prevails over the obligation of the expert witness to the person instructing, or paying the fees and expenses of, the expert witness.

(3) The expert witness has the following duties:
  (a) to give an objective and unbiased opinion that is also independent and impartial on matters that are within the expert witness's knowledge and capability;
  (b) to conduct the expert witness's functions in a timely way;
  (c) to avoid acting on an instruction or request to withhold or avoid agreement when attending a conference of experts;
  (d) to consider all material facts, including those that may detract from the expert witness's opinion;
  (e) to tell the court:
    (i) if a particular question or issue falls outside the expert witness's expertise; and
    (ii) if the expert witness believes that the report prepared by the expert witness is based on incomplete research or inaccurate or incomplete information, or is incomplete or may be inaccurate, for any reason;
  (f) to produce a written report that complies with rules 7.21 and 7.22.

(4) The expert witness's duty to the court arises when the expert witness:
  (a) receives instructions under rule 7.13; or
  (b) is informed by a party that the expert witness may be called to give evidence in a proceeding.

(5) An expert witness who changes an opinion after the preparation of a report must give written notice to that effect:
  (a) if the expert witness is appointed by a party—to the instructing party; or
  (b) if the expert witness is appointed by the court—to the Registry Manager and each party.

(6) A notice under subrule (5) is taken to be part of the expert's report.

7.19 Expert witness's right to seek orders

(1) Before final orders are made, a single expert witness may, by written request to the court, seek a procedural order to assist in carrying out the expert witness's function.

Note: The written request may be by letter and may, for example:
(a) ask for clarification of instructions; or
(b) relate to questions referred to in Division 7.1.6; or

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(c) relate to a dispute about fees.

(2) The request must:
(a) comply with rule 2.14; and
(b) set out the procedural orders sought and the reason the orders are sought.

(3) The expert witness must serve a copy of the request on each party and satisfy the court that the copy has been served.

(4) The court may determine the request in chambers unless:
(a) within 7 days after being served with the request, a party makes a written objection to the request being determined in chambers; or
(b) the court decides that an oral hearing is necessary.

7.20 Expert witness's evidence in chief

(1) An expert witness's evidence in chief comprises:
(a) the expert's report; and
(b) any changes to that report in a notice under subrule 7.18(5); and
(c) any answers to questions under rule 7.27.

(2) An expert witness has the same protection and immunity in relation to the contents of a report disclosed under these Rules or an order as the expert witness could claim if the contents of the report were given by the expert witness orally at a hearing or trial.

7.21 Form of expert's report

(1) An expert's report must:
(a) be addressed to the court and the party or parties instructing the expert witness; and
(b) have attached to it a summary of the instructions given to the expert witness and a list of any documents relied on in preparing the report; and
(c) be verified by an affidavit of the expert witness.

(2) The affidavit verifying the expert's report must state the following:

I have made all the inquiries I believe are necessary and appropriate and to my knowledge there have not been any relevant matters omitted from this report, except as otherwise specifically stated in this report.

I believe that the facts within my knowledge that have been stated in this report are true.

The opinions I have expressed in this report are independent and impartial.

I have read and understand Divisions 7.1.4, 7.1.5 and 7.1.6 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* and have used my best endeavours to comply with them.

I have complied with the requirements of the following professional codes of conduct or protocol, being [*state the name of the code or protocol*].

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I understand my duty to the court and I have complied with it and will continue to do so.

7.22 Contents of expert's report

(1) An expert's report must:
  (a) state the reasons for the expert witness's conclusions; and
  (b) include a statement about the methodology used in the production of the report; and
  (c) include the material referred to in subrule (2) in support of the expert witness's conclusions.

(2) For the purposes of paragraph (1)(c), an export's report must include the following in support of the expert witness's conclusions:
  (a) the expert witness's qualifications;
  (b) the literature or other material used in making the report;
  (c) the relevant facts, matters and assumptions on which the opinions in the report are based;
  (d) a statement about the facts in the report that are within the expert witness's knowledge;
  (e) details about any tests, experiments, examinations or investigations relied on by the expert witness and, if they were carried out by another person, details of that person's qualifications and experience;
  (f) if there is a range of opinion on the matters dealt with in the report—a summary of the range of opinion and the basis for the expert witness's opinion;
  (g) a summary of the conclusions reached;
  (h) if necessary, a disclosure that:
    (i) a particular question or issue falls outside the expert witness's expertise; or
    (ii) the report may be incomplete or inaccurate without some qualification and the details of any qualification; or
    (iii) the expert witness's opinion is not a concluded opinion because further research or data is required or because of any other reason.

7.23 Consequences of non-compliance

If an expert witness does not comply with these Rules, the court may do any of the following:
  (a) order the expert witness to attend court;
  (b) refuse to allow the expert's report or any answers to questions to be relied on;
  (c) allow the report to be relied on but take the non-compliance into account when considering the weight to be given to the expert witness's evidence;
  (d) take the non-compliance into account when making orders for:
    (i) an extension or abridgment of a time limit; or
    (ii) a stay of the proceeding; or
    (iii) interest payable on a sum ordered to be paid; or

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(iv) costs.

Note: For the court's power to order costs, see subsection 117(2) of the Family Law Act.

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Division 7.1.6—Clarification of single expert witness reports

7.24 Purpose of Division 7.1.6

(1) The purpose of this Division is to provide ways of clarifying a report prepared by a single expert witness.

(2) Clarification about a report may be obtained at a conference under rule 7.25 or by means of questions under rule 7.26.

7.25 Conference

(1) Within 21 days after receiving the report of a single expert witness, the parties may enter into a written agreement about conferring with the expert witness for the purpose of clarifying the report.

(2) The agreement may provide for the parties, or for one or more of them, to confer with the expert witness.

(3) Without limiting the scope of the conference, the parties must agree on arrangements for the conference.

(4) It is intended that the parties should be free to make any arrangements for the conference that are consistent with this Division.

Note: For example, arrangements for a conference might include the attendance of another expert, or the provision of a supplementary report.

(5) Before participating in the conference, the expert witness must be informed of arrangements for the conference.

(6) In seeking to clarify the report of the expert witness, the parties must not interrogate the expert witness.

(7) If the parties do not agree about conferring with a single expert witness, the court, on application by a party, may order that a conference be held in accordance with any conditions the court determines.

7.26 Questions to single expert witness

(1) A party seeking to clarify the report of a single expert witness may ask questions of the single expert witness under this rule:
  (a) within 7 days after a conference (if any) is held under rule 7.25; or
  (b) if no conference is held under that rule—within 21 days after the party received the single expert witness's report.

(2) The questions must:
  (a) be in writing and be put once only; and
  (b) be only for the purpose of clarifying the single expert witness's report; and
  (c) not be vexatious or oppressive, or require the single expert witness to undertake an unreasonable amount of work to answer.

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(3) The party must give a copy of any questions to each other party.

7.27 Single expert witness's answers

(1) A single expert witness must answer a question received under rule 7.26 within 21 days after the later of the following:
  (a) the date the expert witness received the question;
  (b) the date the fees and expenses for answering the question are paid or secured.

(2) An answer to a question:
  (a) must be in writing; and
  (b) must specifically refer to the question; and
  (c) must:
    (i) answer the substance of the question; or
    (ii) object to answering the question.

(3) If the single expert witness objects to answering a question or is unable to answer a question, the single expert witness must state the reason for the objection or inability in the document containing the answers.

(4) The single expert witness's answers:
  (a) must be:
    (i) attached to the affidavit under subrule 7.21(2); and
    (ii) sent by the single expert witness to all parties at the same time; and
    (iii) filed by the party asking the questions; and
  (b) are taken to be part of the expert's report.

7.28 Single expert witness's costs

(1) The reasonable fees and expenses of a single expert witness incurred in relation to a conference are to be paid as follows:
  (a) if only one of the parties attends the conference—by that party; or
  (b) if more than one of the parties attends the conference—by those parties jointly.

(2) If a single expert witness answers questions under rule 7.27, the expert witness's reasonable fees and expenses incurred in answering any questions are to be paid by the party asking the questions.

(3) A single expert witness is not required to undertake any work in relation to a conference, or answer any questions, until the fees and expenses for that work or those answers are paid or secured.

(4) In this rule:

attend includes attendance by electronic communication.

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7.29 Application for directions

A party may apply to the court for directions relating to a conference with a single expert witness or the asking or answering of questions under this Division.

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