

Penny Raby & Co.

Family Lawyers



**Penny Raby**

**Divorce lawyer specialising  
in HNW Financial Cases**

**Mike Gordon**

**FCMA Forensic Accountant**



**Penny Raby & Co.**

Family Lawyers



## **Types of Forensic Work**

- 1. Single Joint Expert**
- 2. Single Expert**
- 3. Shadow**
- 4. Investigative**



Penny Raby & Co.

Family Lawyers



1. How can we give you better instructions?
2. How can you give the advice we need ?
3. How can you be the expert we will choose ?





**How can we give you better instructions ?**

**Garbage in, Garbage out (GIGO)**

**The secret is getting the instructing solicitors to ask the right questions.**

**To recognise and agree on the limitations of your brief.**





## **Suggested issues for instructions :**

- 1. Capital value of share in the business.  
An art not a science?**
- 2. Liquidity in the business.**
- 3. Sustainability of the business.**
- 4. Earning capacity of the business.**
- 5. Reasonable drawings from the business  
as personal income for the owning party.**
- 6. Status of Directors' Loan Account and  
liquidity/need for repayment.**





**Best response to request for quote**

**Schedule of information required and clear requirement for cooperation in providing access and documentation**

**Agreement on seeking information from non – owning party.**

**Be clear your report will be based on your professional judgement on a neutral basis. Especially when SE – expectation can be otherwise.**

**Payment before report released!!**





**Giving the advice we need.**

**Clarity and comprehensible by mere lawyers!**





**Ensuring you are the expert we choose**

### **Criteria of lawyers and Judges**

- 1. Be clear and succinct in all communication and reports.**
- 2. Give realistic estimates of timescales and inform the court and parties if any timescale imposed by them is unreasonable.**
- 3. Keep to timescales and costs quotes , and warn early if these must be increased.**
- 4. Make it clear from the outset if there are issues outside your brief or capability**
- 5. Do not engage with behaviour allegations from either party which are irrelevant to the instructions.**
- 6. Respond to questions raised on any report in a prompt and neutral manner.**





7. If SJE, copy in both sides and the court with any communication and remember your first duty is to the court, not either party or their solicitors.
8. An SJE should confirm that they have no previous business or social relationship with either party.
9. An SE may be chosen **BECAUSE** they have a previous business or social connection, but that makes them a soft target for cross examination and is to be avoided.





**Procedure and Caselaw in Forensic cases**

**[Family Procedure Rules Part 25](#)**

**[Practice Directions 25a](#) – Emergencies and  
Pre- Proceeding Instructions**

**[Practice Direction 25b](#) – The Duties of an  
Expert, The Expert's Report and  
Arrangements for an Expert to Attend Court**

**[Practice Direction 25d](#) – The Use of SJE's and  
the process leading to Expert Evidence being  
put before the court**





## **PD 25d of particular interest**

**2.1 Wherever possible, expert evidence should be obtained from an SJE.**

**The court's permission is required to put evidence from an SJE before the court.**





**2.4 Where the parties cannot agree on the identity .. disagreements .. may be better managed by the court.**

**And in reality, the court will always prefer an order for one SJE in the first instance rather than separate experts.**



Penny Raby & Co.

Family Lawyers



**3.1 this alters the requirement for the expert evidence to be ‘reasonably required’ to ‘NECESSARY IN THE OPINION OF THE COURT TO ASSIST THE COURT TO RESOLVE THE PROCEEDINGS’**





**If one party wishes to use a separate expert after the SJE has reported, then the test laid down in the personal injury case of Daniels v Walker (2000)1WLR1382**

**Laid down a number of relevant criteria :**

- 1. Has there been a jointly instructed expert? There may be a distinction between a joint expert and an expert nominated by one side, to whom the other party does not object.**
- 2. What is the value of the case- is it 'substantial' or at least not 'modest'**
- 3. Are the reasons for wanting a further report 'fanciful'? This is, on the face of it, a very broad test. It does not appear to take much to lift reasons from 'fanciful' to 'real'.**
- 4. Has the SJE been asked to address the live issue via questions? If not, why not?**





**Cf the role of the Shadow Expert and their preliminary comments on the report of the SJE will usually suffice to establish reasons that are ‘real’.**

**Such a mini report may wish to address such issues as :-**

- a. The wide range of expert opinion in the area**
- b. Subjective judgement based on experience**
- c. The substantial funds in question**
- c. Aspects of the evidence which have not been taken into account sufficiently or at all**
- d. That the expert is ready to produce his report within a short timeframe, ideally not affecting any existing court directed timetable**





**Financial Proceedings Rules 25.5(2) set out the issues to which the court is to have regard in making this decision**

- a) The issues to which the expert evidence would relate**
- b) The questions which the court would require the expert to answer**
- c) The impact which giving permission would be likely to have on the timetable, duration and conduct of the proceedings**
- d) Any failure to comply with rules or directions**
- e) The cost of the expert evidence**





**Why is all of that your problem rather than your Instructing Solicitors ?**

**Because you can affect the result of an application for SJE expert evidence by the way in which you respond to a request for a quote before being instructed .**

**I suggest you add a paragraph which reads something like this**

**‘My report will aim to help the parties reach agreement on the issues on which I give an opinion, or at least significantly reduce the arguments, thereby reducing time and cost for both parties and the court. My fees are appropriate in aiding them to avoid a trial, which would be expensive, traumatic and time consuming.’**





## **Family Proceedings Rules**

### **Part 25**

#### **Rule 25.17**

**Experts may file written requests for directions for the purpose of assisting them in carrying out their functions.**

**The rule does not require any particular format save that the request should be in writing and copied to the parties, but it is extremely useful where one party is uncooperative and the expert is unable to complete a report giving a useful conclusion either on time or at all. Experts tend to prefer the parties to make court applications to force cooperation, but their own submission is usually more effective and dealt with more swiftly by a court, as the expert is reporting to the court and a refusal to cooperate is seen as potential contempt.**





## **The way ahead**

**Talk given by the Rt Hon Sir Andrew McFarlane, President of the Family Division at the Worcestershire High Sheriff's Lecture at the University of Worcester on the 31<sup>st</sup> October 2022**

**Sub Title : 'Almost anything but the Family Court'**





**Mainly about Children Act Cases , but the writing is on the wall – the aim is to take as many family law cases out of the court process as possible.**

**MIAMS certificates already barriers to financial proceedings.**

**Mediation is the preferred first step.**

**Other alternative processes suggested by Sir Andrew all involve parties meeting live or online to negotiate a deal.**

**As if that can always be done without due process of law**





## **Pros**

- 1. Cheaper**
- 2. Quicker**
- 3. Parties make their own decision**
- 4. Can still be confirmed through a Consent Order on paper process only**





## **Cons**

- 1. No Disclosure process**
- 2. No separate advice to weaker party**
- 3. Opportunity for wealthier party to dominate and bully**
- 4. This process can confirm an abusive relationship by an equally abusive financial order. The basic financial form filed with a Consent Order only has a few lines of voluntary disclosure of finances, with no cross check with documents and no certainty that the information is accurate or complete. While lying on the form would be a good ground for an appeal, the applicant would have to know of the lie.**





**Protection to the weaker party is best provided by**

- 1. Separate legal advice**
- 2. Comprehensive disclosure, if necessary enforced through a court order.**
- 3. Expert opinion on an SJE basis to reduce dispute and give guidance to court in the event of a trial.**

**Speeches like Sir Andrew's, while of course well meaning and intended to result in a better way to deal with relationship breakdown, also encourage those who want to keep professionals out of their financial dispute so that they do not have to disclose their finances or submit to a court order for capital and maintenance.**





**So how do we maintain our professional services for our clients without being accused of increasing animosity, costs and time spent in the process?**

**A challenge to us all!!**

**And some suggestions.....**

**The core issue of disclosure and valuation of finances in complex and HNW cases must be dealt with professionally.**

**We need to be seen as part of the solution to the problems of the overburdened Family Court and the perception that professional assistance in Family Law leads inevitably to more costs and animosity.**

**Thank you 😊**



# Penny Raby & Co.

---

Family Lawyers

