
Table of Contents

<i>Preface</i>	v
<i>Table of Cases</i>	xiii
<i>Table of CPR Provisions</i>	xix
1 Introduction	1
Background	1
Issues Covered	2
2 What Type of Privilege?	4
Introduction	4
Legal Advice Privilege	4
Qualifying Communications	4
Who is the Lawyer?	6
The Client and Client Experts	7
Litigation Privilege	8
Basic Principles	8
Adversarial Proceedings	8
Dominant Purpose	9
Contemplated Litigation	12
Production of Documents to Third Parties	13
Relationship with Confidentiality	13
Common Interest Privilege	14
Without Prejudice Communications	15
Chapter Summary	17
3 Part 35	18
Introduction	18
To Whom Does Part 35 Apply?	18
‘Behind the Scenes’ Experts	18
‘Part 35’ Experts	19
The Effect of Expert Status on Privilege	19
Carlson v Townsend	20
The Rationale for Part 35	20
Jackson LJ’s Review of Civil Litigation Costs	27
(a) Case Management	28
(b) One Size Does Not Fit All	28
(c) Costs Sanctions	29
(d) Concurrent Evidence (‘Hot Tubbing’)	29
Chapter Summary	30

4	Instructions	31
	Introduction	31
	CPR 35.10	32
	Objectives	32
	CPR 35.10(3)—What the Report Must Contain	32
	CPR 35.10(4)—Material Instructions and their Status	33
	Instructions and Inaccurate or Incomplete Statements	34
	Undisclosed Basis of Discussion— <i>Morris v Bank of India</i>	34
	Documents Provided for Instruction— <i>Lucas v Barking</i>	36
	Chapter Summary	40
5	Documents Generally Referred to in the Report	42
	Introduction	42
	Documents ‘Mentioned’— <i>Expandable v Rubin</i>	43
	Background	43
	First Instance and Appeal	44
	Second Appeal	44
	The Effect of Mentioning a Document	46
	The Old Rule	46
	Under the CPR—Prima Facie Right to Inspection?	47
	Waiver of Privilege by Deployment	50
	What is Required?	50
	Reliance on ‘Effect’ or ‘Contents’?	51
	‘Cherry-Picking’ Content— <i>Nea Karteria</i>	53
	Support for <i>Nea Karteria</i>	55
	Scope of Waiver—Identifying the ‘Transaction’	57
	Chapter Summary	59
6	Pre-Existing Documents	61
	Introduction	61
	The Status of Original Documents	61
	The Status of Copies	63
	An Old View— <i>The Palermo</i>	63
	A Different View— <i>Ventouris v Mountain</i>	63
	Copies Reconsidered— <i>Sumitomo Corporation</i>	64
	Translations	65
	Selections—the Rule in <i>Lyell v Kennedy</i>	66
	A Note on Production	66
	Chapter Summary	67
7	Joint Experts, Statements and Discussions	69
	Introduction	69
	Instructions to Single Joint Experts	70
	The Applicable Rules and their Effect	70
	Access to Joint Experts	73

Use of a Unilateral Expert by another Party	75
Unilateral Experts Used by another Party	75
Unilateral Expert Becoming a Joint Expert	77
Discussions and Statements between Experts	78
Joint Statements—CPR 35.12	78
Status of Joint Statement and Discussions	78
Robin Ellis v Malwright Ltd	79
Losing Without Prejudice Protection in a Joint Statement	81
Can the Experts Bind the Parties?	82
Joint Statements Ordered for Mediation	83
Aird v Prime Meridian	84
Chapter Summary	86
8 The Status of Draft Reports	88
Introduction	88
Unserved Expert's Reports	88
Earlier Drafts by the Same Expert	90
Jackson v Marley Davenport	90
Complications from County Court Decisions	92
Reports Prepared after Disclosure of Earlier Report	93
Fairness and Justice Overriding Privilege?	94
Chapter Summary	95
9 Changing Experts	96
Introduction—When will this Problem Arise?	96
Personal Injury Cases	97
Lane v Willis	97
The Beck v Ministry of Defence 'Principle'	98
Disclosure—a Condition of Permission	99
Is Beck a Narrow Authority?	100
Broader Application of the 'Beck Principle'	100
A Valuation Case—Vasilou v Hajigeorgiou	100
Permission not required if Expert Unnamed	101
Effect of Naming the Expert in an Order	102
Expert Shopping	102
Privilege not 'Abrogated but 'Waived'	102
Which Draft Report should be Disclosed?	103
Application in the County Court—Carruthers	103
Background	103
Disclosure of any Report	104
Problems with Carruthers	104
A Narrower View of Carruthers	105
Chapter Summary	106

10 Experiments and Surveys	107
Introduction	107
Experiments in Patent Cases	108
Experiments without Notice	108
Abandoned Experiments	109
‘Work-Up’ Experiments	110
Survey Evidence	112
Disclosing the Context of Surveys	112
Surveys in Relation to Experiments	115
Reconciling the Experiment Cases—a Discussion	115
Honeywell	115
Laddie J’s Critique of Honeywell in <i>Electrolux</i>	117
Pumfrey J’s Critique of <i>Electrolux</i> in <i>Mayne v Debiopharm</i>	120
A General Principle?	121
11 Use of Reports in proceedings by Third Parties	124
Introduction	124
The Basic Rule—CPR 35.11	124
Gurney Consulting Engineers—Background	124
Gurney—the Argument	125
Relationship between CPR 35.11 and CPR 35.4	125
Notification of Use and Reliance	126
Other Applicable Rules?—CPR 35.1 and 35.7	127
Shepherd Neame—Background	127
Shepherd Neame—the Argument	127
Relationship with CPR 35.11	128
Chapter Summary	130
12 Collateral Use of Expert Materials	131
Introduction	131
Context	131
Rules for Witness Statements and Disclosure Documents	131
A Rule for Expert Reports?	132
Collateral Use Pre-CPR	133
Implied Undertaking	133
The ‘Compulsion’ Principle	135
The Difference between Expert Reports and Witness Statements	136
Restrictions on Use of Experts Reports under the CPR	137
Limits on Interpretation of CPR 35.11	137
Guidance in <i>L’Oreal v Bellure</i>	137
Restrictions on Using Documents Referred to in Report	138
Guidance in <i>SmithKline Beecham</i>	138
Restrictions on Use of Deposition Evidence	140
Dendron—Facts	140
Dendron—Application of the Compulsion Principle to Depositions	141

Dendron—Effect of the CPR on Deposition Evidence	142
Restrictions on Use of Expert Material by Third Party	143
Paul Sayers v SmithKline Beecham	143
Application of CPR 5.4C(2)	145
Identifying Documents with Precision	147
Documents Read in Open Court	147
Open Justice	147
Meaning of ‘Open Court’	148
Protecting Material Read in Open Court	150
Exercising Discretion to Protect Material	151
Lifting Restrictions on Collateral Use	155
Identity between Implied Undertaking and CPR 31.22	155
The Interests of Justice	158
CPR 31.17 Must be Considered	159
Use in Foreign Proceedings	159
Chapter Summary	159
13 Litigation Privilege—Competing Forces	161
Introduction	161
Litigation Privilege and Policy	161
The Rationale for Litigation Privilege	161
Is Litigation Privilege an Absolute Right?	163
Part 35 Overriding Expert Privilege	168
The Starting Point	168
Instructions	168
Joint Experts and Discussions between Experts	169
Changing Experts	169
Use of Reports by Third Parties	169
Conclusions	170
14 Practical Notes and Queries	172
Appendices	174
A. Access to Justice—Final Report: Chapter 13 ‘Expert Evidence’	174
B. Part 35—Experts and Assessors	187
C. Practice Direction—Experts and Assessors	192
D. Protocol for the Instruction of Experts to Give Evidence in Civil Claims	197
E. Part 31—Disclosure and Inspection of Documents	211
F. Practice Direction—Disclosure and Inspection	219
G. Part 5—Court Documents	224
H. Practice Direction—Court Documents	228
<i>Index</i>	237