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PRACTICE DIRECTION – PRE-ACTION CONDUCT AND PROTOCOLS

## PRACTICE DIRECTION – PRE-ACTION CONDUCT AND PROTOCOLS

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### Introduction

1. Pre-action protocols explain the conduct and set out the steps the court would normally expect parties to take before commencing proceedings for particular types of civil claims. They are approved by the Master of the Rolls and are annexed to the Civil Procedure Rules (CPR). (The current pre-action protocols are listed in paragraph 18.)

2. This Practice Direction applies to disputes where no pre-action protocol approved by the Master of the Rolls applies. A person who knowingly makes a false statement in a pre-action protocol letter or other document prepared in anticipation of legal proceedings may be subject to proceedings for contempt of court.

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### Objectives of pre-action conduct and protocols

3. Before commencing proceedings, the court will expect the parties to have exchanged sufficient information to—

- (a) understand each other's position;
- (b) make decisions about how to proceed;
- (c) try to settle the issues without proceedings;
- (d) consider a form of Alternative Dispute Resolution (ADR) to assist with settlement;
- (e) support the efficient management of those proceedings; and
- (f) reduce the costs of resolving the dispute.

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## Proportionality

**4.** A pre-action protocol or this Practice Direction must not be used by a party as a tactical device to secure an unfair advantage over another party. Only reasonable and proportionate steps should be taken by the parties to identify, narrow and resolve the legal, factual or expert issues.

**5.** The costs incurred in complying with a pre-action protocol or this Practice Direction should be proportionate (CPR 44.3(5)). Where parties incur disproportionate costs in complying with any pre-action protocol or this Practice Direction, those costs will not be recoverable as part of the costs of the proceedings.

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## Steps before issuing a claim at court

**6.** Where there is a relevant pre-action protocol, the parties should comply with that protocol before commencing proceedings. Where there is no relevant pre-action protocol, the parties should exchange correspondence and information to comply with the objectives in paragraph 3, bearing in mind that compliance should be proportionate. The steps will usually include—

(a) the claimant writing to the defendant with concise details of the claim. The letter should include the basis on which the claim is made, a summary of the facts, what the claimant wants from the defendant, and if money, how the amount is calculated;

(b) the defendant responding within a reasonable time – 14 days in a straight forward case and no more than 3 months in a very complex one. The reply should include confirmation as to whether the claim is accepted and, if it is not accepted, the reasons why, together with an explanation as to which facts and parts of the claim are disputed and whether the defendant is making a counterclaim as well as providing details of any counterclaim; and

(c) the parties disclosing key documents relevant to the issues in dispute.

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## Experts

**7.** Parties should be aware that the court must give permission before expert evidence can be relied upon (see CPR 35.4(1)) and that the court may limit the fees recoverable. Many disputes can be resolved without expert advice or evidence. If it is necessary to obtain expert evidence, particularly in low value claims, the parties should consider using a single expert, jointly instructed by the parties, with the costs shared equally.

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## Settlement and ADR

**8.** Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings.

**9.** Parties should continue to consider the possibility of reaching a settlement at all times, including after proceedings have been started. Part 36 offers may be made before proceedings are issued.

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**10.** Parties may negotiate to settle a dispute or may use a form of ADR including—

(a) mediation, a third party facilitating a resolution;

(b) arbitration, a third party deciding the dispute;

(c) early neutral evaluation, a third party giving an informed opinion on the dispute; and

(d) Ombudsmen schemes.

(Information on mediation and other forms of ADR is available in the Jackson ADR Handbook (available from Oxford University Press) or at—

<https://www.gov.uk/guidance/a-guide-to-civil-mediation>

**11.** If proceedings are issued, the parties may be required by the court to provide evidence that

ADR has been considered. A party's silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.

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## Stocktake and list of issues

**12.** Where a dispute has not been resolved after the parties have followed a pre-action protocol or this Practice Direction, they should review their respective positions. They should consider the papers and the evidence to see if proceedings can be avoided and at least seek to narrow the issues in dispute before the claimant issues proceedings.

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## Compliance with this Practice Direction and the Protocols

**13.** If a dispute proceeds to litigation, the court will expect the parties to have complied with a relevant pre-action protocol or this Practice Direction. The court will take into account non-compliance when giving directions for the management of proceedings (see CPR 3.1(4) to (6)) and when making orders for costs (see CPR 44.3(5)(a)). The court will consider whether all parties have complied in substance with the terms of the relevant pre-action protocol or this Practice Direction and is not likely to be concerned with minor or technical infringements, especially when the matter is urgent (for example an application for an injunction).

**14.** The court may decide that there has been a failure of compliance when a party has—

- (a) not provided sufficient information to enable the objectives in paragraph 3 to be met;
- (b) not acted within a time limit set out in a relevant protocol, or within a reasonable period; or
- (c) unreasonably refused to use a form of ADR, or failed to respond at all to an invitation to do so.

**15.** Where there has been non-compliance with a pre-action protocol or this Practice Direction, the court may order that

- (a) the parties are relieved of the obligation to comply or further comply with the pre-action protocol or this Practice Direction;
- (b) the proceedings are stayed while particular steps are taken to comply with the pre-action protocol or this Practice Direction;
- (c) sanctions are to be applied.

**16.** The court will consider the effect of any non-compliance when deciding whether to impose any sanctions which may include—

- (a) an order that the party at fault pays the costs of the proceedings, or part of the costs of the other party or parties;
- (b) an order that the party at fault pay those costs on an indemnity basis;
- (c) if the party at fault is a claimant who has been awarded a sum of money, an order depriving that party of interest on that sum for a specified period, and/or awarding interest at a lower rate than would otherwise have been awarded;
- (d) if the party at fault is a defendant, and the claimant has been awarded a sum of money, an order awarding interest on that sum for a specified period at a higher rate, (not exceeding 10% above base rate), than the rate which would otherwise have been awarded.

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## Limitation

**17.** This Practice Direction and the pre-action protocols do not alter the statutory time limits for starting court proceedings. If a claim is issued after the relevant limitation period has expired, the defendant will be entitled to use that as a defence to the claim. If proceedings are started to comply with the statutory time limit before the parties have followed the procedures in this Practice Direction or the relevant pre-action protocol, the parties should apply to the court for a stay of the proceedings while they so comply.

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## Protocols in force

**18.** The table sets out the protocols currently in force and from which date.

Protocol	Came into force
Personal Injury	6 April 2015
Resolution of Clinical Disputes	6 April 2015
Construction and Engineering	9 November 2016 2nd Edition
Defamation	02 October 2000
Professional Negligence	16 July 2000
Judicial Review	6 April 2015
Disease and Illness	8 December 2003
Housing Disrepair	6 April 2015
Possession Claims by Social Landlords	6 April 2015
Possession Claims for Mortgage Arrears	6 April 2015
Dilapidation of Commercial Property	1 January 2012
Low Value Personal Injury Road Traffic Accident Claims	30 April 2010 extended from 31 July 2013
Low Value Personal Injury Employers' and Public Liability Claims	31 July 2013
Personal Injury Claims Below the Small Claims Limit in Road Traffic Accidents	31 May 2021

Updated: Wednesday, 6 April 2022

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