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| ONR Guidance Document  The Expert Witness in Criminal Proceedings in England and Wales |



ONR Guidance

The Expert Witness in Criminal Proceedings in England and Wales

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Process Owner: Professional Lead – Operational Inspection

Issue No.: 1

Publication Date: Nov-2022

Next Major Review Date: Nov-2027

Doc. Ref. No.: ONR-ENF-GD-010

Record Ref. No.: 2019/356581

Table : Revision commentary

|  |  |
| --- | --- |
| Issue No. | Description of Update(s) |
| 0 | New document issued. |
| 1 | No changes to content. Format of document and review date updated. |

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# Introduction

In England and Wales, an expert witness to the court fulfils a particular role. It is the duty of an expert witness instructed in a criminal case to act in the cause of justice. There is no ‘ownership’ of an expert by either the prosecution or the defence in a criminal case.   
Instead, the expert’s role is to assist the court or jury on matters where their ordinary, everyday experience does not enable them to adequately consider the issues in the case.

There is sometimes confusion in distinguishing between an expert, who is assisting the court, and a person who has expertise and skills which they bring to the investigation of a potentially criminal offence. However, the difference is important since it affects how that expertise, and those skills are used during an investigation and any subsequent criminal proceedings.

For the purposes of this guide the former role will be considered the ‘expert’, and the latter a ‘specialist’.

Expert witnesses may have three privileges over ordinary witnesses of fact:

* They can remain in court prior to giving evidence, (unless there is a challenge raised about any factual evidence from which they might form their opinion) in order to hear evidence of both fact and circumstance;
* They may express an opinion on matters within their expertise; and,
* They may refer to the works of others within their field of expertise without infringing the rules against hearsay.

These privileges are subject to the permission of the court, for whom they are working.

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# Purpose and Scope

This guide is intended to aid those who act as an expert in criminal proceedings in England and Wales, and those who engage or interact with a person who is likely to be appointed as an expert to assist the court.

The guide introduces the legislation, rules, and directions which are relevant to the role of an expert, which must be followed when an expert is deemed necessary and appointed. **Note:** An individual professionalism may also have its own codes of practice issued by the relevant body regarding the role of an expert in criminal proceedings. Any such codes are out-with the scope of this document.

The guide does not attempt to describe how an expert report is written other than in general terms, or what is essential content; each report will vary depending on the questions an expert is asked, and the facts they may have to consider.

This guide consists of four parts:

* Part one addresses relevant legislation, rules, and directions (Section 3);
* Part two discusses the role of an investigator instructing an expert (Section 4);
* Part three discusses the role of an expert being instructed by an investigator and any output so produced (Section 5); and,
* Part four expresses the views of a prosecutor intending to use an expert in criminal proceedings (Section 6).

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# Part 1 - Legislation, Rules, and Directions

## Legislation

As with all criminal investigations, the Criminal Procedure and Investigations Act 1996 (CPIA) is relevant.

The [CPIA Code of Practice](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/447967/code-of-practice-approved.pdf) (ref. [1]) (“the Code”) made under Section 23(1) of the CPIA governs the regulatory aspects of the CPIA. Although the Code applies only to police officers, other investigators are required to “have regard” to any relevant provisions of it.

The purpose of this guide is not to discuss the detail of that Act or the Code, but it is necessary to summarise the four duties relevant to the work of the expert (and also the investigator);

* the duty to record information received and/or generated during their participation in any investigation/subsequent proceedings (this can range from initial instructions, relevant communications, to draft and final reports);
* the duty to retain such information and material provided to or generated by the expert during the course of their duties as an expert to an investigation or proceedings.   
  The Code requires that material of any kind (including information and objects) obtained in the course of a criminal investigation as defined by the CPIA, and which may be relevant to the investigation, must be retained. The examples provided are not an exhaustive list, but do include drafts of expert reports, peer review comments, notes taken during the period of instruction etc. The Code makes it clear that there must be a disciplined management of material relevant to the expert’s work.);
* the duty to reveal such information/material to the person acting as the disclosure officer during any investigation/proceedings (please note; the disclosure officer can be appointed early in any investigation); and,
* the duty to review whether any information has come to the expert’s attention since taking on their role, which they feel is necessary to reveal to the disclosure officer.

Further information on disclosures is found in The Crown Prosecution Service’s (CPS) [Disclosure Manual](https://www.cps.gov.uk/legal-guidance/disclosure-manual) (ref. [2]).

CPIA is so important that, in any report generated for the purpose of use in criminal proceedings the expert must make it clear via a declaration that they have:

* Complied with their duties in accordance with the CPIA; and,
* Provided a list of all relevant material (that they have gathered or generated).

## Rules

The Criminal Procedure Rules 2015 (CPR 2015) have recently been amended by the Criminal Procedure (Amendment) Rules 2019. The amendment to the rules came in to force on 1 April 2019. They made a number of changes that define the role of the expert, so they retain the privileges described above.

The amended role of the expert, as described by rule 19 of CPR 2015, can be found on the GOV.UK [website](https://www.gov.uk/guidance/rules-and-practice-directions-2020) (ref. [3]).

## Directions

Directions have the same legal status as rules.

The changes to the directions regarding experts are described in this section. They follow a [ruling](https://www.judiciary.uk/wp-content/uploads/2019/10/CrimPD-9-CONSOLIDATED.pdf) by Lord Burnett CJ in 2019 (ref. [4]).

The CPR 2015 and the Criminal Practice Directions together are the law. They provide a code of current practice that is binding on the courts to which they are directed, and which promotes the consistent administration of justice. Participants must comply with the Rules and Practice Directions.

The key changes – introduced to allow transparent challenge of an expert’s credibility, qualifications and expertise – are reproduced below:

“AMENDMENT NO. 8 TO THE CRIMINAL PRACTICE DIRECTONS 2015”

Introduction

This is the eighth amendment to the Criminal Practice Directions 2015.1 It is issued by the Lord Chief Justice on 28th March 2019 and comes into force on 1st April 2019.

CPD V Evidence 19A: EXPERT EVIDENCE

19A.7 - To assist in the assessment described above, 19.3(3)(c) requires a *party* who introduces expert evidence to give notice of anything of which that party is aware which might reasonably be thought capable of undermining the reliability of the expert's opinion or detracting from the credibility or impartiality of the expert; and 19.2(3)(d) requires the *expert* to disclose to that party any such matter of which the expert is aware. Examples of matters that should be disclosed pursuant to those rules include (this is not a comprehensive list), both in relation to the expert and in relation to any corporation or other body with which the expert works, as an employee or in any other capacity:

* 1. any fee arrangement under which the amount or payment of the expert's fees is in any way dependent on the outcome of the case (see also the declaration required by paragraph 19B.1 of these directions);
  2. any conflict of interest of any kind, other than a potential conflict disclosed in the expert's report (see also the declaration required by paragraph 19B.1 of these directions);
  3. adverse judicial comment;
  4. any case in which an appeal has been allowed by reason of a deficiency in the expert's evidence;
  5. any adverse finding, disciplinary proceedings or other criticism by a professional, regulatory or registration body or authority, including the Forensic Science Regulator;
  6. any such adverse finding or disciplinary proceedings against, or other such criticism of, others associated with the corporation or other body with which the expert works which calls into question the quality of that corporation's or body's work generally;
  7. conviction of a criminal offence in circumstances that suggest:
     1. a lack of respect for, or understanding of, the interests of the criminal justice system (for example, perjury; acts perverting or tending to pervert the course of public justice),
     2. dishonesty (for example, theft or fraud), or
     3. a lack of personal integrity (for example, corruption or a sexual offence);
  8. lack of an accreditation or other commitment to prescribed standards where that might be expected;
  9. a history of failure or poor performance in quality or proficiency assessments;
  10. a history of lax or inadequate scientific methods;
  11. a history of failure to observe recognised standards in the expert's area of expertise;
  12. a history of failure to adhere to the standards expected of an expert witness in the criminal justice system.

19A.8 - In a case in which an expert, or a corporation or body with which the expert works, has been criticised without a full investigation, for example by adverse comment in the course of a judgment, it would be reasonable to expect those criticised to supply information about the conduct and conclusions of any independent investigation into the incident, and to explain what steps, if any, have been taken to address the criticism.

19A.9 - The rules require disclosure of that of which the expert, or the party who introduces the expert evidence, is aware. The rules do not require persistent or disproportionate enquiry, and courts will recognise that there may be occasions on which neither the expert nor the party has been made aware of criticism. Nevertheless, where matters ostensibly within the scope of the disclosure obligations come to the attention of the court without their disclosure by the party who introduces the evidence then that party, and the expert, should expect a searching examination of the circumstances by the court; and, subject to what emerges, the court may exercise its power under section 81 of the Police and criminal Evidence Act 1984 or section 20 of the CPIA to exclude the expert evidence.**”**

Certain parts in the judgement reproduced above are of particular importance:

* ‘Party’ means the ONR, where the investigator is acting on behalf of ONR. For ONR, the prosecutor is acting on behalf of the’ Party’, and so the onus created by the amendment to the rules does not lie with them , rather remains with ONR.
* The ‘Expert’ is under a duty to disclose anything that might affect their ability to properly support the court.
* Points (f) and (i) demonstrate how important it is that where an expert is appointed, all steps necessary should be taken to prevent the appointing party (ONR) being besmirched because of the work of the expert; it can affect future use of an expert in criminal proceedings.

As can be discerCJ [2019] EWCA 495:pertise - are me were key to the role of the expert. The role of the expert, as described byned from the above, the changes made to the rules to allow transparent challenge of an expert’s credibility, qualifications and expertise could have wide reaching ramifications. The role of the expert is not one that should therefore be undertaken lightly. Nor is the role of the investigator who is instructing an expert.

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# Part 2 - The Investigator Instructing the Expert

Firstly, the investigator must ask themselves the question ‘why do I need an expert?’   
The investigator is reminded about the comments made in Section 1 in relation to an expert:

* They remain in court prior to giving evidence, (unless there is a challenge to any factual evidence from which they might form their opinion) in order to hear evidence of both fact and circumstance;
* They may express an opinion on matters within their expertise; and
* They may refer to the works of others within their field of expertise without infringing the rules against hearsay.

Specialist inspectors become involved in an investigation because of their specialist knowledge. They provide a skill and knowledge set to the investigation that allows the investigation to progress. However, in proceedings they are ordinary witnesses of fact.

A factual witness is an individual who knows facts about the specific case at hand.   
For example, a person may witness a fall at height, so they know facts about the specific case. In a similar way a specialist can collate and present in a logical way the information they are provided with. There is some opportunity to express opinion; clearly, they can interpret what they have found.

Just because they have become aware of an investigation, might have provided advice, and possibly given direction to lines of enquiry does not preclude a specialist from being an expert witness instructed in a criminal case to act in the cause of justice. Importantly, it must be recognised that the more a specialist becomes intimate with the investigation process, the more vulnerable they are to challenge at court regarding their independence.

A specialist inspector may advise the investigator(s) on the gathering of evidence and questions to put to witnesses or to a suspect. However, if a specialist has been appointed (or is intending) to act as a potential expert in any future proceedings, they should generally avoid taking statements as part of the investigation or attending an interview of a suspect under caution (PACE interview) if possible. Good practice is to utilise different specialist inspectors in these roles to prevent their independence from being questioned.

If a specialist inspector (who is not to act as an expert) attends a PACE interview, the fact of their specialist expertise should be disclosed (to the interviewee and any legal representative).

The above points should be considered by the investigator – particularly for areas where there are limited subject matter experts within ONR – when conducting their investigations (refer to ref. [5] for further information).

The key question to be asked is, ‘Do any potential proceedings need an expert, who has the privileges described above, to advise the court?’ If the answer is yes, then the following is relevant to identifying the most appropriate person(s) to take on the expert role.

The decision of whether an ‘independent expert’ is necessary and who it should be rests with the person responsible for managing the investigation. It is the investigator who makes the decision between identifying a witness as a specialist who can speak to matters of fact, or a witness who has the privileges described above in order to aid the court, and can be presented as an expert, sufficiently separate from the investigation that their independence for court proceedings can be reasonably guaranteed. It is not possible to differentiate between an ‘expert’ and a ‘specialist’ in this guide because such a decision is made on a case-by-case basis and is for the investigator and ultimately a tribunal/court to decide.

Those instructing an expert need to think carefully about what information should be supplied to them and how it should be communicated. It is good practice to ask open questions of the expert in any communications that allow them the scope to form their own unbiased opinion. This is not to undermine the disclosure process described above when considering CPIA. Rather, that their ability to put opinion before the court can be undermined if it appears their opinion has been improperly influenced. However, the investigator should not prevent the expert from conducting their own lines of enquiry, even if it seems that this could undermine any potential proceedings. The expert is acting on behalf of the court.

A final note for the investigator; many matters are now settled out of court between experts appointed by either side. However, it is likely that an expert will need to give oral testimony, in an adversarial environment. A question to consider is whether a subject matter expert can explain a particular matter key to the considerations of the court, in a manner that assists the court. It is worth noting that to maximise authority, in many cases communication skills are just as important as expertise in the topic under discussion.

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# Part 3 - The Expert Receiving Instructions

If an expert is required for potential proceedings, they must be clear in their role. In order to act in such a role, they must be properly appointed, and this should be properly recorded. The expert should record and retain all such details.

In order to perform the role, they must be provided with:

* basic information such as names, addresses, telephone numbers, dates of birth, and dates of incident(s);
* the type of expertise which is called for; the purpose for requesting the report, and a description of the matter to be investigated;
* questions to be addressed;
* the history of the matter, identifying any factual matters that may be in dispute;
* details of any relevant documents;
* whether proceedings have been commenced or are contemplated, the identity of the parties, and whether the expert may be required to attend to give evidence; and,
* in the case of medical reports: where the medical records are situated (including, where possible, the hospital record number); whether or not the consent of the client/patient to an examination and disclosure of records has been given; and whether or not the records are to be obtained and provided by the solicitor.

Those requested to act as experts should be only accept the request in matters where they:

* have the knowledge, experience, expertise, qualifications, or professional training appropriate for the assignment; and,
* have access to the resources required for the assignment.

They should make clear what can and cannot be expected on completion of the assignment. In particular, as soon as possible after being instructed, they should identify any aspects of a commission with which they are unfamiliar, or not professionally qualified to deal with, or on which they require or would like further information or guidance. It is clear that experts should not give evidence in matters outside their experience (refer to ref. [6]).

If any part of the assignment is to be undertaken by parties other than the individual instructed, this should be made clear to the investigator

Inevitably, a report will be one output expected from an expert. Appendix 1 is paraphrased from the Health and Safety Executive’s (HSE) guidance on the report, and the process behind its generation. However, there is no template for an expert report; the report will vary according to the questions asked. Further commentary is provided in Section 6 of this document.

There is also a requirement to produce a declaration to an expert’s report. Appendix 2 details the content of the declaration. This declaration captures some of the responsibilities described in rules and directions above.

Finally, the expert might be interviewed by the prosecutor prior to proceedings to evaluate the value of their evidence. The prosecutor cannot lead the expert to an opinion, merely question to see whether the expert adds value to court proceedings. They cannot ‘rehearse’ the expert to practice presenting their valuable addition to court proceedings in the best way. The outcome of this process may mean that an expert will not be used by the prosecutor. This however does not devalue the expertise of the expert.

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# Part 4 - The Prosecutor, Reviewing and Using and Expert

At the outset it is vital to understand the core rules that exist in relation to expert evidence in criminal proceedings. The following comments are relevant to the Rules and Practice Directions extant in April 2019. **Note:** Colleagues are reminded, this change and they should refer to the latest version.

Expert evidence is admissible in criminal proceedings if in summary:

* it is relevant to a matter in issue in the proceedings;
* it is needed to provide the court with information likely to be outside the courts own knowledge and experience; and,
* the witness is competent to give that evidence e.g., criminal practice direction v expert evidence.

In addition, case law reminds us that:

* ‘an expert’s opinion is admissible to furnish the court with… Information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary’ (ref. [7]).

And that:

* ‘an expert witness should provide independent assistance to the court by way of objective unbiased opinion, in relation to matters within his expertise.’ (ref. [8]).

The first question that a prosecutor [and also the investigator] must answer is whether the instruction of an expert would be helpful to the case in terms of providing the court with expert guidance that would assist its understanding of the case.

If the answer to that question is yes, then the next key objective of the prosecutor is to ensure that any expert evidence is presented to the court in such a way that the judge and jury can get the maximum benefit from that assistance. This will be achieved if the evidence is placed in its proper context within the case as a whole and is presented in a clear and straightforward manner.

It is important to remember that any expert evidence that is placed before the court will be just one aspect of the case that the jury will consider in reaching their verdict. **It is not for the expert to seek to determine the outcome of the case**. The expert is there to assist the jury to fully understand any technical issues that are placed before them so that they can form their own conclusions after taking account of any expert opinions.

In regulatory prosecution work you may well encounter a defence expert’s report that seeks to go well beyond the true role of an expert by dealing with issues that are not within the expert’s proper remit and that seek to impinge upon the jury’s own functions. This can take the form of seeking to introduce factual evidence on behalf of the defendant or expressing opinion upon matters that are not issues for the expert to address. In addition, attempts may be made to express opinions on matters that may be technical issues, but which are actually outside that particular expert’s discipline.

Prosecutors must always be alive to these issues and must meticulously review any defence expert’s report and identify any such issues. Where such issues arise, the court and the defendant will be put on notice of any objections to the admission of any part of the expert’s report that strays outside of admissible expert opinion and a formal note or skeleton argument will be served and the matter dealt with before the commencement of any trial.

The core rules on expert evidence in criminal proceedings are set out in detail in **Part 19 of the Criminal Procedure Rules and Practice Directions** on expert evidence (ref. [3]).   
Anyone involved in any aspect of the prosecution of a criminal case involving expert evidence must ensure that they have a working knowledge of these documents. Amendments are regularly made to those rules, and it is good practice therefore to check the latest version of the same which is freely available online when commencing any case involving expert evidence.

By way of example, the **Criminal Practice Direction V at 19.A.5 and 19.A.6** sets out detailed provisions as to the matters that a court may take into account in determining the reliability of expert evidence which includes amongst other matters : the extent and quality of the data on which the expert opinion is based, the validity and accuracy of methods used, whether all relevant information was considered; any unjustifiable assumptions made by the expert and instances where the expert seeks to rely upon an inference or conclusion not properly reached.

**Rule 19.2 of the Criminal Procedure Rules** (ref. [3]) sets out in clear terms that the expert’s duty is to help the court by giving objective and unbiased opinion within the expert’s areas of expertise. This is an important qualification. Experts are not given carte blanche to express opinions on any issues that they wish to but are rather limited to matters truly within their areas of expertise. Linked to this is a duty when giving evidence in person to draw the courts attention to any question the answer to which would be outside the expert’s area or areas of expertise.

Prosecutors have an overriding obligation to conduct cases fairly and this must also apply to their interaction with expert witnesses. In instructing a prosecution expert witness the prosecutor is not seeking someone to provide a favourable opinion in order to help secure a conviction but is rather seeking expert opinion that will ultimately assist the judge or jury upon some technical aspect of the case.

In this regard the instructions provided to an expert by a prosecutor should be open, fair and transparent and should not seek to lead the expert into forming a particular opinion. The expert must be provided with all the admissible evidence that is being presented to the court and any question set sent to an expert should generally take the form of open questions which seek to obtain the experts opinion on matters within his or her expertise, the answers to which would assist the court.

Every set of instructions will be different. As it is not for the prosecutor to be overly prescriptive in his or her instructions, it is permissible to use a question as part of the question set that invites the expert to for example, ‘provide further expert opinion on any other aspects of health and safety that you feel appropriate’. The prosecutor will proceed on the basis that in due course the defendant will be entitled to see the question set that you send out to your expert.

Whilst every case will necessarily have its own individual characteristics, it should often be possible to obtain a comprehensive report from an expert based on a question set running to a dozen or less questions on a single A4 sheet of paper. The important point to remember is that an expert is not being asked to determine the outcome of a case, but rather to provide objective unbiased opinion on technical matters within his or her areas of expertise. As such there is no consistent format to an expert report.

As a matter of good practice, all instructions sent to an expert should contain a copy of or a link to **Part 19 of the Criminal Procedure Rules** (ref.[3])and in particular **rule 19.4** which sets out in detail the principles that cover the content of an expert’s report.

When a report is received from an expert, you will have to decide whether you wish to rely upon that expert as a witness on behalf of the prosecution. If you do so, then their report should be served upon the defence with an accompanying section 9 (Criminal Justice Act 1967) statement exhibiting the same.

There is no obligation to call an expert that has been instructed, nor does an unfavourable report mean that a case cannot proceed. Remember that an expert witness is ultimately one witness in the case – they may be an important potential witness, but they would rarely on their own determine a case one way or another.

A prosecution will naturally be informally reviewed upon the receipt of an expert’s report.   
If that report is unfavourable or damages the prosecution case, then the prosecutor will consider how to deal with this situation.

Each case will depend on its own facts at this point. If there is a reasonable prospect of conviction despite the contents of that report then you would normally proceed with the prosecution, either without any expert evidence, or by obtaining an alternative expert report.

In both cases the unfavourable report should be disclosed to the defendant on the basis that it is likely in those circumstances to either undermine the prosecution case, or potentially assist the defendant. The defendant will then have the option of calling the expert as a defence witness. This is rare, but it does happen. It is perfectly possible however to proceed with a case in those circumstances and to obtain a conviction.   
In essence this simply re-iterates the fact that the jury decide guilt or innocence, not one or two experts.

It should also be noted that prosecutors have an obligation to notify the defence if the prosecution expert evidence changes during the course of the case (**Criminal Procedure Rule 19.2(3)** (ref. [3])) and that they must also give notice of anything that they become aware of during the course of a case that might reasonably be thought capable of undermining the reliability of the prosecution experts report (**Criminal Practice Direction 19A.7**)

Most prosecutions result in guilty pleas, including those in which expert evidence has been obtained. However, even in such guilty plea cases, experts’ reports can be relevant when the court proceeds to sentence.

A recent practice has developed in which defendants plead guilty but then serve expert evidence by way of mitigation, either to persuade the court that culpability is lower than the prosecution allege, or that the likelihood of harm is lower.

The same rules apply to the admissibility of evidence as apply in trials. Expert evidence will only be admissible if the expressed opinion falls within the expert’s area of expertise and assists the sentencing judge in forming his or her conclusions. In many cases large parts of an expert’s report served upon sentence will not meet these criteria and a formal objection should be raised on this in the form of a written note or skeleton argument served upon the defence and the sentencing court.

In the small minority of cases that do proceed to trial, the court may order the prosecution and defence experts to discuss the expert evidence in advance of trial. This is covered explicitly in **Rule 19.6 of the Criminal Procedure Rules** (ref. [3]) which provides that the court may direct experts to discuss the expert issues in the proceedings and to prepare a statement for the court of the matters on which they agree and disagree and giving their reasons.

It should be noted that the obligation here is simply to discuss (which includes a telephone discussion) and record areas of agreement and disagreement, rather than to reach agreement as this clearly may not be possible. This is nevertheless a very useful exercise as it can narrow the issues for the trial and the prosecution should seek an order in this regard in all cases that proceed to trial.

The value of narrowing the issues is that it can avoid the jury getting bogged down in technical matters, which may obscure the central facts and the core issues in the case. Trials should not be about which expert the jury prefers but should be about the jury’s overall assessment of all the facts and evidence placed before it.

It is important to remember that it is the evidence that is placed before the jury that is crucial. Occasionally oral evidence at trial can differ substantially from the written evidence that the experts considered when compiling their report. For this reason, it is essential that the prosecution expert witness is present at court throughout the whole of the evidence as it is ultimately that evidence that he or she must base their opinion on, rather than other material that has not been presented to the jury.

In addition, it will often be essential for the prosecution expert to remain in court whilst the defence expert gives his or her evidence or during cross examination as the prosecution expert may be able to assist with lines of cross examination as the defence expert evidence proceeds.

# Conclusion

In contrast to Scotland, ONR bring proceedings and their prosecutor acts on their behalf. The investigator, the expert, and the prosecutor must act in accordance with the legislative and directions applicable in this direction.

There is no template for the role of the expert, or for those requesting their expertise.   
Every request must be dealt with on a case-by-case basis.

This guidance should be read in conjunction with that issued for the expert in criminal proceedings in Scotland.

# Appendix 1: The Expert’s Report

The main point is that any report is for the court, not the client; **you are aiding the court whoever you employer is**

There are likely to be two main types of expert report in prosecution proceedings:

* one dealing with clearly measurable matters (such as the results of analysis and tests);
* the other with broader matters of opinion, such as safe systems of work.

The first can best be described as a laboratory report and the second might be termed a consultant's report, although some reports may include elements of both.

Reports should ideally therefore be stand-alone documents, but both can express opinion and the first is typically referenced to by the second.

**Report Contents**

All reports should begin with the expert's name, official address, occupation, relevant academic and professional qualifications, accreditations including membership of professional institutions, career history, relevant experience, the range and extent of his/her expertise and any limitations upon the expertise. There is an option to include a detailed CV in an appendix.

The report should also include:

* Information on who has carried out any examination, measurement, test or experiment which the expert has used for the report, including that person's qualifications, relevant experience and accreditation. The report should give details of the methodology used, summarise the findings on which the expert relies and say whether or not such measurements etc. were carried out under the expert's supervision;
* Where there is a range of opinion in the matters dealt with in the report, a summary of the range of opinion and the reasons for their opinion;
* If the expert is not able to give an opinion without qualification, state the qualification;
* Include such information as the court may need to decide whether the expert's opinion is sufficiently reliable to be admissible as evidence; For example, any material facts or matters that detract from the expert's opinions, and any points which should fairly be made against any opinions expressed in the report, should also be set out.
* Details of any literature or any other information or material which the expert has relied on in making the report or which might assist the court (see also 'Extrinsic material' below);
* A summary of the conclusions reached;
* A statement that the expert understands their duty to the court to provide independent assistance by way of objective and unbiased opinion on matters within their expertise  and that they have complied, and will continue to comply, with that duty.   
  The expert should acknowledge that the expert will inform all parties and, where appropriate, the court in the event that their opinion changes on any material issue   
  (refer to Appendix 2);
* The same declaration of truth as that contained in a voluntary witness statement form (LP70).

The expert’s final opinion should be based on as much information as possible and, if necessary, they can then deal with any question which may arise subsequently, including matters which counsel may wish to be dealt with if the case goes to the Crown Court.   
The report should not be signed by the expert until it is ready to be disclosed.

Expert evidence may be introduced by way of summary (if the other party agrees) or by serving the report on the court and the defendant/s as soon as practicable and in any event, when the prosecution is making an application which is supported by the expert evidence, for example at the mode of trial determination.

If service is not carried out in accordance with the Criminal Procedure Rules, the expert evidence cannot be introduced, unless all parties agree, or the court gives permission.

When an expert report is served on another party or the court, those instructing the expert must inform them at once. If, on exchange of experts' reports, matters arise that require a further or supplemental report, the above guidelines should once again be followed.

**Opinion**

The opinion of an expert is admissible on matters that are outside the ordinary knowledge of the court but within their expertise. The expert should therefore make it clear when any matter falls outside their expertise.

If more than one expert is to be called by the prosecution, it is important to avoid too much overlap in their reports. Each expert should indicate what they have been instructed to provide expert opinion on, where their expertise ends and should not go ‘out on a limb’, as they will be cross-examined on the report if the case is defended.

The prosecution must establish its case beyond reasonable doubt, but it can still do so despite a doubt which an expert might have to accept. This has been expressed as follows:

* the available data may be inadequate to prove scientifically that the alternative hypothesis is false, so the scientific witness will answer ‘No, I cannot exclude it’, though the effect of his evidence as a whole can be expressed in terms such as ‘But for all practical purposes (including the jury's) it is so unlikely that it can safely be ignored’.

The expert should explain the operation and any shortcomings in terms which a layman can understand, and it may be useful for them to use headings.

If the expert has dealt with similar subject matter elsewhere where better standards were achieved, they can make comparisons.

The expert should not, disregard evidence or conclusions that are unfavorable to the prosecution. They should deal with factors that do not support their opinion and explain how they have taken them into account. These should be discussed with the Investigating Inspector, and/or lawyer and the expert should point out any potential problems.

**Expected Defences**

The expert should be asked to deal with any expected defence and evaluate any defence documents. Although the prosecution expert will give evidence first, their report can be the basis for advance rebuttal of expected defences.

**Exhibiting the Report**

To exhibit the report to a witness statement (form LP70), the initials of the author and a consecutive number should be used. To formally exhibit the report, the usual form of words in the witness statement is as follows:

"I produce a report of my findings [X pages long] as exhibit YZ/1 [initials of the author and the report followed by a number: this will always be '1' unless the expert has already produced exhibits in their LP70 statement], which is signed by me and dated [date of signature]".

When a witness (including an expert) signs a statement on form LP70, they sign a declaration that states that the content of the statement is true to the best of their knowledge. The witness also accepts that they might be prosecuted if they knowingly state something which they know to be untrue. The responsibility for the final content of the report remains with the author.

**Exhibits**

The expert should properly introduce and exhibit any presentational material that they have produced, and they may refer to exhibits produced by others, such as photographs, sketches, models, plans, tables, and graphs. Even in the simplest of cases, illustrative material may be very helpful in explaining the case to the court.

**Extrinsic Material**

The expert should bring to the attention of the prosecutor and the court any material that will help decide the case. This may include articles, published papers, codes of practice, guidance, published and unpublished research reports etc. References to material to which the defendant would or should have had access may be particularly useful. The expert should exhibit to the report any material to which they refer, or the relevant extract from it, and they should have the whole document or publication available in court.   
Some documents may be produced without being exhibited to the report (for example, approved codes of practice) but in some cases it may be necessary for the expert to explain its significance. Regulations may also require explanation.

The expert may need to do a literature search or obtain a statistical analysis, and if they can verify that analysis, it will not be necessary to call the statistician.

The defence may object to reference to other documents (of which the expert is not the author) on the grounds of hearsay. Examples of such documents include British standards, ONR/HSE/ORR guidance documents, industry publications, calculation tables, textbooks, articles, and summaries of research. The prosecutor must establish that the expert is competent to express an opinion on such material; where it does form part of the expert's body of expertise, the expert may refer to the material to support their opinion without infringing the rules against hearsay.

**Updating the Report**

As indicated in 'Contents of the report' above, after an expert report has been produced, matters may arise that require the report to be amended. Consideration should be given as to whether a new, revised report is necessary or whether, if the changes are only minor, additional information could be produced in the form of a supplementary report. Details of the changes, referring to the sources of any new or additional information and setting out any revised conclusions, must be recorded.

**Draft Reports**

The report, or statement, of an expert should not be signed at an early stage; it should initially be considered a draft and marked as such. This is because:

* the expert will not necessarily have seen all the evidence;
* the expert may consider on reflection that the case, or a part of it, is outside their expertise; and
* the informations/charges and the ambit of the investigation may not yet have been finalised.

Draft reports and statements should be retained, as they may be disclosable to the defence. Whether draft reports will in fact be disclosed at a later stage will be a matter for the disclosure officer and prosecutor, who consider the disclosure test.

Professional oversight of an expert's work by their line manager is useful in establishing a benchmark for quality and accuracy and can be done without compromising personal authorship of the report.

Discussion of the content of a report between the expert and the investigating inspector or lawyer/s is entirely proper, provided care is taken to ensure that the report is, and is seen to be, the expert's own product. When an inspector, or anyone else, communicates with an expert, whether in-house or from outside, they should be careful to ensure that there is no risk that the communication could be misinterpreted to suggest that it might influence the expert's opinion.

The expert and the inspector (or other person) instructing them should remember that all communications (including draft reports), other than those between an expert and lawyers, may be liable to be disclosed. Communications between the expert and the lawyers in the case are privileged. A note of any such discussion should be made and retained.

The expert should set out in their report only those facts that have been, or are to be, proved in evidence and other expert opinion upon which they base their opinion. They can refer to written admissions made by the defendant. Experts should be aware that, just as a party must challenge in cross-examination contested evidence given by a witness of fact, so the opinions of an expert must be challenged if they are disputed.

Before any decision to prosecute is taken, it is permissible for an expert to advise as to whether, in their opinion, there is any breach of the law; the balance of legal opinion permits an expert to give opinion on what has been called “the ultimate issue”. However, experts should be careful; where an expert deals with such an issue in their report, the judge in a Crown Court trial must direct the jury that they are not bound by the expert’s opinion, and that the issue is for them to decide.

Expert witnesses may be the subject of management control and/or auditing to ensure quality and accuracy. Experts can legitimately be asked to account for any delay caused in providing their written opinions and may be required to do so in open court.

# Appendix 2: The Declaration

The following is the declaration to be provided in an experts report in England and Wales. This version applies from 1 April 2019 and is taken from the relevant Criminal Practice Direction.

‘I (name) DECLARE THAT:

1. I understand that my duty is to help the court to achieve the overriding objective by giving independent assistance by way of objective, unbiased opinion on matters within my expertise, both in preparing reports and giving oral evidence. I understand that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied with and will continue to comply with that duty.
2. I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.
3. I know of no conflict of interest of any kind, other than any which I have disclosed in my report.
4. I do not consider that any interest which I have disclosed affects my suitability as an expert witness on any issues on which I have given evidence.
5. I will advise the party by whom I am instructed if, between the date of my report and the trial, there is any change in circumstances which affect my answers to points 3 and 4 above.
6. I have shown the sources of all information I have used.
7. I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.
8. I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.
9. I have not, without forming an independent view, included or excluded anything which has been suggested to me by others including my instructing lawyers.
10. I will notify those instructing me immediately and confirm in writing if for any reason my existing report requires any correction or qualification.
11. I understand that:
    1. my report will form the evidence to be given under oath or affirmation;
    2. the court may at any stage direct a discussion to take place between experts;
    3. the court may direct that, following a discussion between the experts, a statement should be prepared showing those issues which are agreed and those issues which are not agreed, together with the reasons;
    4. I may be required to attend court to be cross-examined on my report by a cross-examiner assisted by an expert; and,
    5. I am likely to be the subject of public adverse criticism by the judge if the Court concludes that I have not taken reasonable care in trying to meet the standards set out above.
12. I have read Part 19 of the Criminal Procedure Rules and I have complied with its requirements.
13. I confirm that I have acted in accordance with the code of practice or conduct for experts of my discipline, namely *[identify the code]*
14. [For Experts instructed by the Prosecution only] I confirm that I have read guidance contained in a booklet known as *Disclosure: Experts’ Evidence and Unused Material* which details my role and documents my responsibilities, in relation to revelation as an expert witness. I have followed the guidance and recognise the continuing nature of my responsibilities of disclosure. In accordance with my duties of disclosure, as documented in the guidance booklet, I confirm that:
    1. I have complied with my duties to record, retain and reveal material in accordance with the Criminal Procedure and Investigations Act 1996, as amended;
    2. I have compiled an Index of all material. I will ensure that the Index is updated in the event I am provided with or generate additional material; and,
    3. in the event my opinion changes on any material issue, I will inform the investigating officer, as soon as reasonably practicable and give reasons.

I confirm that the contents of this report are true to the best of my knowledge and belief and that I make this report knowing that, if it is tendered in evidence, I would be liable to prosecution if I have wilfully stated anything which I know to be false or that I do not believe to be true.’

# References

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| [1] | Ministry of Justice, “Statutory guidance - Criminal Procedure and Investigations Act Code of Practice,” February 2015. [Online]. Available: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/447967/code-of-practice-approved.pdf. |
| [2] | CPS, “Disclosure Manual,” July 2022. [Online]. Available: https://www.cps.gov.uk/legal-guidance/disclosure-manual. |
| [3] | Ministry of Justice, “Guidance - Criminal Procedure Rules and Practice Directions 2020,” October 2022. [Online]. Available: https://www.gov.uk/guidance/rules-and-practice-directions-2020. |
| [4] | *Neutral Citation Number: EWCA Crim 495 - Criminal Practice Directions 2015 Amendment No. 8,* 2019. |
| [5] | ONR, “ONR-ENF-GD-005 - Conducting Investigations”. |
| [6] | *Neutral Citation Number: EWCA Crim 162 - R v Clarke Morabir,* 2013. |
| [7] | *R v Turner 1 QB 834,* 1975. |
| [8] | *R v Harris 1 CR App r 532,* 2006. |