

Instructing an Expert

A toolkit for lawyers and expert witnesses in criminal cases involving children.



YOUTH JUSTICE LEGAL CENTRE

yjlc.uk

The Youth Justice Legal Centre (YJLC) has been set up by the charity Just for Kids Law to provide legally accurate information, guidance and training on youth justice law. YJLC is a centre of excellence on youth justice law, providing:

- Guidance and expertise on youth justice law to safeguard children's rights in the youth justice system;
- A dedicated website with comprehensive information, legal resources and best practice guides for lawyers, judges, magistrates, youth offending teams, professionals, children and families;
- Training on youth justice issues for lawyers and non legal professionals working with children;
- Free specialist legal advice for children, their families, youth offending teams, the judiciary and lawyers.

JUST FOR KIDS LAW

justforkidslaw.org

Just for Kids Law is a UK charity that works with and for children and young people to hold those with power to account and fight for wider reform by providing legal representation and advice, direct advocacy and support, and campaigning to ensure children and young people in the UK have their legal rights and entitlements respected and promoted and their voices heard and valued.

MORRISON & FOERSTER

Morrison & Foerster is a leading global law firm with 16 offices across the US, Europe, and Asia. Our clients include some of the largest financial institutions, investment banks, and Fortune 100, technology, and life sciences companies. Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. The firm also has a long history of commitment to the community through providing pro bono legal services, including litigating for civil rights and civil liberties, improving public education for poor children, advocating for veterans, promoting international human rights, winning asylum for the persecuted and safeguarding the environment.

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INTRODUCTION

LAWYERS

This toolkit will walk you through how to instruct an expert witness

EXPERTS

This toolkit will show you how to comply with the law around expert witnesses



This advice is specifically focused on criminal cases involving children

LAWYER

In criminal cases involving children, it will often be essential for the defence to instruct a suitable expert. This toolkit is designed to help you:

- navigate instructing an expert and
- manage the evidence at every stage of the process.

There are many different kinds of experts in criminal cases – we will focus on those that are specific to children in the criminal justice system.

The legal framework your expert will need to comply with can be found in the Criminal Procedure Rules (CrimPR) and Criminal Practice Directions (CrimPD).

EXPERT

You might be instructed as an expert in a criminal case that involves a child.

This toolkit is a guide to making sure you can:

- fulfil the relevant requirements
- demonstrate your credentials to your instructing lawyer
- establish your expertise in court and
- explain the science behind your findings in your written report.

If you are required to give oral evidence, this toolkit will help you to explain your expertise in a way that is persuasive to the decision-maker and is harder to undermine.

THE RULES

**CRIMINAL
PROCEDURE RULES
(CRIMPR)**

**CRIMINAL PRACTICE
DIRECTIONS
(CRIMPD)**



The rules around expert evidence can be found in

When instructing an expert, the Criminal Procedure Rules (CrimPR) and the Criminal Practice Directions (CrimPD) will need to be complied with.

The applicable directions for expert evidence in criminal proceedings are set out in (bit.ly/3p2Ac9B):

- CrimPR Part 19 'Expert evidence' and
- CrimPD Division V Part 19A 'Expert evidence'.

These include important timetables for service of expert reports prior to the trial, and guidance on identifying common ground and what is actually in dispute.

CHOOSING AN EXPERT

Requisite
expertise?

Concise +
clear
writing?



Experience
in court?

Registered
with regu-
latory
body?

CV? Summary of
experience? Work
peer reviewed?

Disciplinary
procedures
or bad
publicity?

LAWYER

Check that the expert has the requisite expertise (and that this is child / adolescent focused where necessary).

Check that the expert has experience in giving evidence before the criminal courts.

Ask for the expert's CV and a summary of their previous clinical, academic and court experience.

Check that the expert is accredited with their regulatory body.

Research if the expert has complied with quality standards published by the appropriate regulatory body.

Check whether the expert's work is peer reviewed.

Investigate whether the expert has ever been the subject of adverse judicial comment or disciplinary proceedings.

EXPERT

You should have a copy of your CV available which includes:

- academic and clinical/technical experience and qualifications, as well as
- previous legal work.

Discuss the following with the lawyer:

- if there have been any adverse judicial comments about either your expertise or your work
- whether you have ever been subject to disciplinary proceedings.

APPROPRIATE EXPERTS

Take instructions from both sides

Must be able to live up to proof beyond their report.

Have mental flexibility and be willing to update their view in the light of new evidence

Are capable of resisting undue pressure from lawyers and steering a neutral path

Experts have specific expertise - check your expert is an expert in the area you need.

Understand that their duty is to the court and not to those instructing them

Ask to see all the evidence before deciding - based on the evidence rather than the letter of instruction.

Are up to date and research aware

Explain things in simple and non-technical terms

You may need more than one expert if there are different things which need to be explained.



EXPERT REPORTS

The expert reports with the most credibility are by experts who:

- regularly take instructions from both sides
- see all the relevant evidence (and background material) before they draw their conclusions
- make up their minds based on the evidence rather than the letter of instruction
- are capable of resisting undue pressure from lawyers and steering a middle path
- understand that their duty is to the court and not to the lawyer instructing them
- have mental flexibility and are willing to update their view in the light of new evidence
- explain things in simple and non-technical terms
- are up-to-date and research aware.

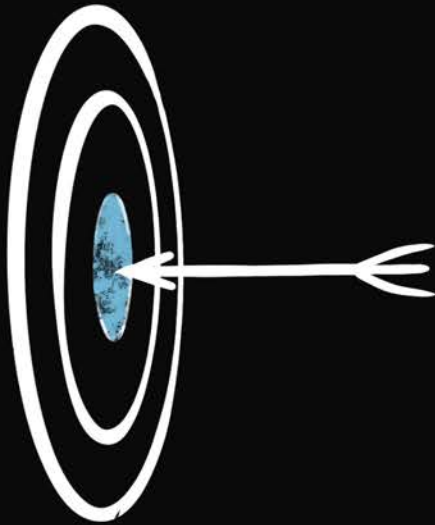
EXPERTS GIVING EVIDENCE

The most credible experts giving evidence must be able to live up to proof beyond their report.

When taking the witness stand, this requires them to be able to:

- explain their position
- defend their position
- explain themselves clearly and not get pushed into an answer
- let go and move on if it feels like they lose a point
- be a specialist in their particular areas of expertise but don't comment on matters outside their expertise.

HOW TO ENSURE THE ADMISSIBILITY OF EXPERT EVIDENCE



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
court's own knowledge and
experience



The witness is
competent to give
that opinion

Expert opinion evidence is admissible in criminal proceedings at common law if (CrimPD 19A.1):

- (i) it is relevant to a matter in issue in the proceedings
- (ii) it is needed to provide the court with information likely to be outside the court's own knowledge and experience and
- (iii) the witness is competent to give that opinion'.

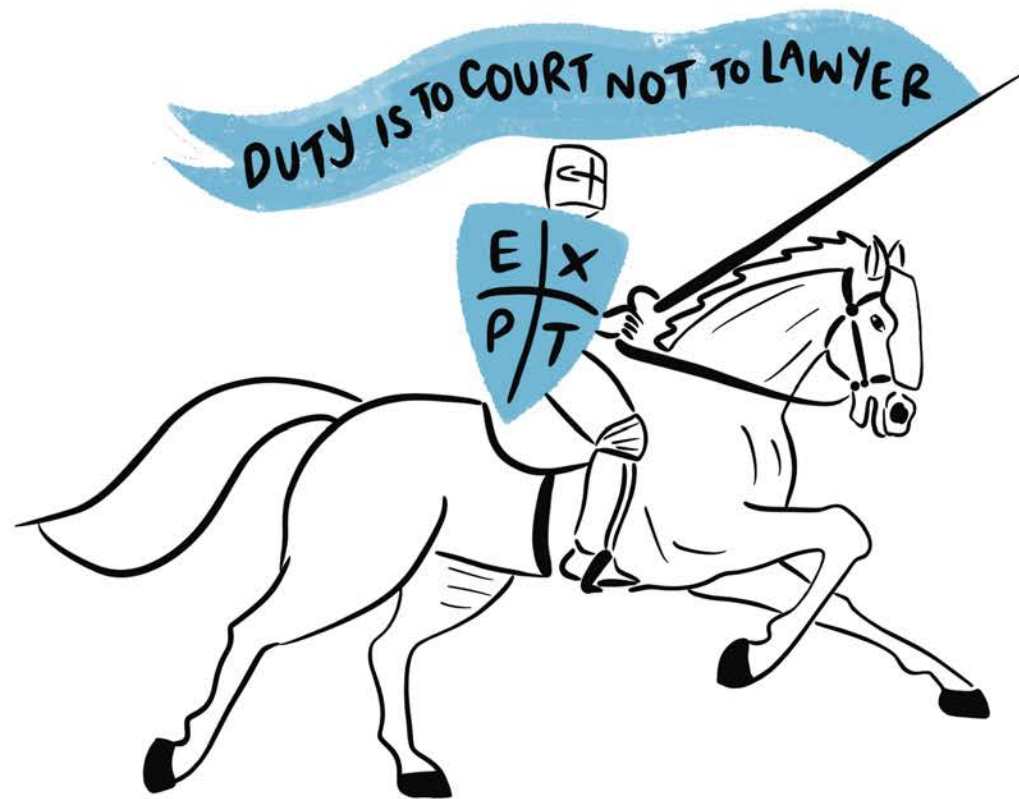
'the court must be satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted'

R v Dlugosz and others [2013] EWCA Crim 2 para 11

The individual claiming expertise must have acquired by study or experience sufficient knowledge of the relevant field to render their opinion of value. For example, R v Hodges [2003] EWCA Crim 290 involved the evidence of a police officer with years of experience in the investigation of drugs offences. Knowledge acquired from informants and arrested suspects was admissible in relation to the issue of the normal manner of supply of heroin, the usual price and the quantity of drugs that would constitute a supply for personal use.

An expert has an overriding duty to give opinion evidence which is 'objective and unbiased' (CrimPR 19.2).

THE DUTY OF AN EXPERT WITNESS

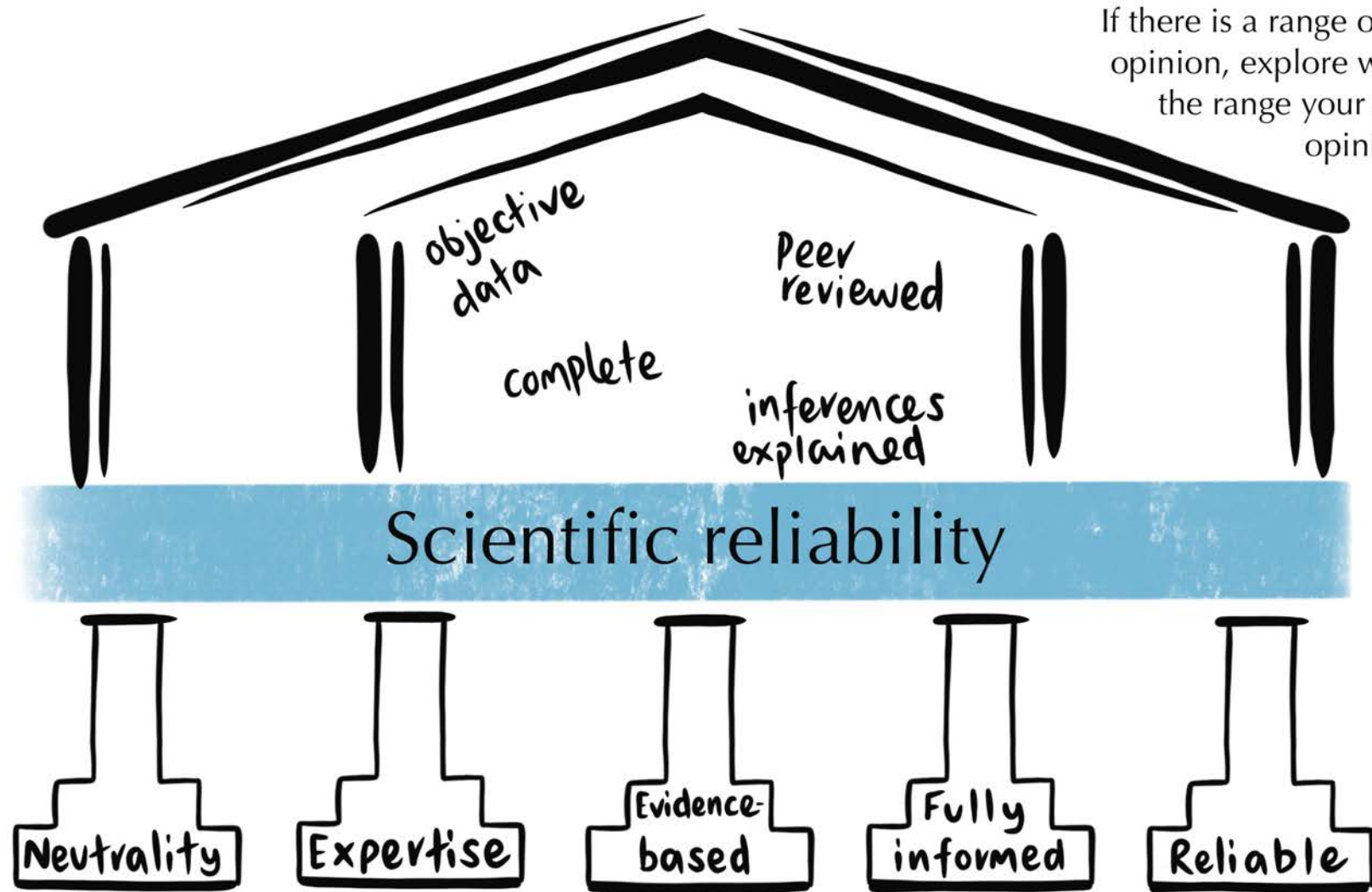


The court's duty is to achieve justice.

The expert's duty is to help the court do this.

- The court's 'overriding objective' is that criminal cases be dealt with justly (CrimPR 1.1).
- The duty of an expert witness is to help the court to achieve the overriding objective by giving opinion which is:
 - objective and unbiased and
 - relates to matters within the expert's areas of expertise (CrimPR 19.2(1)(a)).
- All experts must disclose to the party instructing them anything (of which they are aware) that might reasonably be thought capable of undermining the expert's opinion or detracting from their credibility or impartiality, and inform all parties and the court if their opinion changes from that contained in a report served as evidence or given in a statement (CrimPR 19.2(3)).

EXPERT CREDIBILITY



If there is a range of expert opinion, explore where in the range your expert's opinion lies.

There should be a sufficiently reliable scientific basis for the expert evidence.

Factors which the court may take into account in determining the reliability of expert opinion include (CrimPD 19A.5):

- (a) the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained
- (b) if the expert's opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is ...
- (c) if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results
- (d) the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on that material
- (e) the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise;
- (f) the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion ...
- (g) if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained
- (h) whether the expert's methods followed established practice in the field and, if they did not, whether the reason has been properly explained.'

Guidance about the reliability of scientific evidence was provided by the Privy Council in *Lundy v R* [2013] UKPC 28 at 138, in which the factors to be considered were set out as:

1. whether the theory or technique can be and has been tested
2. whether the theory or technique has been subject to peer review and publication
3. the known or potential rate of error or the existence of standards and
4. whether the theory or technique used has been generally accepted.

POTENTIAL RED FLAGS

Lawyers: examine the background of potential experts thoroughly, and explore issues of concern and discuss with the expert.

Experts: be honest about any possible issues which could impact your credibility, and do this as early as possible, before accepting instructions.



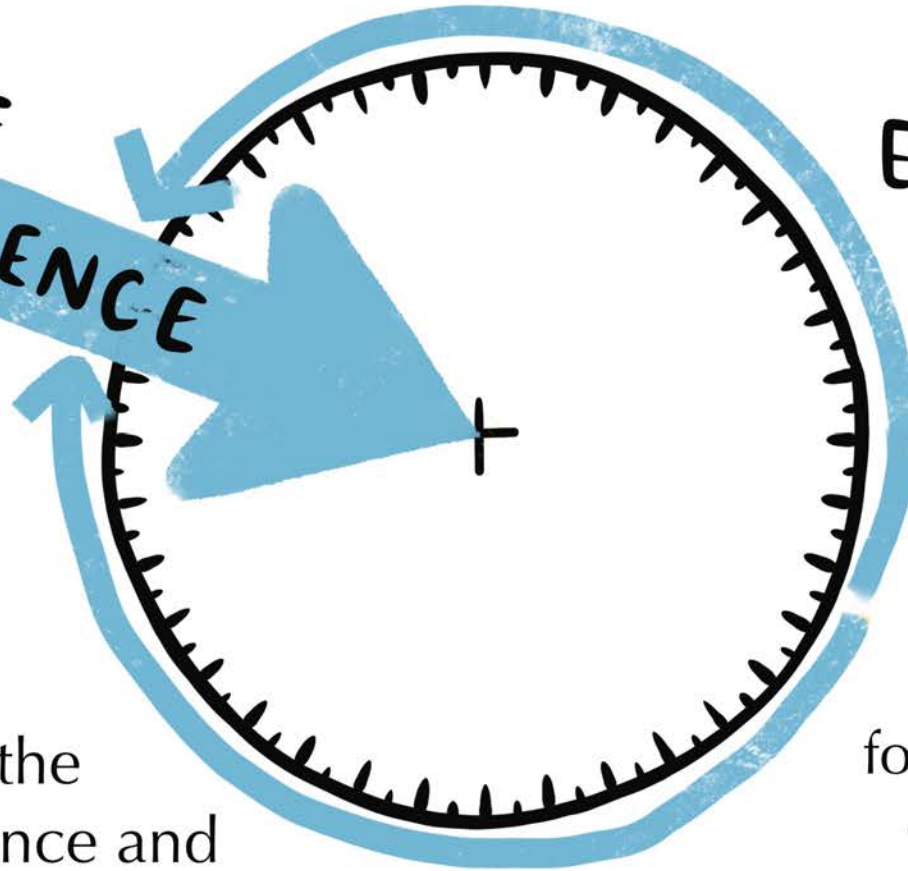
Leave no stone unturned!

Examples of matters that should be disclosed by the expert to the lawyer pursuant to the CrimPR are (under CrimPD 19.A7):

- 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
- any conflict of interest of any kind, other than a potential conflict disclosed in the expert's report
- any adverse judicial comment
- any case in which an appeal has been allowed by reason of a deficiency in the expert's evidence
- any adverse finding, disciplinary proceedings or other criticism by a professional, regulatory or registration body or authority
- any such adverse finding or disciplinary proceedings against, or other such criticism 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
- conviction of a criminal offence in circumstances that suggest:
 - a lack of respect for, or understanding of, the interests of the criminal justice system
 - dishonesty (for example, theft or fraud)
 - a lack of personal integrity (for example, corruption or a sexual offence)
- lack of an accreditation or other commitment to prescribed standards where that might be expected
- a history of failure to adhere to the standards expected of an expert witness in the criminal justice system.

DISCLOSING EVIDENCE

PROVIDE
THE EVIDENCE



Lawyers need to provide all the relevant evidence and keep under review.

EXAMINE ALL
OF IT - 360°



Experts need to ask for lawyers to provide complete disclosure of the evidence they will need.

The lawyer should supply the expert with:

- any historic information available about the defendant including previous reports, diagnoses and assessments
- any part of the evidence or disclosure that will be potentially relevant to the expert's analysis.

Without these, the expert's report and opinion may be discarded or rejected.

The expert should list in their report all of the evidence that they have been given and have reviewed in order to reach their conclusion.

'It is striking that Mr Barlow was not asked to reconsider his conclusions in light of this critical digital evidence, which was available to the applicant's representatives. Given none of this vital material was reviewed by Mr Barlow, we regret to conclude that his opinion was rendered valueless.'

Brecani v R [2021] EWCA Crim 731 para 74

'Unfortunately, his willingness as an expert to opine on the basis of inaccurate, incomplete and partisan accounts appears to be yet another growing trend before this court.'

R v Grant-Murray and another [2017] EWCA Crim 1228 para 156

All communication between the lawyer and the expert is subject to legal professional privilege until the expert report is served on the other side. At this point the report, and all the underlying material which informed it, enters the public realm and can be requested by the other side. Lawyers need to have this in mind when disclosing evidence to experts.

LETTER OF INSTRUCTION

Provides the legal team with proof of their steps and requests.

Sets out the issues that need to be addressed.

Should include the materials listed below.

Lists of background and evidence provided.

May be disclosed to the other side.



The lawyer's letter of instruction to the expert should include:

- the criminal offence(s) that the child is charged with
- the issues that the expert is supposed to address
- the duty of the expert to impartiality and the court
- the need for reliability of the scientific evidence that the expert will be using
- confirmation that the expert has considered the factors that might undermine the expert's evidence and specifically addresses those;
- the background evidence and the evidence in the case that is being disclosed to the expert
- the specific questions that the lawyer is asking the expert in relation to each child defendant
- the relevant law and legal framework in which expert evidence is required, including the factors that must be taken into consideration by the decision-maker, and the alternative options available (such as modifications or special measures)
- a note that if the alternative arrangements do not change the expert's finding, the expert should explain why.

This letter and accompanying material (including any proof of evidence or witness statements) is disclosable, and so might be shown to the other parties in the case and/or the judge.

LETTER OF INSTRUCTION: CONTENT TO CONSIDER

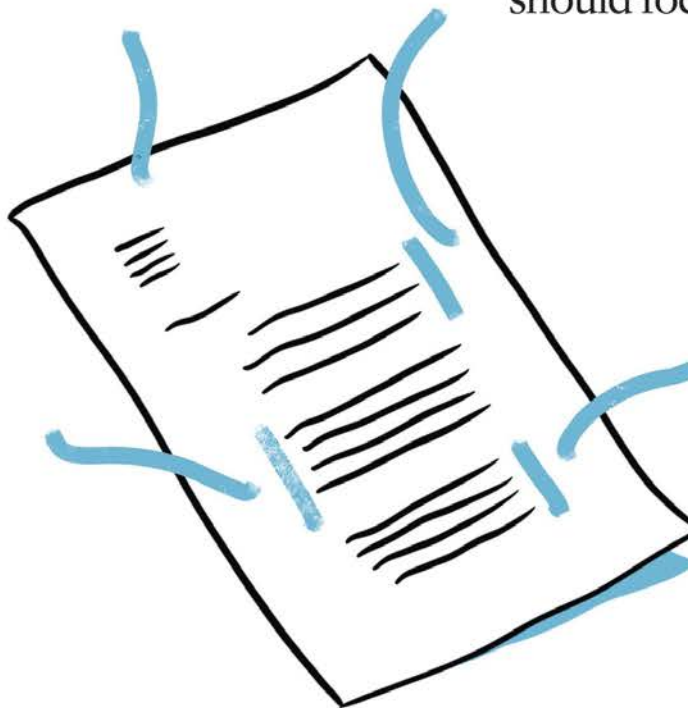
Include a list of the evidence

Explain precisely the issues the expert should focus on

State clearly if there are things that you do not want discussed with the client

Explain the law succinctly and clearly

Include the funding requirements and whether private or legally aided



- Personal details of client (name, date of birth, address, parent or carer, address)
- Background of the case
- A list of evidence disclosed to the expert. Collateral information is often useful, for example, the DVD of the police interview rather than just the transcript
- Contact details of anyone you want them to speak to
- Details of court proceedings (offences, court, dates of hearings)
- Court process (trial/sentence, nature of the evidence, co-defendants)
- Set out the legal framework for the expert. Their expertise is in their area, yours is the law: you should not assume that the expert has a thorough knowledge of the criminal law and procedure. The law should be explained as succinctly and clearly as possible, as well as any legal principles that may be relevant
- The extent of the expert's remit ie precisely the issues, and/or the suspects, the lawyer wants the expert to focus upon
- The standard of proof which the expert is being asked to apply
- Additional matters the lawyer might ask them to look into
- Set out that the report is a privileged document for the purposes of the case only and as instructed by the client's lawyer. Make the expert aware of any evidential undertakings or reporting restrictions as well as the usual GDPR rules
- Ask the expert to provide a provisional indication of their likely conclusions and ask that them to contact the lawyer to discuss the draft report before it is finalised. This will prevent errors or things that are factually wrong. Whilst it is unethical to exclude parts of the report that are unhelpful, it is legitimate to explore whether the evidence can be presented in a more favourable way in the light of further information that addresses or ameliorates concerns that the expert has. It is possible to make amendments later, but it is better to get the report right before it is served, hence why it is important to discuss while still in draft form. Note that even minor typographical errors can detract from the authority of the expert as it suggests a lack of attention to detail
- State if there are things that you do not want discussed or the client doesn't want to discuss
- State if you want the elements of an offence to be discussed hypothetically, rather than getting into specifics of the offence charged. You don't want to undermine preparation of the defence or the client's instructions with the expert report
- In terms of the content of the report itself, the expert should be reminded to preface detailed observations by setting out (1) experience and qualifications; and (2) a list of the evidence and any other material they have considered
- Remember – an expert witness works for the court not for the lawyer, and has a duty to disclose all information, favourable or not, in a report
- Include the funding requirements and whether private or legally aided – check prescribed legal aid hourly rates, warn the expert not to add administrative costs (which are overheads) to their estimate, confirm any limitation set by the Legal Aid Agency, and make it clear that the court is responsible for any fees for attending to give evidence. If the expert wants to charge a rate higher than the prescribed or allowed rate, they should provide details of other publicly funded cases (for defence or prosecution) where that rate has been approved

EXPERT REPORT

Give details of the expert's qualifications

Give details of any literature relied upon

Set out the facts

Summarise findings

State an understanding of duty to the court and provide declaration of truth

Make clear which facts are within the experts own knowledge.

Name who carried out tests or experiments

Explain the range of expert opinion and where the instructed expert sits



CrimPR 19.4 sets out what should be contained in an expert report:

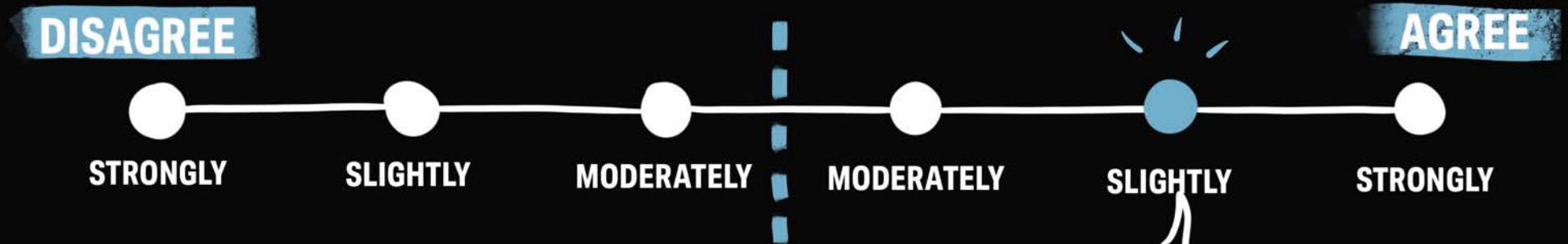
‘19.4 ... an expert’s report must–

- (a) give details of the expert’s qualifications, relevant experience and accreditation
- (b) give details of any literature or other information which the expert has relied on in making the report
- (c) contain a statement setting out the substance of all facts given to the expert which are material to the opinions expressed in the report, or upon which those opinions are based
- (d) make clear which of the facts stated in the report are within the expert’s own knowledge;
- (e) where the expert has based an opinion or inference on a representation of fact or opinion made by another person for the purposes of criminal proceedings (for example, as to the outcome of an examination, measurement, test or experiment)–
 - (i) identify the person who made that representation to the expert
 - (ii) give the qualifications, relevant experience and any accreditation of that person and
 - (iii) certify that that person had personal knowledge of the matters stated in that representation

- (f) where there is a range of opinion on the matters dealt with in the report–
 - (i) summarise the range of opinion, and
 - (i) give reasons for the expert’s own opinion
- (g) if the expert is not able to give an opinion without qualification, state the qualification
- (h) include such information as the court may need to decide whether the expert’s opinion is sufficiently reliable to be admissible as evidence
- (i) contain a summary of the conclusions reached;
- (j) contain a statement that the expert understands an expert’s duty to the court, and has complied and will continue to comply with that duty and
- (k) contain the same declaration of truth as a witness statement.’

Lawyers should read expert reports carefully and then discuss the findings with the expert. Sometimes these discussions will result in amendments being made to the report.

EXPERTS CAN EXPRESS A DEGREE OF SUPPORT



Experts can express a
degree of support.



Experts can express a degree of support provided that:

- the absence of any objective criteria (such as a database of persons sharing the same characteristics) is made clear to the court
- the degree of support is expressed in conventional language that is not designed to mislead (for example, strong, very strong etc) and
- the expert is prepared to explain and justify how they reached the conclusion as to that degree of support.

An example of this type of conclusion can be found in *Atkins & Atkins v R* [2009] EWCA Crim 1876, where an expert compared facial features in photographs of the offenders with a CCTV shot and highlighted what he concluded were similarities. There is no database of facial features from which to calculate the frequency with which those features appear in the population at large or sub-sets of the population. The expert was permitted to say that the similarities that he had identified lent support/strong support to his conclusion that the offenders were the persons shown in the CCTV.

EXPERT DECLARATION

An Expert should
set out the
following
declaration:



The expert report must include the expert declaration, as set out in CrimPD 19B.1:

'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: (a) my report will form the evidence to be given under oath or affirmation; (b) the court may at any stage direct a discussion to take place between experts; (c) 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; (d) I may be required to attend court to be cross-examined on my report by a cross-examiner assisted by an expert; (e) 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]

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.'

SERVICE OF EXPERT EVIDENCE



The admin matters!



There are rules about the advance disclosure of expert evidence. These can be found in s81 of the Police and Criminal Evidence Act 1984 (Crown Court cases) and s20 of the Criminal Procedure and Investigations Act 1996 (magistrates' court cases).

A party to proceedings is prohibited from adducing such evidence, without leave of the court, should advance disclosure not be made.

CrimPR 19.3 states:

'19.3(1) A party who wants another party to admit as fact a summary of an expert's conclusions must serve that summary–

- (a) on the court officer and on each party from whom that admission is sought; and
- (b) as soon as practicable after the defendant whom it affects pleads not guilty.

...

(3) A party who wants to introduce expert evidence ... must–

- (a) serve a report by the expert ... on– (i) the court officer, and (ii) each other party
- (b) serve the report as soon as practicable, and in any event with any application in support of which that party relies on that evidence
- (c) serve with the report– (i) notice of anything of which the party serving it 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 (ii) explanation of how facts stated in the report are admissible as evidence if that is not explained by the report

- (d) if another party so requires, give that party a reasonable opportunity to inspect– (i) a record of any examination, measurement, test or experiment on which the expert's findings and opinion are based, or that were carried out in the course of reaching those findings and opinion, and (ii) anything on which any such examination, measurement, test or experiment was carried out.

(4) ... a party may not–

- (a) introduce expert evidence if that party has not complied with paragraph (3) or
- (b) introduce in evidence an expert report if the expert does not give evidence in person.'

JOINT STATEMENTS AND JOINT EXPERTS

The court may direct the experts on opposing sides of a case to discuss the expert issues and prepare a statement for the court of the matters on which they agree and disagree, giving their reasons.



The Court can dictate that there is only one expert on an issue at trial for all co-defendants. Where the court gives a direction for a single joint expert to be used, each of the co-defendants may give instructions to the expert.

The CrimPR give the courts power to instruct experts to discuss their respective findings with each other.

CrimPR 19.6:

‘(2) The court may direct the experts to—

- (a) discuss the expert issues in the proceedings; and
- (b) prepare a statement for the court of the matters on which they agree and disagree, giving their reasons.

(3) Except for that statement, the content of that discussion must not be referred to without the court’s permission.’

In the case of *R v Henderson and others*, it was held that these meetings should take place in the absence of legal representatives with a careful and detailed minute prepared for the purposes of disclosure.

The experts can issue a Joint statement (CrimPD 19C.7):

‘We each DECLARE THAT: 1. We individually here re-state the Expert’s Declaration contained in our respective reports that we understand our overriding duties to the court, have complied with them and will continue to do so. 2. We have neither jointly nor individually been instructed to, nor has it been suggested that we should, avoid reaching agreement, or defer reaching agreement, on any matter within our competence.’

The court can also dictate that there be one expert for all co-defendants (CrimPR 19.7) the court may direct that the evidence on that issue is to be given by one expert. Where the co-defendants cannot agree who should be the expert, the court may select the expert from a list prepared or identified by them; or direct that the expert be selected in another way.

Where the court gives a direction for a single joint expert to be used, each of the co-defendants may give instructions to the expert (CrimPR 19.8).

The discussion between the experts should take place without the legal representatives being present.

However, detailed minutes of the discussion should be recorded.

The experts can issue a joint statement which should have a joint declaration:

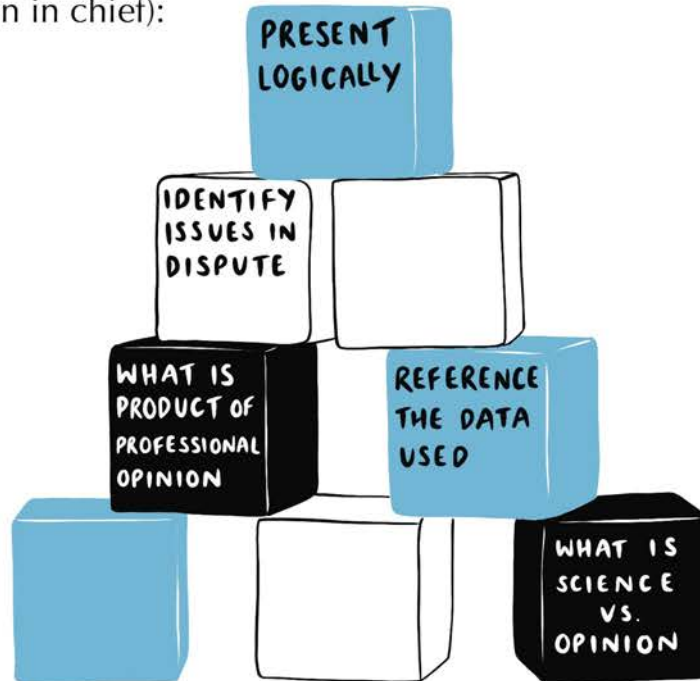
‘We each DECLARE THAT: 1. We individually here re-state the Expert’s Declaration contained in our respective reports that we understand our overriding duties to the court, have complied with them and will continue to do so. 2. We have neither jointly nor individually been instructed to, nor has it been suggested that we should, avoid reaching agreement, or defer reaching agreement, on any matter within our competence.’

The court also has the power to order one joint expert for multiple co-defendants. If the court orders one joint expert, each defence lawyer can give instructions to the expert.

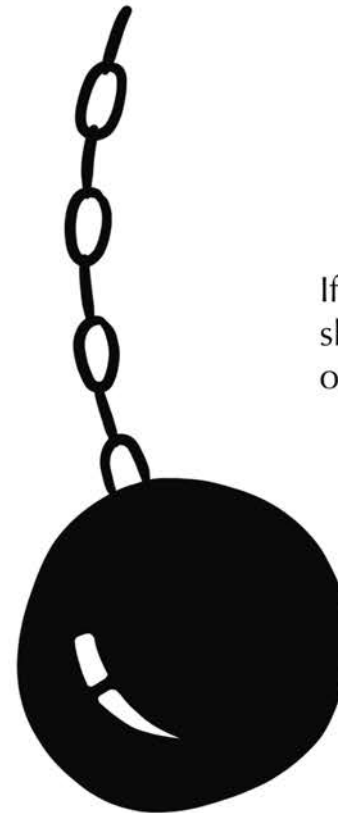
EXPERT GIVING EVIDENCE

When an expert comes to court they will be asked questions by:

The party who instructed them
(examination in chief):



The other party (cross-examination):



If possible, your expert
should be present when the
other expert gives evidence.

LAWYERS

Examination in chief

- Examination in chief should be prepared with particular care so as to ensure the decision maker is given the clearest possible presentation of the evidence and its relevance to the issues in the case. Topics should be taken sequentially, and in a clear and logical manner so the decision maker understands the conclusions and the reasoning behind them.
- it is essential that the issues in dispute between the experts are identified. This may be done after a joint conferences between the prosecution and defence experts.
- Once the issues in dispute are identified, the advocate should identify these key points with the expert and should be dealt with by the expert in chief.

Cross-examination

- Cross-examination of experts requires particular care and preparation.
- If helpful, you can discuss with your expert cross examination points that you want to raise with the opposition expert. Your expert should, if possible, be present when the other expert gives evidence.
- Are there any obvious points which the expert has not considered?
- What evidence has the expert looked at? Has the expert seen all the evidence? Has the expert relied upon unproved matters or hearsay? Has the expert failed to understand the prosecution's case? Have they requested and considered other relevant records such as the full medical history?

- What opinions are the products of science and what opinions are the products of professional experience? If the science is agreed, then it will be the expert's personal judgment that will be the subject of scrutiny.
- The judge may also have questions which the expert should be prepared to answer to the best of their ability.

WAYS TO CHALLENGE EXPERT EVIDENCE



There are ways the lawyer can challenge the expert evidence in advance, and also when the expert witness is giving evidence in court.

Lawyers are permitted to challenge expert evidence:

- By an application to the judge (on a voir dire or at a case management hearing) to exclude expert evidence that is biased, unhelpful or unreliable evidence
- By an application to the judge to exclude expert evidence due to non-compliance with CrimPR
- By requesting that evidence be edited to remove comment on matters outside of expert's experience, or amended where conclusions are overstated
- By requesting the preparation of a joint experts' report may result in reports being amended to more accurately reflect the underlying science or
- By testing the expert's findings in cross examination to ensure it has been the subject of sufficient scrutiny and peer reviews

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