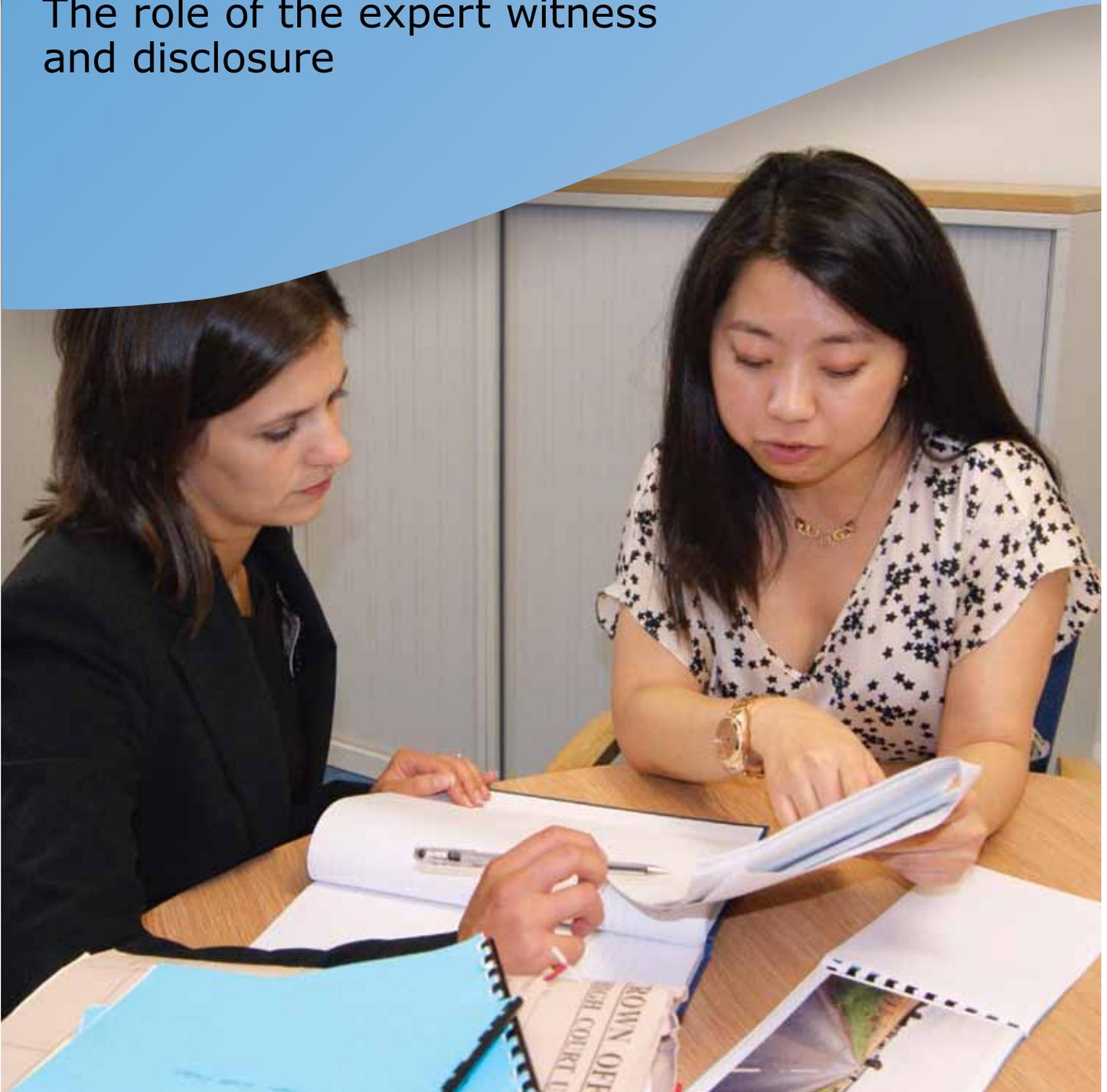




Guidance booklet for expert witnesses

The role of the expert witness
and disclosure



COPFS guidance booklet for expert witnesses

The role of the expert witness and disclosure

This booklet has been created to provide guidance to expert witnesses concerning the role of an expert witness and also about their obligations in relation to disclosure.

“Expert” is an English term although it is now used throughout the UK in place of the older Scottish term “Skilled Witness”. Whilst there is no precise definition, for practical purposes it can be said that:

“A skilled witness is a person who through practice, or study, or both, is specially qualified in a recognised branch of knowledge, whether it be art, science or craft”.

Dickson on Evidence, Third Edition, paragraph 398.

The role of expert witness is different from that of any other witness in a criminal trial as an expert is the only type of witness who can give opinion evidence. The evidence of an expert witness must be independent and the court requires the highest standards of objectivity and accuracy from expert witnesses.

The evidence of expert witnesses can be extremely valuable, and sometimes absolutely critical, in criminal cases. In all criminal proceedings in Scotland, disclosure of relevant material to the accused is a fundamental requirement for a fair trial. If the Crown does not fulfil its disclosure obligations, there is the potential for the conviction to be quashed on appeal.

In order that COPFS can ensure that all relevant material has been disclosed in advance of a criminal trial, prosecutors require to be aware of all material that may be relevant which has been obtained during an investigation. It is therefore essential that all relevant information about investigations conducted by expert witnesses is revealed to the Crown. When the disclosure obligations are complied with correctly, the credibility of and public confidence in expert witnesses is enhanced.

PART 1 - DISCLOSURE

(1) Disclosure Obligations – Introduction

When you are instructed as an expert witness in an investigation, it is important that you understand the obligations placed upon you by this status. As an expert witness you have an overriding duty to assist the court and, in this respect, your duty is to the court and not to the party instructing you. This will include obligations relating to disclosure.

The obligations which apply to you as an expert are to assist in ensuring that the Crown can comply fully with their statutory disclosure obligations. These obligations take precedence over any internal codes of practice or other standards set by any professional organisations to which you may belong.

The overriding objectives of the criminal justice system are that criminal cases are dealt with justly and that trials are fair. Disclosing relevant material to the defence is one of the most fundamental ways in which the Crown acts in accordance with Article 6 of the European Convention of Human Rights: the right to a fair trial. If the Crown does not fulfil its disclosure obligations to the defence, this may result in a conviction being quashed on appeal. In order that the Crown can fulfil its duty of disclosure, all relevant

material obtained during investigations must be revealed to the Procurator Fiscal.

A failure to comply with your obligations to reveal may have a number of adverse consequences which could include:

- A prosecution being halted or delayed;
- A conviction being quashed on appeal;
- The court making an adverse judicial comment about you as an expert. Such adverse comment could seriously undermine your credibility as an expert and consequently your fitness to be instructed in future cases;
- Professional embarrassment, including possible action by a professional body, loss of accreditation and the potential for civil action by an accused.

The role of the expert witness, and the issue of immunity from suit, was discussed by the Supreme Court in the case of *Jones v. Kaney [2011] UKSC 13*.

Conversely, your credibility as an expert will be enhanced by the considered application of this guidance and your appropriate management of the materials within the investigation.

(2) Disclosure Guidance – ACPOS Manual

The ACPOS Disclosure Manual contains the operational instructions on disclosure which have been agreed between COPFS and ACPOS. COPFS were closely involved

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in the production of the manual. It explains how the Scottish police forces and SPSA have agreed to fulfil their duties to reveal material to the Crown. You should be familiar with that manual, and in particular, chapter 7: Investigations Involving Forensic Examination or Analysis. When submitting statements and reports to the Crown, you will be required to sign the declaration, an example of which is contained in the appendix to this booklet, in every case confirming that you have read the ACPOS Disclosure Manual and understand your disclosure obligations.

(3) Crown's Duty of Disclosure

The Crown is obliged to disclose any information that forms part of the prosecution case that the Crown intends to use at trial, and any information obtained or generated during the investigation that is for the accused, i.e. that materially weakens the Crown case or materially strengthens the defence case. It is important to remember that it is the nature of any information which is significant and not the format in which it is held. The Crown's disclosure duty may encompass a negative finding as such a finding may support the defence case or undermine the Crown case.

The Crown's duty of disclosure continues during and after any trial and appeal, so if further information comes to light at any

stage, the Crown must review the case to see whether or not the information would have met the disclosure test and falls to be disclosed to the defence. Similarly, expert witnesses must consider whether any information which was previously deemed not to be relevant may now be relevant in light of the new information.

(4) What to Reveal

You should ensure that all relevant material from your investigations or examinations is revealed to the Crown in your report or witness statement. This includes all results or findings, regardless of whether the result is a negative one or assists the defence rather than the Crown. If you realise that you have not included any relevant material you should provide a supplementary report or statement. As a witness for the Crown, you are obliged to provide a detailed account of your involvement in a criminal investigation. It is not sufficient to provide a report alone, a National Standard Statement must also be completed to ensure your full involvement and not just the results of your examinations are available to the Crown. While COPFS normally consider material to assess whether it meets the disclosure test, a different approach is taken to forensic notes as due to their scientific and technical nature, COPFS is not best placed to determine the materiality of that

information. Therefore, you should ensure that any material which in your view, having regard to the disclosure guidance, is relevant, is included in your report or statement. Furthermore, access by the defence to the examination and analysis records held by SPSA will be in accordance with the current SPSA Defence Access Policy.

(5) Precognition of Expert Witnesses

Expert witnesses should always be precognosed in person. Precognition is a very important investigative process which is undertaken by the Crown to elicit information to supplement the conclusions in an expert report and to ensure that the prosecutor has all the relevant information available before the case comes to court. The best way to present evidence in court can also be discussed at precognition, to establish if there is a particular way the evidence should be elicited to assist the jury. As well as precognition, it is also important in High Court cases for the prosecuting Advocate Depute to consult with expert witnesses in advance of a trial to fully explore the evidence and method of presentation. If you consider that precognition would be of assistance given the specifics of the case, but a precognition has not been arranged by the Crown, please contact the Procurator Fiscal to discuss this. Your precognition will not be disclosed to the

defence but any information contained within it which is additional to what is contained in your report and is material information will be communicated to the defence.

Precognition is also an appropriate time to discuss standby arrangements for court. Where it is possible to schedule your attendance, every effort will be made to do so. An indication of your availability in your report or statement, together with further discussion at precognition will be useful in informing the Crown when it comes to citation of witnesses.

(6) Laboratory Technicians

Where you were assisted in your expert work either by persons under or outwith your supervision, you should make this known to the prosecutor. The court will accept hearsay evidence of what procedures were carried out in the laboratory by technicians, but it is essential that the Crown is aware of their involvement.

(7) Published Work

Passages from a published work may be adopted by an expert witness and made part of his/her evidence or they may be put to a witness in cross examination for comment. Where it will be necessary for you to refer to published work when you give evidence let the Procurator Fiscal know this so that the items can be added to the indictment as

productions and disclosed to the defence. If the Procurator Fiscal is unaware that you wish to refer to published work during your oral evidence, it will not be available as a production in court.

(7) Quick Guide for Disclosure

Retain – you should retain everything, including physical, written and electronically captured material, until otherwise instructed.

Record – you should keep records of all of the work you have carried out and any findings you make in relation to the investigation. The requirement to record begins at the time you receive instructions and continues until the end of your involvement in the case.

Reveal – you must make the Crown aware of all relevant material you have in your statement or report, and your records should be made available to the defence if requested.

Review – you should review your conclusions if any new information comes to light, both before and after a trial or appeal.

"A foundation for such an examination must always be laid by ascertaining whether the witness is a person of skill or an expert, under is included those who have a theoretical acquaintance with the subject, as well as men who speak from practical knowledge. A peculiar fitness, however, for the office in one of those respects is essential."

PART II – EXPERT EVIDENCE AND THE ROLE OF THE EXPERT WITNESS

(1) Introduction

In general, opinion evidence is not admissible in our criminal courts. Under normal circumstances, witnesses may only give evidence about matters within their direct knowledge. The evidence of an expert witness is an exception to this rule.

It is important to remember that you are not an expert witness until the court accepts you as such. For this to happen, evidence must be led of qualifications and expertise, whether or not these are formal or by experience. Dickson on Evidence, Third Edition, paragraph 397 states that: *"A foundation for such an examination must always be laid by ascertaining whether the witness is a person of skill or an expert, under is included those who have a theoretical acquaintance with the subject, as well as men who speak from practical knowledge. A peculiar fitness, however, for the office in one of those respects is essential."*

It is not necessary to have professional or academic qualifications to be an expert witness. It is perfectly possible to be an expert witness because of your experience in a particular field. Qualifications, where they are held, do not automatically make someone an expert.

(2) Corroboration of the Expert Witness

There is no general rule that the evidence of an expert witness does not require to be corroborated. If the essential fact in dispute is a matter of technical science, it cannot be established on the uncorroborated testimony of a single expert witness. However, an expert opinion given on the basis of facts which are established by corroborated evidence does not itself require corroboration. There are exceptions to the general rule requiring corroboration, such as evidence given in Fatal Accident Inquiry proceedings, and Sections 280 and 281 of the Criminal Procedure (Scotland) Act 1995. Section 280 allows the evidence of an expert to be replaced by a certificate, and section 281 allows the Crown to call only one signatory of an autopsy or forensic science report to speak to the contents of the report in Court.

(3) Expert Evidence – The Character of Expert Evidence

The High Court of Justiciary considered the proper character of expert evidence in the referral by the Scottish Criminal Cases Review Commission in the case of *Brian Wilson and Iain Murray 2009 SCCRC 666 (paragraphs 58-63)*. The Court held that it is not possible to provide an absolute direction as to what constitutes legitimate subject matter for expert opinion. However,

two general principles give some guidance. Firstly, the subject matter under discussion must be necessary for the proper resolution of the dispute, and be such that a judge or jury without instruction or advice in the particular area of knowledge or experience would be unable to reach a sound conclusion without the help of a witness who had such specialised knowledge or experience. Secondly, the subject matter in question must be part of a recognised body of science or experience which is suitably acknowledged as being useful and reliable, and properly capable of reaching and justifying the opinions offered, and the witness must demonstrate a sufficiently authoritative understanding of the theory and practice of the subject.

(4) Duties of the Expert Witness

The role of the expert witness, and his/her duties and responsibilities, have been subject to much judicial comment. The leading case is that of *R. v. Harris and others [2006] 1 Cr App R 5 and R. v. B[T] 2006 EWCA 417*. The court, at paragraph 116, approved the list of obligations listed by Cresswell J in the case of *National Justice Campana Naviera, S.A. v Prudential Assurance Co. Ltd ("The Ikarion Reefer") [1993] 2 Lloyd's Rep 68*:

- Expert evidence presented to the court should be and should be seen to be

the independent product of the expert uninfluenced as to form or content by the party instructing the opinion.

- An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of advocate.
- An expert witness should state the facts or assumptions on which his/her opinion is based. He/she should not omit to consider material facts which detract from his concluded opinions.
- An expert should make it clear when a particular question or issue falls outside his/her expertise.
- If an expert's opinion is not properly researched because he/she considers that insufficient data is available then this must be stated with an indication that the opinion is no more than a provisional one.

If after considering defence expert reports an expert witness changes his view on material matters, such change of view should be communicated without delay to the party instructing the opinion and when appropriate to the court. A supplementary report may require to be produced in consultation with the party instructing the opinion.

When producing an expert report, reference to literature or any other material

which may assist the court should be referred to in the report. The report should also contain details of the expert's academic and professional qualifications, experience and accreditation relevant to the opinions expressed in the report, and the range and extent of the expertise and any limitations.

The High Court in the SCCRC referral of the case of *Wilson and Murray* added to this list and said that an expert witness should in particular explain why any material relevant to his/her conclusions is ignored or regarded as unimportant, or why relevant material is accepted or rejected. Although the categories of duty and responsibility described by Cresswell J in the *Ikarion Reefer* case were concerned with civil matters, these rules are equally applicable to criminal cases.

In addition, particularly in criminal cases, other duties and responsibilities have been recognised by the courts. For example, the court will expect in a criminal case that an expert's report must state the facts upon which opinions are based, and if assumptions are made, these must be clearly identified. Also, reasons must be given for conclusions. The High Court, in the SCCRC referral mentioned above, held that whether instructed for the prosecution or defence, the principal duty of an expert witness is to the court, and this overrides any duty he/she owes to the party which instructed him/her.

(5) Effect of Expert Evidence

The judge and jury are not bound by the opinion evidence given by an expert witness, even if the expert is not challenged. Expert evidence is only one factor in the decision of the judge/jury. There are clear principles under which such evidence is admitted. In *Davie v Magistrates of Edinburgh* 1953 S.C. 34 the Lord President Cooper said (at p40):-

"Expert witnesses, however skilled or eminent can give no more than evidence. They cannot usurp the functions of the jury or the Judge sitting as a jury ... Their duty is to furnish the Judge or jury with the necessary specific scientific criteria for testing the accuracy of their conclusions so as to enable the Judge or jury to form their own independent judgement by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or jury. In particular the bare ipse dixit of a scientist, however, eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert."

An expert should also stick to matters within his/her expertise. The Court held in *R v. Turner [1975]* AB 834 that: *"...the opinion of scientific men upon proven facts may be given by men of science within their own science. An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience of a judge and jury. If on the proven facts a judge or jury can form their own conclusions without help, then opinion of an expert is unnecessary. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that he may think it does"*.

An expert witness should not provide the court with a statement of unqualified conclusions about the question of fact on which his/her opinion relies. If an expert witness does so, the effect of his/her testimony may well be diminished. It is therefore of the utmost importance that any expert witness carefully describes the source and assesses the worth of all material on which his/her opinion is based. Do not disregard evidence just because it does not fit with your conclusion – you must be able to explain why you have accepted or rejected relevant material. The role of the expert is to place an opinion before a court or jury, in

order to allow the court or the jury to reach a proper conclusion on the matter.

Please remember that what carries the weight is the reasoning not the conclusion. What is important is that you have evidence to justify your conclusions.

Queries

If you have any queries relating to the contents of this guidance or your disclosure obligations please contact the investigating officer or the Procurator Fiscal.

Appendix – Declaration by Expert Witness

Declaration:

I confirm that I have read the guidance contained in the ACPOS Disclosure Manual which details my duties as an expert witness in assisting the Crown to discharge its disclosure obligations. I have followed the guidance and recognise the continuing nature of my responsibilities.

Signed: _____

Date: _____

