

SFO OPERATIONAL HANDBOOK

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Expert Witnesses

Who is an expert witness?

An expert witness is a person of any vocation, trade or profession who is permitted by the court to give evidence because of their specialist knowledge or expertise on an issue that is relevant to the case. More detailed guidance on expert witnesses can be found in Part 19 of the **Criminal Procedure Rules** (CrimPR) and Division V, paragraphs 19A to 19C of the **Criminal Practice Directions** (CrimPD).

What is different about expert witnesses?

Most witnesses in criminal cases are witnesses of fact. In other words, they are people who are called to give evidence because of what they have seen, heard or experienced directly regarding an issue in the case.

Expert witnesses are allowed to give evidence of their findings, but also of their **opinion** on matters within their expertise. For example:

- a) An expert medical witness may give evidence regarding the defendant's state of health and fitness to plead and stand trial.
- b) An expert accountant may give opinion evidence as to the solvency of a company, or the viability of the business model operated by a company.
- c) An expert in property valuations may give his or her opinion as to the market value of a property.

Expert witnesses have a duty to the court to be independent and objective in the evidence they provide. The key to the introduction of an expert's evidence is his or her specialist knowledge acquired through their professional qualifications, training and experience of operating in a particular field or specialism. Expertise in that field must always be established by the witness by providing a full CV and being prepared to give evidence about their experience. Moreover, this must relate to evidence which, in the judgement of the court, the jury could not be expected to know for themselves.

Distinction between expert witnesses and professional witnesses

There is a difference between an expert witness who has a particular specialism by virtue of their training, qualifications and experience, and a professional witness, such as an accountant or auditor, who gives evidence of fact as to what they saw, were told and did during the course of their work.

Generally, a professional witness will give evidence in his or her professional capacity as to matters of fact i.e. what took place. Common types of professional witnesses include:-

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- a) A bank manager who approved a loan to an individual;
- b) Other banking professionals who produce documents in compliance with Section 2 notices;
- c) An auditor who spoke to a director;
- d) Trustees, finance officers and legal advisers (subject to Legal Professional Privilege (LPP) considerations) [See the "Legal Professional Privilege" topic].

A witness of fact may be relied upon for proof of any such fact. He or she cannot venture an opinion, and cannot be relied upon for an opinion.

An expert witness may offer an opinion based on the facts. However, unless the opinion of an expert is placed before the jury as an agreed fact, juries are invariably reminded by a Judge that although they should take the opinion of an expert into account, they are not bound to accept it.

SFO staff as witnesses

SFO employees operate within multi-disciplinary teams and can be ordinary or professional witnesses, but the Courts do not treat them as expert witnesses.

SFO employees who give evidence in SFO cases are witnesses of fact even if they have a specialism such as accountancy or law. This is because they are providing evidence as to what they did (trace funds, seize evidence, interview a witness or suspect) and the product of their work.

Selecting an expert

Once the need for an expert has been identified, it is important to take into account the following points:

- Identifying any conflicts of interest that would prevent an expert from acting for the SFO;
- Considering whether there is anything which may undermine the credibility of an expert witness such as a criminal conviction, adverse findings by a professional body or judicial criticism;
- The professional qualifications, experience and skills required of the expert;
- What will be required of the expert, in terms of whether the expert will be required to produce a report/statement and attend Court to give evidence;
- What the specific terms of reference are, including the identifiable material upon which any expert evidence will be based.

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Duties of an expert

Obligations

In *R v Harris and others* [2006] 1 Cr App Rep 55 at [271] the Court of Appeal (Criminal Division) summarised the obligations of an expert witness:

1. Expert evidence presented to the Court should be and be seen to be the independent product of the expert.
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his/her expertise.
3. An expert witness should state the facts or assumptions on which his opinion is based.
4. An expert should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available then this must be stated with an indication that the opinion is no more than a provisional one.
6. If after exchange of reports, an expert changes his view on material matters, such changes of view should be communicated to the other side without delay and when appropriate to the Court.

The court also said that if an expert is advancing any hypothesis, he or she owes a very heavy duty to the Court to explain that it is no more than a hypothesis. Moreover, best practice requires that experts should always express their views with clarity, bearing in mind that they will have to be digested by ordinary members of the public.

Duty to the Court

The obligations summarised in *Harris* have since been reinforced by CrimPR 19.2 which confirms that an expert's duty to the court overrides any obligation to those instructing or paying him.

An expert must help the court by giving objective and unbiased opinion on matters within his area of expertise.

The duty to the court includes obligations:

- a) To define his area of expertise in his report and when giving evidence.
- b) When giving evidence, to draw the court's attention to any question to which the answer would be outside area of expertise.
- c) To inform all parties and the court if his opinion changes.

Content of the expert's report

CrimPR 19.4 sets out what an expert's report must contain. This includes the following:

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- the expert's qualifications, relevant experience and accreditation
- details of information which the expert has relied upon in making the report
- a summary of the conclusions reached
- a statement that the expert understands his or her duty to the court and has and will continue to comply with that duty
- the same declaration of truth as appears in a witness statement

A full list detailing all matters that the report must contain is found in [Criminal Procedure Rules].

Additionally CrimPD V paragraph 19B contains detailed guidance about the terms in which statements of understanding and declarations of truth should be made.

Wider Disclosure Duties

An expert must comply with their disclosure duties under Criminal Procedure and Investigations Act 1996 (CPIA). These duties fall into the following three categories:

1. Retain – an expert should retain all material/information provided to them or obtained themselves throughout their instruction.
2. Record – an expert should keep a record of all work carried out and any findings made.
3. Reveal – an expert must be able to reveal what they have recorded to those instructing.

The ambit of an expert's common law duty of disclosure was considered by the Court of Appeal in *R v Ward* (1993) 96 Cr App R 1. There a general duty to disclose material which may assist the defendant and this applies irrespective of any defence request.

Work carried out by Assistants

Experts often rely on their colleagues to undertake research. Any work undertaken by assistants should be clearly identified in the expert's report and the assistants' experience and qualifications should be provided.

If assistants have been involved in the casework, an evidential foundation must be laid to ensure the admissibility of the work of the assistants.

Assistants must be made aware that they are subject to the same disclosure duties and obligations as experts under the CPIA 1996.

In *R v Jackson (Terry)* [1996] 2 Cr App R 420, the Court of Appeal gave guidance for occasions when the prosecution is relying on a statement provided by an expert witness and part of the underlying work has been carried out by assistant(s). The main point covered in this guidance was that the prosecution

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should maximise the use of written statements or admissions by assistants of expert witnesses so as to save time and costs in calling them as witnesses.

Giving expert evidence

Witnesses must never be coached in the evidence they will give. This should always be kept in mind when an expert is questioned or challenged as the expert develops his or her views on the facts presented in the course of their instructions. While this process may be required to ensure that the evidence is properly understood and the questions asked of the expert have been fully answered, care must be taken to ensure that the expert is not being "led" to a particular conclusion or a way of presenting the evidence.

Service of expert evidence and disclosure of unused material

Particular rules apply to service of expert evidence and disclosure of unused material.

Service of expert evidence

CrimPR 19.3 sets out the procedural requirements for the introduction of expert evidence. By virtue of CrimPR 1.2 and 3.3 advance notice of an intention to adduce to expert evidence should be provided to the court and each other party at the earliest practicable opportunity.

CrimPR 19.3(3) requires that a party who wants to introduce expert evidence (otherwise than as admitted fact) must serve a report by the expert on the court, and each other party, as soon as practicable. The report must be accompanied by a notice of anything which might reasonably be thought capable of detracting substantially from the credibility of the expert. In addition, if another party so requires, there are obligations to facilitate inspection of the expert's records and equipment.

The potential consequences of failing to comply with these requirements are grave – a party who has not complied with CrimPR 19(3) may not introduce expert evidence unless the parties otherwise agree or the court directs.

It is also of note that following service of a report, the expert must be informed at once of the fact of service (Crim PR 19.3(5)).

Pre-trial discussion between experts to narrow the issues

Where there is conflicting expert evidence, CrimPR 19.6 contains provision for the court to direct the experts to discuss the issues and prepare a statement indicating the matters on which they agree and disagree, along with their reasons. Detailed guidance is provided at CrimPD V, paragraph 19.C.

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Disclosure of Unused Material

All expert reports other than the final report should be identified as drafts, making it clear that they do not represent the final report. This is an important point as any such material would come within the ambit of disclosable unused material.

Experts are also required to retain any notes used in the preparation of a draft report which contain primary facts not already recorded elsewhere. This would include any notes relating to preliminary conclusions.

For more information on the duties and responsibilities of expert witnesses under the CPIA 1996, and on draft expert statements and unused material – see also the "Disclosure Part 3" topic.

Case Management Protocol

The Protocol on Case Management of Heavy Fraud Cases issued by the Lord Chief Justice on 22 March 2005 [2005] 2 All E.R. 429 requires that:

- the subject matter of expert evidence to be adduced by the prosecution and the defence should be identified as early as possible, preferably at the Plea and Trial Preparation Hearing (PTPH)
- following the exchange of expert evidence, any areas of disagreement should be identified and a direction should generally be made requiring the experts to meet and prepare, after discussion, a joint statement
- the joint statement should identify points of agreement identifying points of agreement/contention and any areas where the prosecution is put to proof on matters of which a positive case to the contrary is not advanced by the defence

After the statement has been prepared it should be served on the court, the prosecution and the defence. In some cases it may be appropriate to provide it to the jury. Generally, the jury will hear evidence direct from the expert unless that evidence has been agreed in which case it may be given in writing or read out by prosecuting counsel.

This Protocol should be read together with the **Criminal Procedure Rules and Criminal Practice Directions** set out above.

The Law

The **Criminal Procedure Rules and Criminal Practice Directions**.

The **Protocol on Case Management of Heavy Fraud Cases** issued by the Lord Chief Justice on 22 March 2005 [2005] 2 All E.R. 429.

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