The Inns of Court College of Advocacy

The Council of the Inns of Court

Guidance on the preparation, admission and examination of expert evidence

Promoting Reliability in Expert Evidence

Copyright notice

CONTENTS

FOREWORD

For the advocate, the expert witness is a different prospect from a witness of fact, and different skills are called for. That is true when it comes to both examination and cross-examination, but there are also quite different considerations which need thought before any trial is reached; indeed, even if there may be no trial, or no expert witness called. The key to the difference is the expert's critical overriding duty to the court; the partisan expert is usually useless.

This helpful guide deals with the pre-trial stage.

There is an element of choice of expert, which rarely applies to other witnesses, and the choice may be critical to the outcome of the case. There can be, and normally will be, discussion with the expert in advance of the trial, in a way which cannot arise with most witnesses of fact. The advocate will need specific preparation in the discipline involved before they can understand the basis of most expert evidence well enough either to elicit it or to challenge it. The roles of advocate and expert witness are, and must remain, distinct. Just as an expert witness who embraces the role of advocate usually neutralises their contribution, the advocate is not and must not make themselves the witness. But some familiarity – and sometimes detailed familiarity – by the advocate with the area of expertise is essential. And as this guide importantly points out, the expert and the advocate both need to understand that they may well not start by speaking the same language. Making sure that the expert understands the legal framework in which his opinion is sought is a vital part of the advocate's task.

In this guide, the advocate will find a short statement of the key principles, and a route to the important sources of them, which differ according to the kind of proceedings in contemplation. I hope that it will be a valuable vade mecum for the advocate, experienced or otherwise, who is navigating the pre-trial stages of selection, preparation, conference and disclosure.

Lord Hughes of Ombersley,

Justice of the Supreme Court 2013-2018

I. INTRODUCTION

1.1. The importance of expert evidence and the crucial role of advocates in promoting its reliability through high standards of case preparation has long been recognised. Several high-profile appeals[1] and a number of inquiry and other reports have in the past identified serious failings and shortcomings in the use of expert evidence and potential ways of improving its reliability. Recommendations included improved training for lawyers and judges, many of whom have little or no knowledge of the many areas covered by expert evidence in court. Among other things it was suggested that law degrees should incorporate an introduction to the basic principles of scientific methodology and statistics and that the CPD requirements for practising barristers and solicitors undertaking work in the criminal courts should be amended to require attendance at approved lectures covering those topics.[2]

1.2. It is in this context that the ICCA embarked on its "Promoting Reliability in Expert Evidence" project. There are already numerous mandatory rules, guidance documents and other widely adopted sources of information about the preparation and admissibility of expert evidence. The purpose of this Guidance is to draw on these sources, along with the experience of senior legal practitioners, to identify and promote the principles of good practice which are commonly accepted across the barristers' profession. The Guidance is intended to be generic, practical and relevant to advocates working in any court or tribunal in England and Wales. It should be used together with, and not in substitution for, the relevant detailed materials referred to in section II below.

[1] E.g.: *Clark* [2003] EWCA Crim. 1020 (second appeal), in which consultant paediatrician Professor Meadow had given statistical evidence that he was not qualified to give. The evidence was incorrect, but its admissibility was not challenged. Professor Meadow was disciplined by his regulator, the GMC, see para. 3.3 below.

See also *R v Doheny* [1997] Cr App R 369, a rape / DNA case, in which counsel asked the expert a question in such a way as to elicit an answer that fell foul of the prosecutor's fallacy (see p.27 of the Royal Statistical Society and ICCA's publication "Statistics and Probability for Advocates: Understanding the use of statistical evidence in courts and tribunals" [2017])

[2] Law Commission Report "Expert Evidence in Criminal Proceedings in England and Wales" (March 2011) paras.1.43, 5.92, 5.115, 8.7; Royal Society's "Brain Waves" Module 4 "Neuroscience and the Law" December 2011, recommendation 3.

II SOURCES

2.1. This section describes some of the materials that underpin this guidance and which should be considered alongside it. Advocates, when preparing to call or challenge expert evidence, might wish to use this section as a checklist to ensure that they have available to them the appropriate materials when considering expert evidence.

The Procedure Rules and Practice Directions

2.2. The importance of the "Expert Evidence" parts of the Procedure Rules and Practice Directions for the relevant jurisdictions cannot be over-emphasised. There are three separate sets of Procedure Rules that apply to litigation in each of the civil, family and criminal courts. Advocates should ensure that they have access to the latest version and an up-to-date commentary (contained in, for example, the White Book for civil procedure, the Red Book for family law practice and Blackstone's Criminal Practice or Archbold: Criminal Pleading, Evidence and Practice for crime) where relevant, noting that the Rules are amended frequently and often at short notice.

2.3. For the purpose of **civil proceedings**, the Rules are found in Part 35 of the Civil Procedure Rules ["CPR"], in Practice Direction ["PD"] 35 and in the Guidance for the Instruction of Experts to Give Evidence in Civil Claims 2014, which is published on the website of the Civil Justice Council and in the White Book immediately following PD 35. The practice and procedures embodied in these documents have been widely adopted in **international and domestic arbitrations and many tribunals**. CPR Part 35 is supplemented by specialist guides containing guidance about the case management of expert evidence; see e.g. the Chancery Guide (paras. 17.46 – 17.61), the Queen's Bench Guide (para. 10.8) and the Admiralty and Commercial Courts Guide (para H2). These can be found online or in Volume 2 of the White Book.

2.4. The practice in the **criminal courts** regarding the use of expert evidence was extensively reviewed by the Law Commission in 2011 in its report *Expert Evidence in Criminal Proceedings in England and Wales*, Law Commission No. 325. The report contained detailed recommendations designed to improve the reliability of expert evidence, including the introduction of a form of "enhanced" reliability test for admissibility. This test, almost in its entirety, has been implemented in Part 19 of the Criminal Procedure Rules 2015 ("CrPR") and the accompanying Practice Directions at 19A, 19B and 19C.

2.5. Practice and procedure relating to expert evidence in the **family courts** is covered by the Children and Families Act 2014 ("CAF") section 13 and Part 25 of the Family Procedure Rules 2010 as amended in 2016, supplemented by Practice Direction 25 (PD 25B covers the Duties of an Expert, the Expert's Report and Arrangements for the Expert to Attend Court Annex, "Standards for Expert Witnesses in the Family Courts in England and Wales".

2.6. These rules share many common principles, but their practical application is affected by significant differences in disclosure obligations, especially for prosecutors and in family proceedings. Even in civil proceedings, however, the court may effectively override litigation privilege, for example, requiring disclosure of an existing report as a condition for permitting a change of expert in an effort to avoid 'expert shopping'.[3]

2.7. There is an overriding duty of full and frank disclosure in all family proceedings.[4] This duty applies in both financial remedy applications following divorce and applications concerning children. In financial remedy applications, the duty is required to enable the court to consider all the relevant factors under the Matrimonial Causes Act 1973 and to apply its discretion when deciding on the appropriate final order. In cases concerning children, the duty is required to ensure that the welfare of the child remains the court's paramount consideration.

2.8. In financial remedy applications however disclosure may be avoided if litigation privilege applies, as in all civil proceedings. The admissibility of the expert evidence will depend upon its necessity to fairly determine the case. The rules governing admissibility of experts' reports in financial remedy proceedings are contained in FPR 25 and Practice Directions 25A and 25D.

2.9. In contrast, litigation privilege does not apply to experts' reports prepared in the course of proceedings concerning children.[5] Therefore, an expert's report, once obtained, will need to be disclosed even if its content is unfavourable to the individual who commissioned the report. In practice this makes it very difficult to hold discussions with experts in conference. Any draft reports that are altered as a result of such discussions are likely to be ordered to be disclosed. This requirement makes the process of selection and instruction of experts even more critical: as it may not be possible to withhold a draft report, even if it was not prepared

[3] See e.g. *Edwards-Tubb v JD Wetherspoon Plc* [2011] EWCA 136.

[4] *Practice Direction: Case Management* [1995] 1 FLR 456.

[5] *Re L (A Minor) (Police Investigation: Privilege)* [1997] AC 16, [1996] 2 WLR 395, [1996] 1 FLR 731, [1996] 2 All ER 78, HL.

as intended, or its contents reflect a failure to provide proper instructions or a lack of clarity in the questions asked.

2.10. The situation is less clear in respect of reports commissioned outside of family proceedings concerning children, but where the contents of the report may be relevant to a subsequent application. Here litigation privilege will apply and the court will need to decide whether welfare of the child overrides the individual's rights to litigation privilege.[6] Given the limits of litigation privilege in family proceedings concerning children, all communications with an expert whose report has been commissioned for the purposes for child proceedings are also disclosable and it is therefore extremely unlikely that a meeting or conference with the expert will take place away from court. Communication can however take place in advance of trial via written questions permitted by FPR Part 25.10

2.11. While the legal position regarding reports commissioned outside Children Act proceedings is less clear, if litigation privilege is asserted the preferred approach is to disclose the existence of the report and to apply for a declaration to dispense with the obligation to disclose.

Duties of Expert Witnesses

2.12. The parts of the procedure rules dealing with expert evidence draw extensively on the list of expert duties derived from authorities and set out by Cresswell J in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68, 81-82. The principles, relevant in all cases involving experts,[7] have frequently been affirmed by the appeal courts[8] and are set out below. They were expanded in 2005 and again in 2009 in the Civil Justice Council's Protocol for the Instruction of Experts to give evidence in civil claims, now renamed "Guidance for the instruction of experts to give evidence in civil claims 2014".

[6] *In Re R (A Minor) (disclosure of privileged material)* [1993] 4 All ER 702, sub *nom Essex County Council v R* [1994] Fam 167, [1993] 2 FLR 826 Thorpe LJ held that the duty to the child overrode litigation privilege, but in contrast Charles J expressed the view that this was limited to those reports which had been prepared for the proceedings relating to the child and refused to order disclosure of a report prepared for the purposes of criminal proceedings: *S County Council v B* [2000] 3 WLR 53, [2000] 2 FLR 161, [2000] 2 FCR 536, FD.

[7] See e.g. *Harris* [2005] EWCA Crim 2980 para. 273

[8] See e.g. the Court of Appeal in *Meadow v GMC* [2007] 1 All ER 1 at para 70

Guidance published by professional bodies and other organisations

2.13. Generic guidance on the role of the expert witness is available, such as the Expert Witness Institute's "Guidance on Professional Conduct". In addition, advocates should check whether there is guidance relevant to experts of specific disciplines published by the professional bodies about the role and duties of their expert witness members. This guidance usually reproduces the relevant Procedure Rules and the Ikarian Reefer principles, but it often imposes additional ethical or other obligations on its members or provides advice specific to the members' profession. Examples include the General Medical Council's *Acting as a Witness in Legal Proceedings*, *Psychologists as Expert Witnesses in England and Wales: Standards, Competencies and Expectations. Guidance from the Family Justice Council and the British Psychological Society,* the Royal Institute of Chartered Surveyors *Surveyors Acting as Expert Witnesses*.

2.14. Guidance is also available about expert evidence in **specific types of cases**, for example, those concerning non-accidental head injury ["NAHI"][9] or child abuse.[10] Similarly there is guidance about adducing **specific types of expert evidence**, for example, DNA identification evidence,[11] hair strand testing for drugs or alcohol[12] and veracity evidence[13] . This type of guidance may be found in publications by bodies such as the CPS, professional bodies, charities such as the Royal Statistical Society, or in the higher courts' judgments on appeal.[14]

---

[9] For example, the CPS's Guidance *Non Accidental Head Injury Cases […] – Prosecution Approach*, published in January 2011. *Sudden Unexpected Death in Infancy: the Report of a Working Group convened by the Royal College of Pathologists and the Royal College of Paediatrics and Child Health* chaired by Baroness Helena Kennedy QC, September 2004 is widely regarded as the definitive review of the issues in such cases, and the *Furness Report* of a Meeting on the Pathology of Traumatic Head Injury in Children (2009) contains crucial information about the relevance of certain findings to an opinion that the cause of death or injury was non-accidental .

[10] An advocate undertaking work involving alleged child abuse in the **Family Division** would be expected to be aware of the guidance provided by Wall J (as he then was) in *Re AB (Child Abuse: Expert Witnesses)* [1995] 1 FLR 181

[11] CPS *Guidance on DNA Charging Including National Tripartite Protocol* (2004); ACPO's *DNA Good Practice Manual* (2005); the Forensic Science Service's *Guide to DNA for Lawyers and Investigating Officers* (2004); *Assessing the Probative Value of DNA Evidence: Guidance for Judges, Lawyers, Forensic Scientists and Experts*, prepared under the auspices of the RSS's Working Group on Statistics and the Law (2012); *Forensic DNA Analysis: A Primer for Courts* The Royal Society (2017)

[12] *Re H (A Child - Hair Strand Testing)* [2017] EWFC 64

[13] *Wigan Council v M & Others (Veracity Assessment)* [2015] EWFC 6

[14] For example, in **NAHI** cases:

Henderson [2010] EWCA Crim 1269, paras 200-221, emphasised the importance of the expert continuing to be in clinical practice. Paragraph 6 reminds the reader that any scientific findings made in one case are not binding on another court determining similar issues (the same point is made in *Harris* paras.70 and 100)

2.15. Those preparing expert evidence should check (with the expert and/or the website of the relevant professional body) whether guidance specific to the expert's discipline or type of case exists and, if it does, that the advocate and the expert have the latest and/or relevant version.[15] The guidance should be obtained at an early stage of case preparation because it can affect important early decisions and case management, including who it might be appropriate to ask to give expert evidence.

2.16. In some circumstances it is acceptable for an employee of a party to give expert evidence, so long as the relationship is disclosed. Thus, in housing cases permission may be given to call an employee to give expert evidence about the extent and costs of disrepair.[16] In many circumstances, an existing relationship with a party, even if disclosed, will render it inappropriate for the expert to give evidence.[17] The necessary relationship of trust between treating clinicians and their patients may be inconsistent with a duty to the court to provide truly independent evidence such that, if there is a need to call them, they would need to be witnesses of fact rather than providing expert evidence.[18] Similarly, paediatricians involved in the acute management of patients should not be expected to give expert testimony in cases involving those patients.[19] Prior to 2016, paediatricians with clinical responsibility for the infant victim were regularly called by the prosecution as expert witnesses; as a result of the Kennedy Report, published in 2016, this is no longer the case.

Detailed guidance on DNA evidence was given in *R v Doheny* [1997] 1 Cr App R 369 and *R v Reed and Reed* [2009] EWCA Crim 2698 at paras 128-131

[15] In the criminal jurisdiction, since March 2017 the expert is personally required to check if there is a code of practice for their discipline [see Criminal Practice Direction March 2017, amending point 13 of PD 19B]

[16] See e.g. *Field v Leeds CC* [2000] 32 HLR 618, 621-622, 624.

[17] See e.g. *Liverpool Roman Catholic Archdiocesan Trust v Goldberg* (No. 3) [2001] 1 WLR 2337, per Evans Lombe J. and *EXP v Barker* [2017] EWCA Civ. 63.

[18] *Wright v Sullivan* [2005] EWCA Civ. 656.

[19] See Kennedy Report "*Sudden Unexpected Death in Infancy*" (2016), page 5.

III. PRELIMINARY ISSUES

Do you need an expert at all?

3.1. The procedural rules in civil proceedings discourage the calling of expert evidence unless it can be shown to be reasonably required for the court's adjudication on the points in issue. In family proceedings the test for permission has been elevated to one of necessity to determine points in issue fairly: CAF 2014 s.13(6). In either case, permission must be obtained from the Court before an expert report can be relied on or expert evidence can be called.[20] Further, the use of expert evidence increases costs and even if the client is successful the court may limit the amount of an expert's fees that may be recovered from another party and, therefore, the amount recovered may be less than full costs reasonably incurred.[21] In publicly-funded cases a proper case has to be made for the instruction of an expert before funding will be granted and the advocate will also be expected to justify the use of expert evidence at a pre-trial case management hearing.

Therefore, one of the first preparation decisions for the advocate is whether an expert is needed and, if so, in what discipline and for what purpose. In order to make these decisions it is necessary to have a clear understanding of the live issues in the case and what an expert can be instructed to do.

In *Kennedy v Cordia (Services) LLP* [2016] UKSC 6, the Supreme Court identified four factors that govern the admissibility of expert evidence in civil proceedings:

i) Whether the proposed evidence will assist the court in its task,
ii) Whether the witness has the necessary knowledge and experience,
iii) Whether the witness is impartial in his or her presentation and assessment of evidence, and
iv) Whether there is a reliable body of knowledge or experience to underpin the expert's evidence.

When making an application in a family case, practitioners will need to apply the statutory test of necessity in the place of i) in *Kennedy above*. In *Re H-L (a child)* [2013] EWCA Civ 655 the President provided a definition of necessity at paragraph 3: "The short answer is

[20] Civil Procedure Rules Part 35.1 and 35.4 and PD 35, *Guidance for the Instruction of Experts to give evidence in civil claims* 2014 para. 5; Family Procedure Rules, r. 25.4 – 25.7

[21] E.g. Civil Procedure Rules r.35.4(4)

that 'necessary' means necessary. It is, after all, an ordinary English word. It is a familiar expression nowadays in family law, not least because of the central role it plays, for example, in Article 8 of the European Convention and the wider Strasbourg jurisprudence. If elaboration is required, what precisely does it mean? That was a question considered, albeit in a rather different context, in *Re P (Placement Orders. Parental Consent) [2008] EWCA Civ 535*, [2008] 2 FLR 625, paras 120, 125, where the court said it "has a meaning lying somewhere between 'indispensable' on the one hand and 'useful', 'reasonable' or 'desirable' on the other hand", having "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable." In my judgment, that is the meaning, the connotation, the word 'necessary' has in rule 25.1."

What can an expert do?

3.2. An expert can perform a number of different functions and does not have to be engaged for all of them.

3.2. An expert can be engaged at an advisory stage, before litigation is contemplated, where it is being considered, or where it is in progress, but without commitment to the expert's giving evidence at a court hearing. The expert might be asked, among other things, to:

- explain technical factual matters which lawyers and the lay client may need to have explained
- give an opinion on the probable cause of a specific event which has occurred
- make forecasts of future events and outcomes
- give an opinion on any other issue which is contested between parties, for example, a valuation
- give this advice orally or in writing.

Any advice given at this stage might be protected by legal professional privilege, depending on the circumstances in which it has been requested. Advocates should be aware of the case law which defines the circumstances in which privilege attaches to an expert's advice.[22]

i) An expert can also be engaged for the purpose of giving expert evidence in the course of proceedings:

- to provide a written report on any and all of the above matters
- to assist in the preparation of a written case, including pleadings
- to comment on an expert report provided by another party

[22] See e.g. White Book para 31.3.5; and see para 2.7 above.

- to hold a joint discussion with other experts and produce a joint statement of areas of agreement and disagreement,
- to provide oral evidence in accordance with their report and be subjected to cross-examination
- to assist with the cross-examination of another party's expert.

Note however that in family cases concerning children a report commissioned in the course of proceedings will almost always be required to be disclosed.

Choosing an expert: how expert is the expert?

3.3. There are two aspects to this question.

(1) The expert must have the training, knowledge and experience which legally entitles them to give expert opinion evidence at all. If they do not, the evidence is inadmissible. *Meadow v GMC* [2007] 1 All ER 1 records the well-known miscarriage of justice which occurred in a murder trial involving the cot deaths of two infants in the same family. An expert paediatrician purported to give an opinion on the statistical probability of two such deaths occurring in the same family which was outside of his expertise and misleading.[23]

Experts must not stray outside the discipline in which they practise and, as the Court of Appeal confirmed in *Meadow,* it is the duty of lawyers to ensure that they do not do so.

(2) Even if the expert is formally qualified to speak to the issues for which they are retained, qualifications should not be equated with experience. Advocates must satisfy themselves that an expert has the requisite experience, up-to-date knowledge and, where necessary, has carried out sufficient research to give evidence which is credible and reliable. Experts must be sufficiently qualified and equipped to give evidence which is authoritative and can withstand rigorous scrutiny.

- Is the expert still in practice? Is he or she at the 'cutting edge' of the latest developments in the discipline where that is relevant?
- Does the expert have relevant experience/knowledge of the practices at the relevant time in a case involving historic allegations?

[23] The statistical error is explained in the ICCA's publication *Statistics and Probability for Advocates: Understanding the use of Statistical Evidence in Courts and Tribunals* 2017 at pages 14-15

- Does the expert only ever appear for one side in a dispute (claimant, prosecution, defendant, regulator, insurer, government department or other similar interest)?
- Has the expert ever served on a public or professional body, committee, tribunal or panel? Did that body produce a report or decision to which the expert was a party? What was the outcome?
- Is there any potential conflict of interest?[24]
- The reputation of the expert within their own profession and before the courts may also be relevant. Has the expert ever been the subject of criticism by the courts or in another professional context? Since 2015 there is an obligation on the party serving an expert report in criminal cases to disclose anything of which the party is aware "which might reasonably be thought capable of detracting substantially from the credibility of that expert." [25]
- Can the expert demonstrate training in and/or knowledge of their duties to the court as an expert and compliance with those duties?
- Is the expert capable of providing sound reasons for their opinion, rather than merely stating a conclusion without logical justification?

Instructing the expert

3.4. Experts must be instructed in accordance with relevant rules and guidance appropriate to the jurisdiction. The material instructions will be disclosed if the expert's report is served, as the rules require them to be set out in the report. The instructions must be clear, state the stage the case has reached (whether proceedings have been started or a charging decision made; if not, whether they are contemplated and whether the expert is being asked for advice only or a full report etc.), provide an accurate summary of the relevant evidence and the issues to be addressed and set out the timetable within which the expert's work needs to be delivered. The advocate should be vigilant that the live issues are correctly identified, the relevant admissibility issues, substantive law[26] and guidance checked, and, in light of that, the expert is or has been asked the correct questions.

[24] e.g. *Guidance for the Instruction of Experts to give evidence in civil claims*, para. 16(e)

[25] R.19(4)(h) Criminal Procedure Rules

[26] For example, if the issue in an unlawful act manslaughter case is whether the prosecution can prove to the criminal standard that the defendant caused the death where a subsequent injury or infection could also be responsible, it is important that the question for the expert accurately reflects the relevant substantive law – not "did the defendant cause the death" but "in your opinion, was the defendant's assault of [the victim] *a significant* cause of death"?

IV. THE ROLE AND RESPONSIBILITIES OF THE EXPERT WITNESS

4.1. The key points below set out the role and responsibilities of the expert witness based on the statement of experts' duties gathered from the authorities by Cresswell J in his judgment in the Commercial Court in the *Ikarian Reefer:*

i) "Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation.

ii) An expert should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise.

iii) An expert witness should state the facts or assumption on which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

iv) An expert witness should make it clear when a particular question or issue falls outside his expertise.

v) 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. In cases where an expert witness who has prepared a report could not assert the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

vi) If, after exchange of reports, an expert witness changes his view on the material having read the other side's expert's report or for any other reason, such change of view should be communicated (through the legal representative) to the other side without delay and when appropriate to the court.

vii) Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports." [27]

[27] [1993] 2 Lloyd's Rep 68 at 81-82

4.2. The rules of court and good practice referred to above have enlarged and expanded upon the principles stated in *Ikarian Reefer*. Advocates may find the following points useful as a checklist:

i) when they are interviewing and conferring with the expert who has been retained by their own client;

ii) when preparing cross-examination of an opposing expert and

iii) when preparing to challenge the admissibility of another party's expert evidence.

1. An expert witness owes a duty to the court to give independent, objective and unbiased evidence within his or her area of expertise.
2. The expert's duty to assist the court overrides any duty owed to the party by whom the expert is instructed or paid.
3. An expert owes a duty to the court to define his or her area of expertise and inform the court of any question to which the answer would fall outside his or her area of expertise.
4. An expert must make clear which facts relied upon are within his or her own knowledge and which facts are derived from other sources.
5. Where any facts, including examinations, measurements, tests or experiments, have been provided or carried out by others, the expert must say from whom the relevant information has been obtained and the extent to which (if at all) the expert participated in the obtaining of the facts or material in question.
6. Experts should always resist any attempt by advocates to present their opinions in an over-simplistic numerical form, or to usurp the decision making function of the court.
7. Where there is a range of opinion on any matter the expert must summarise it and explain why they have reached their own conclusion.
8. Where there are material facts in dispute, the expert should give their opinion on each hypothesis and should not express a view in favour of one version or another unless, by virtue of expertise and/or experience, they can express and justify a view on the probabilities, where that is appropriate.
9. If at any stage in legal proceedings an expert believes that there is a reason for changing or qualifying their disclosed opinion then the parties and the court must be informed immediately.
10. Any of the following could provide a reason for determining that expert opinion evidence is not sufficiently reliable to be admitted in evidence–

a. the opinion is based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing), or which has failed to stand up to scrutiny;

b. the opinion is based on an unjustifiable assumption;

c. the opinion is based on flawed data;

d. the opinion relies on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case;

e. the opinion relies on an inference or conclusion which has not been properly reached.

11. In assessing the reliability of expert opinion evidence, the court will have regard to:

a. the extent and quality of the data on which the opinion is based, and the validity of the methods by which they were obtained.

b. if the opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms).

c. if the 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.

12. As with Judicial or other opinions, what carries weight in expert opinions is the reasoning, not the conclusion.[28]

The content of the expert report

4.1. An expert witness is responsible for providing their evidence in a written report unless the court directs otherwise.[29] The Procedure Rules and the Practice Directions contain lists of detailed requirements concerning the contents of expert reports.[30] Some of the key points above apply to the content of the expert's report, but there are numerous other specific requirements that are particular to each jurisdiction, such as the wording of statements of

[28] *Dingley v Chief Constable, Strathclyde Police* [1998] SC 548, 604, approved by the Supreme Court in *Kennedy v Cordia* [2016] UKSC 6.
[29] eg r.35.5 Civil Procedure Rules; r.25.9 Family Procedure Rules
[30] R.19.4 Criminal Procedure Rules and PD19B and PD19C;
r.35.10 and 35PD.3 Civil Procedure Rules;
r.25.14 and PD25.9.1 Family Procedure Rules 2010

truth,[31] statements as to the absence of a conflict of interest, or to confirm that relevant standards have been applied.[32]

[31] See, for example, CPR PD 35.3.3, Criminal Practice Direction 19B handed down by the Lord Chief Justice in November 2016 which sets out a new 13 point declaration of truth for experts in criminal cases, with a fourteenth point where the expert is instructed by the prosecution.

[32] Family Procedure Practice Direction 25PD9.1

V. CHALLENGES AND LIMITATIONS

Communicating: are you speaking the same language?

5.1. Technical, scientific and statistical language is not necessarily the same as legal or indeed everyday language. The same words may have different meanings for experts, jurors and lawyers.

Statisticians, for example, use what appear to be everyday words in specific technical senses. **'Significance'** is an example. In everyday language it carries associations of importance, something with considerable meaning. In statistics it is a measure of the likelihood that a relationship between two or more variables is caused by something other than random chance.

Scientists, doctors and other experts similarly use other words in a sense which does not closely correspond to the language of the law or ordinary language. Examples include **'evidence', 'proof', 'force', 'probable', 'possible' 'reliable' 'consistent with'.** Words such as **'accuracy', 'precision', 'sensitivity'** and **'specificity'** are used in scientific tests and observations. They are sometimes used by lawyers indiscriminately, but in science they can have specific meanings although experts do not always use them with scientific precision.

Advocates must ensure that technical language used by the expert is adequately explained and interpreted for the benefit of the court.

Quality and quantity of evidence and assumptions

5.2. The reliability of any expert's opinion may depend upon the quality and quantity of the data at the expert's disposal. If so it must be rigorously researched and accredited. Where it depends on sampling or other statistical, technical or scientific methodology the expert must be able to vouch for its viability.

Where there is no recognised proven methodology then the court may refuse to admit evidence based on a single, unproven methodology.[33]

Advocates bear the responsibility of ensuring that any use of a database by experts is consistent with the experts' duties.

[33] *Various Claimants v Sir Robert McAlpine* [2016] EWHC 45.

Expert evidence is frequently undermined on the basis that the assumptions made by the expert are flawed; they need to be tested to ensure that they withstand attack.

Burden and standard of proof

5.3. The purpose behind court procedures is to produce a decision or outcome in each case. A defendant charged with a crime is found either Guilty or Not Guilty. In civil litigation, a claimant is awarded or refused the relief claimed. Decisions are made in the context of, and at times turn upon, the burden and relevant standard of proof.

Experts may not deal in the same currency.

An expert analysing the cause of a past event such as an illness or the collapse of a building will express an opinion on the cause, but may not give it in terms of 'beyond reasonable doubt' or 'on the balance of probabilities'. If a valuer gives an opinion of the value of a piece of real property or an article such as an Old Master picture they may not be able to go further than stating what price they think it is 'likely' to fetch in the open market, based on the information they have and their personal knowledge and experience. A medical expert predicting the likelihood of a patient's future recovery from injury, and the likely degree of recovery, may be in no different position. Experts provide evidence to inform a decision by the court, they do not provide the decision itself, and should not try, or be seen to try, to usurp the decision-making role of the court.

Experts can be asked about the degree of certainty with which their opinion is expressed but it is for the court to connect that evidence with the requirements of legal proof, and for advocates to assist the court with that function and advance their client's case as they do so.

Experts do not provide the final answer to the question which the court has to decide. Their evidence goes no further than forming part of the material on which the decision is based.

VI. WORKING WITH YOUR EXPERT

6.1. Before you meet your expert is there some useful research you can do in advance? Where the expert is a medical doctor, do you understand the expert's qualifications and the system of training sufficiently to assess the expert's experience compared with other experts in the case. There may be textbooks or other technical literature which your expert can recommend, including publications or other materials of their own. Will you need a guide to the expert's methodology or a glossary of technical terms? See, for example, the booklet *"Statistics and Probability for Advocates"* jointly published by the ICCA and the Royal Statistical Society, available on the ICCA's website. If you use a glossary make sure the expert is happy with it. If the primary material, such as medical records, includes manuscript documentation in which recognised abbreviations are used, ensure you understand the abbreviations.[34] In family proceedings, the communications with the expert should take place through written questions put in accordance with FPR 25.10.

6.2. If an expert relies on scientific literature, make sure that you understand which are the key parts, and have read them and understand their relevance. Check with your expert that they have undertaken a thorough literature search to check if there is other literature, whether supportive of their opinion or otherwise. You should understand the system of academic authorship and how to identify who was responsible for the "hands on" work described in the paper, and whether it is presenting new research or reviewing previous research papers. Where another party's expert relies on scientific literature which is unsupportive of your case, look for the distinguishing features in the same way you would a law report. Be prepared to discuss the literature produced by all experts in the case with your expert to ensure you understand its significance. Where clinical trials form part of the expert evidence, ensure you understand how research is carried out and the significance of the various levels and types of study (randomised controlled, observational, cross-sectional, longitudinal etc.)

6.3. Draw up a list of issues and prepare an agenda for meetings with experts to ensure that all relevant points are covered. Use the Guidelines in Section IV above as a checklist, especially for the first meeting.

6.4. Ensure that an accurate note is taken of what the expert says at every meeting. Check with the expert that the note-taker has correctly understood and recorded what they said, particularly where disclosure issues arise (e.g. in a criminal prosecution or where there are

[34] Lists of medical abbreviations are available on the internet; take care to use a reputable UK site in a UK case as some US abbreviations and usages are different

other disclosure obligations).[35] In family proceedings unless litigation privilege has been established, such meetings are unlikely to assist due to the disclosure obligation discussed above. In a case involving more than one expert the court is likely to direct an experts' meeting. For that meeting the experts will answer questions agreed between the parties and a transcript of the meeting will be made. In an attempt to narrow issues the parties should seek to agree a schedule of agreement and disagreement approved by the experts for use at trial or in negotiation.

6.5. If the expert's advice is based on a sequence of events, prepare your own chronology, whether or not the expert has also provided one. Include detailed source references in your chronology because your expert may be working from unpaginated materials or might have missed a piece of evidence. Being able to locate rapidly all relevant material at a meeting with your expert will save time and facilitate informed discussion and it will enable you to check that you and the expert are looking at the same facts in the same order.

6.6. Ask the expert to assess the strengths and weaknesses of your case and of the opposing case. Discuss what you yourself perceive to be the relative weaknesses and strengths. Does the expert agree with you? How are these relative weaknesses and strengths addressed? The opportunity to ask such questions in family proceedings will be rare and is probably restricted to circumstances where the court is considering welfare in public law children cases where a public authority may have a duty to provide support and assistance which would improve a parent's prospects of success.

6.7. What does the expert really think? Has the expert conveyed that clearly in accordance with their duties? This might be an important question if there is some suggestion that the expert may be struggling to express a view that clearly supports your client's case. Is it a failure of expression, or something more fundamental? It is better to be aware of any unsupportive views in conference where that is an option, rather than learning of them for the first time during oral evidence.

However, caution should be exercised. Before asking the question make sure that the expert has undertaken sufficient work on the case to have formed a definitive view about it, otherwise considerable confusion can be caused bearing in mind the disclosure rules if acting for a prosecutor, a regulator or in family proceedings.

[35] Eg R19.3(3)(c) Criminal Procedure Rules there is an obligation on all parties to disclose anything which might reasonably be thought capable of detracting substantially from the credibility of the expert.

6.8. Do you need photographs, drawings, models or visual presentations (for example, PowerPoint) to enable both you and the court to understand better what the expert is saying? If so make sure you have seen it and understand it before calling the expert.

6.9. Should you have a 'view' of any property, location or other physical material? If so, make sure that you have seen it yourself before a view is proposed to the other side or the court. Discuss your own observations with your expert.

6.10. If your expert is not experienced in giving evidence and has little training, ensure that relevant procedural matters are fully explained. These might range from basic rules such as the prohibition on communication between the expert and the legal team instructing them whilst they are giving evidence, to more complex matters relating to court directed discussions between experts and the drafting of joint statements, or the giving of concurrent expert evidence (hot-tubbing). Be clear about the time commitment required, the arrangements for fixing dates and the notice that will be given. Explain how the trial timetable will work, e.g. whether the experts in like fields will be giving their evidence 'back to back' or not, and what evidence the court will already have heard. Where appropriate explain that the expert might be required to attend court to hear other evidence in order to give their final opinion to the court, maybe even attending court on several occasions.

6.11. Be wary of carrying knowledge over from one case to another. The court will be interested in the expert evidence in the present case rather than your view based on your own experience. You may not have understood the expert position as it applies to the present case without being prepared to understand it afresh. Your knowledge from previous cases can be helpful to understand and challenge evidence in preparation for your case, but it is no substitute for well-founded expert evidence.

6.12. Make sure that, at every step, you have fully understood every part of the evidence. Do not shrink from asking questions which might seem naïve or obvious. The only stupid question is one that you should have asked, but were too afraid to do so. A good expert should be able explain even complex issues in plain language, and will need to do so for the court. Do not allow yourself to go into court, or draft documents based on expert opinion, with blanks in your understanding where that can be avoided.

VII. CONCLUSION

7.1. This Guide is not intended as a guide to the techniques of witness handling in evidence in chief or in cross-examination. Resources to help with those topics are available elsewhere on the ICCA website. It is important to remember, however, that expert witnesses are witnesses, and may be subject to the same insecurities, weaknesses and foibles as any other witness. A sound understanding of the points discussed above should equip advocates to help prepare expert witnesses to give evidence, and also help advocates prepare to cross examine experts called by an opposing party.

ACKNOWLEDGMENTS

The ICCA gratefully acknowledges the assistance in the preparation of this guide of the following individuals:

Grahame Aldous QC

David Bentley QC

Alison Easton

Joanna Glynn QC

Martin Griffiths QC

Andrew Hochhauser QC

HHJ David Hodge QC

Michael Kent QC

Scott Kier

Professor Ruth Morgan

Professor David Ormerod QC

Tim Parker

Nathan Rasiah

Sarah Whitehouse QC

Adrian Whitfield QC

Derek Wood QC

The Inns of Court College of Advocacy
9 Gray's Inn Square,
London
WC1R 5JD
T: 020 7822 0763
E: info@icca.ac.uk

The Council of the Inns of Court. Limited by Guarantee
Company Number: 8804708
Charity Number: 1155640
Registered Office
9 Gray's Inn Square, London WC1R 5JD