



The Inns of
Court College
of Advocacy

Guidance on the preparation, admission and examination of expert evidence

Promoting Reliability in Expert Evidence

Third edition

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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 appeals¹ 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.² Recommendations have included improved training for lawyers and judges, many of whom have little or no scientific education. Among other things it has been 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.³ In 2019 the House of Lords Science and Technology Select Committee report *Forensic Science and the Criminal Justice System: a blueprint for change* recommended that:

“all advocates practising in the criminal courts should, as part of their continuing professional development, be required to undertake training in the use of scientific evidence in court and basic scientific principles such as probability, scientific inference and research methods.”⁴

- 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 is an introduction to, and/or handy refresher of, the principles that underlie the use of expert evidence. This Guidance should be used together with, and not in substitution for, the relevant detailed materials referred to in section II below. The provisions applicable in different jurisdictions are deliberately considered alongside each other to encourage the cross-pollination of ideas and good practice.

¹ Eg: [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 \[1996\] EWCA Crim 728](#) [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 The Family Division has identified a shortage of experts willing to give evidence in family proceedings. A multi-disciplinary working group constituted by the President of the Family Division and chaired by Williams J has prepared a draft report for consultation which makes recommendations as to how this serious issue may be addressed: <https://www.judiciary.uk/wp-content/uploads/2019/11/Presidents-Working-Group-on-Medical-Experts-draft-report-Final.pdf>

³ 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.

⁴ 3rd Report of Session 2017-19; HL Paper 333. Para 136.

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. Specialist tribunals may have their own procedural rules that will need to be considered against the principles that are identified in this Guidance.

Civil Proceedings

- 2.3 For the purpose of civil proceedings, the applicable rules on expert evidence are to be 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, which is published on the website of the Civil Justice Council and in the White Book immediately following PD 35.⁵ 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.

Criminal Proceedings

- 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. 325.⁶ 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

⁵ The current version can be found at: <http://www.judiciary.gov.uk/wp-content/uploads/2014/08/experts-guidance-cjc-aug-2014-amended-dec-8.pdf>.

⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/229043/0829.pdf

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.

Family Proceedings

- 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 (PD25B covers the Duties of an Expert, the Expert’s Report and Arrangements for the Expert to Attend Court and an Annex, Standards for Expert Witnesses in Children Proceedings in the Family Court).

Common Principles and Distinct Disclosure Obligations

- 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’.⁷

Disclosure in Financial Remedy Applications

- 2.7 There is an overriding duty of full and frank disclosure in all family proceedings.⁸ In financial remedy applications, however, disclosure may be avoided if litigation privilege applies, as in civil proceedings. The admissibility of expert evidence will depend on its necessity to determine the case fairly. The rules governing admissibility of expert’s reports in financial remedy proceedings are contained in FR25 and Practice Directions 25A and 25D.

Disclosure in Proceedings concerning Children

- 2.8 In contrast, litigation privilege does not apply to experts’ reports prepared in the course of proceedings concerning children.⁹ Therefore an expert’s report once obtained will need to be disclosed even if its contents are 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 may be disclosable. This requirement makes the process of selection and instruction of experts even more critical, as it may not be possible to withhold material that has been produced even if it was not as intended, or is a result of a failure to provide proper instructions or to think things through due to a lack of clarity in the questions asked.

⁷ See e.g. *Edwards-Tubb v JD Wetherspoon Plc* [2011] EWCA Civ. 136.

⁸ Practice Direction: Case Management [1995] 1 FLR 456.

⁹ *Re L (A Minor) (Police Investigation: Privilege)* [1997] AC 16, [1996] 2 WLR 395, [1996] 1 FLR 731, [1996] 2 All ER 78, HL.

- 2.9 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.¹⁰ 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.
- 2.10 Given the lack of litigation privilege 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.

Disclosure in Criminal Proceedings

- 2.11 In criminal proceedings, since April 2019 CrimPR 19.02 and 19.03 place duties on the expert and party relying on him or her to disclose "anything of which the party serving '[the report]' 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." The expert is under a duty to disclose such matters to the party who commissioned the report. If the party then seeks to introduce that report they must serve with it notice of such matters.¹¹ The CrimPR provides a non-exhaustive list of matters that should be disclosed. CrimPR 19.09 provides a procedure for a party who wishes to introduce expert evidence to apply to the court to withhold information that would normally be disclosed.¹²

Duties of Expert Witnesses

- 2.12 The expert evidence parts of the procedure rules draw extensively on the list of the duties of an expert 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 are relevant in all cases involving experts,¹³ have frequently been affirmed by the appeal courts¹⁴ 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

¹⁰ In *Re R (A Minor) (disclosure of privileged material)* [1993] 4 All ER 702, sub nom *Essex County Council v R* [1994] Fam 167n, [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.

¹¹ See also CrimPD V 19A.

¹² See *R v Kelly* [2018] [EWCA Crim 1893](#) (encryption cracking techniques for mobile phones).

¹³ See e.g. *Harris* [2005] [EWCA Crim 2980](#) para. 273.

¹⁴ See e.g. the Court of Appeal in *Meadow v GMC* [2007] 1 All ER 1 at para 70.

evidence in civil claims 2014. The Criminal Practice Direction Rule 19 sets out the obligations on experts in criminal proceedings.¹⁵ CrimPR 19.2 as amended includes a duty on the expert to assist the court in fulfilling its duty of case management by complying with court directions and informing the court of any significant failure by anyone to take any step required by such a direction.

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*; the British Medical Association's *Expert Witness Guidance*; the *Code of practice and performance standards for forensic pathology in England, Wales and Northern Ireland* G131 (September 2018) issued by Home Office, The Forensic Science Regulator, Department of Justice and The Royal College of Pathologists; *Responsibilities of psychiatrists who provide expert opinion to courts and tribunals*, Royal College of Psychiatrists College Report (September 2015); *Psychologists as Expert Witnesses in England and Wales (Standards, Competencies and Expectations)* from the Family Justice Council and the British Psychological Society; and *Surveyors Acting as Expert Witnesses* from the Royal Institute of Chartered Surveyors.
- 2.14 Guidance is also available about expert evidence in specific types of cases, for example those concerning non-accidental head injury ["NAHI"]¹⁶ or child sexual abuse.¹⁷ Similarly there is guidance about adducing specific types of expert evidence, for example, DNA identification evidence¹⁸, Gait Analysis¹⁹, hair strand testing for drugs or alcohol²⁰ and

¹⁵ <https://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu-2015#Anchor6>.

¹⁶ For example, the Crown Prosecution Service's *Guidance Non-accidental Head Injury Cases...A Prosecution Approach* published in January 2011. Sudden Unexpected Death in Infancy and Childhood: the Report of a Working Group convened by the Royal College of Pathologists and endorsed by 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 *Report of a Meeting on the Pathology of Traumatic Head Injury in Children* ('The Furness Report') 2009, contains crucial information about the relevance of certain findings to an opinion that the cause of death or injury was non-accidental.

¹⁷ *The Physical Signs of Child Sexual Abuse*, Royal College of Paediatrics and Child Health (May 2015). 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.)

¹⁸ 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 Royal Statistical Society's Working Group on Statistics and the Law (2012); *Forensic DNA Analysis: A Primer for Courts*, The Royal Society (2017)

¹⁹ <https://royalsociety.org/-/media/about-us/programmes/science-and-law/royal-society-forensic-gait-analysis-primer-for-courts.pdf>

²⁰ *Re H (A Child - Hair Strand Testing)* [2017] EWFC 64

veracity evidence²¹. This type of guidance may be found in publications by bodies such as the CPS, professional bodies, charities such as the Royal Statistical Society, the Forensic Science Regulator²², the Royal Society²³, or in the higher Courts' judgments on appeal²⁴.

- 2.15 The Forensic Science Regulator has produced a raft of guidance for experts including, significantly: *Codes of Practice and Conduct for experts*²⁵; and guidance on legal obligations and report contents for expert witnesses.²⁶
- 2.16 Advocates 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 expert has the latest and/or relevant version.²⁷ 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.
- 2.17 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 if it could be shown that in addition to the required expertise the witness had the required objectivity.²⁸ In criminal cases, it has been held that a prosecution investigator may give expert evidence, and the extent of his independence goes to weight not admissibility.²⁹ The officer must, however, have sufficient training and/or experience to offer an expert opinion and be able to demonstrate that they understand their duties to the court.³⁰ It is for example commonplace for analysts employed by the police to give expert evidence in relation to mobile phone data including cell-site analysis where the jury really need help with the technical limitations of such analysis³¹, or for Forensic Collision Investigators employed by the police to give evidence in prosecutions for fatal road traffic collisions.
- 2.18 As the Court of Appeal said in *Factortame* (No. 8),

²¹ *Wigan Council v M & Others (Veracity Assessment)* [2015] EWFC 6

²² <https://www.gov.uk/government/organisations/forensic-science-regulator>

²³ <https://royalsociety.org/about-us/programmes/science-and-law/>

²⁴ 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)

Detailed guidance on DNA evidence was given in *R v Doheny* [1997] 1 Cr App R 369; *R v Reed and Reed* [2009] EWCA Crim 2698 at paras 128–131 and *R v Duglosz* [2013] EWCA Crim 2. The Court of Appeal (Criminal Division) has issued guidance on the circumstances in which it is permissible to leave a case to the jury based on DNA alone: *R v Tsekiri* [2017] EWCA Crim 40.

²⁵ <https://www.gov.uk/government/collections/forensic-science-providers-codes-of-practice-and-conduct>

²⁶ <https://www.gov.uk/government/collections/fsr-legal-guidance>.

²⁷ 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 Practice Direction point 13 of PD19B].

²⁸ See e.g. *Field v Leeds CC* [2000] 32 HLR 618, 621–622, 624.

²⁹ *Gokal*, Court of Appeal, Criminal Division, 11 March 1999 (unreported), followed in *Stubbs* [2006] EWCA Crim 2312.

³⁰ See the guidance set down by the Privy Council in *Myers v The Queen* [2016] UKPC 40

³¹ *R v Calland* [2017] EWCA Crim 2308.

‘Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence.’³²

In many circumstances, however, an existing relationship with a party, even if disclosed, will render it inappropriate for the expert to give evidence and the potential for problems is best avoided.³³ The necessary relationship of trust between treating clinicians and their patient 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.³⁴ Similarly, paediatricians involved in the acute management of patients should not be expected to give expert testimony in cases involving those patients.³⁵ Before the Kennedy Report in 2016 paediatricians with clinical responsibility for the care of the infant victim were regularly called by the prosecution as expert witnesses in this type of case, but as a result of that report this is no longer the case.

³² *R. (Factortame Ltd) v Transport Secretary (No.8)* [2002] EWCA 932 at [69-70] [2003] Q.B. 381 CA at [70] per Lord Phillips MR.

³³ See e.g. *EXP v Barker* [2017] EWCA Civ. 63.

³⁴ *Wright v Sullivan* [2005] EWCA Civ. 656.

³⁵ See Kennedy Report, *Sudden Unexpected Death in Infancy* (2016), page 5.

III. Preliminary Issues

What is Expert Evidence?

- 3.1 Expert witnesses can give their opinions to assist the court. Their evidence need not consist wholly of opinion. They can give evidence of facts that they have observed that are relevant to a fact in issue, such as the distance between objects, or the angle of a slope³⁶. Unlike other witnesses, however, experts may also give evidence based on their knowledge or experience of a subject matter, and drawing on the work of others. The statement of King CJ in the Australian case of *R v Bonython*³⁷ as to who may offer such opinions was cited with approval by the UK Supreme Court in *Kennedy v Cordia*³⁸:

“Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.”

- 3.2 The statutory source of the court’s power to control the admission of expert evidence in civil cases is to be found in ss.2 and 3 of the Civil Evidence Act 1972. Section 3 provides that an expert’s opinion is admissible on any matter on which he is qualified to give expert evidence. Section 2 defines expert reports as reports that deal wholly or mainly with matters on which the expert is qualified to give expert evidence. The admissibility of an expert’s opinions will thus depend on the issue, i.e. the factual issue that the court has to decide, to which the evidence is directed, and the qualification of the expert to assist. This limitation is recognised by the courts. In *Sansom v Hambleton & Co*³⁹, the Court of Appeal set aside a finding of negligence against a surveyor that was based on evidence by a structural engineer which was critical of what the surveyor had done. Butler-Sloss LJ said (at 549):

³⁶ See e.g. Forensic Science Regulator Non-Expert Technical Statement Guidance FSR-G-225 Issue 2 <https://www.gov.uk/government/publications/non-expert-technical-statements-issue-2>

³⁷ (1984) 38 SASR 45

³⁸ *Kennedy v Cordia* [2016] UKSC 6 para. 43.

³⁹ [1998] P.N.L.R. 542 CA.

“...a court should be slow to find a professionally qualified man guilty of a breach of his duty of skill and care towards a client (or third party) without evidence from those within the same profession as to the standard expected on the facts of the case and the failure of the professionally qualified man to measure up to that standard.”

- 3.3 Expert opinion should not consist simply of an assertion as to the expert’s opinion. The expert must explain the basis of their evidence and mere assertion will carry little weight. In *Kennedy*, the Supreme Court approved the dicta of Wessels JA in the Supreme Court of South Africa in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft fur Schadlingsbekampfung mbH*⁴⁰:

“An expert’s opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert’s bald statement of his opinion is not of any real assistance. Proper evaluation can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.”

- 3.4 They also approved the rather more pithy approach of Lord Prosser in the Scottish case of *Dingley v Chief Constable, Strathclyde Police*⁴¹:

“As with Judicial or other opinions, what carries weight is the reasoning, not the conclusion.”

Do you need an expert?

- 3.5 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 relation to them. In civil and family cases permission must be obtained from the Court before an expert report can be relied on or an expert can be called to give evidence⁴². In criminal cases no express order for permission is required, but a report must have been served and comply with Crim PR, rule 19.4.
- 3.6 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.⁴³ 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.

⁴⁰ [1976] (3) SA 352 at 371.

⁴¹ [1998] S.C. 548 at 604.

⁴² 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.

⁴³ E.g. Civil Procedure Rules r.35.4(4).

Requirements in Civil Proceedings

- 3.7 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 issue⁴⁴. If the expert evidence is admissible then the court needs to consider whether the court can do without it. If it may be reasonably required to resolve the issues then it may be allowed in⁴⁵.
- 3.8 When a party applies for permission under CPR Pt 35 they must provide an estimate of the costs of the proposed expert evidence and identify—
- a) the field in which expert evidence is required and the issues which the expert evidence will address; and
 - b) where practicable, the name of the proposed expert.⁴⁶
- 3.9 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.

Requirements in Family Proceedings

- 3.10 In family proceedings the test for permission has been elevated to one of necessity fairly to determine points in issue: CAF 2014 s13(6). When making an application in a family case, practitioners will need to apply the statutory test of necessity in the place of i) above in *Kennedy*. The high bar imposed by necessity should not be under-estimated. CAFs13(7) requires any application for permission to rely on expert evidence to address the following criteria:
- a) any impact which giving permission would be likely to have on the welfare of the children concerned, including in the case of permission [for an examination or assessment of a child] as mentioned in subsection (3) any impact which any examination or other assessment would be likely to have on the welfare of the child who would be examined or otherwise assessed,
 - b) the issues to which the expert evidence would relate,
 - c) the questions which the court would require the expert to answer,

⁴⁴ CPR Part 35.

⁴⁵ See *RBS (Rights Issue Litigation)*, Re [2015] EWHC 3433 (Ch), *British Airways Plc v Spencer* [2015] EWHC 2477 (Ch) and *Dudding v Royal Bank of Scotland Plc* [2017] EWHC 2207 (Ch) per Asplin J.

⁴⁶ CPR Part 35.4

- d) what other expert evidence is available (whether obtained before or after the start of proceedings),
- e) whether evidence could be given by another person on the matters on which the expert would give evidence,
- f) the impact which giving permission would be likely to have on the timetable for, and duration and conduct of, the proceedings,
- g) the cost of the expert evidence, and
- h) any matters prescribed by Family Procedure Rules.

3.11 In *Re H-L (a child)* [2013] EWCA Civ 655 the President provided a definition of necessity at paragraph 3: "The short answer is 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."

Requirements in Criminal Proceedings

3.12 In criminal proceedings the common law test for the need for expert opinion remains that from *R v. Turner* [1975] Q.B. 834: "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If, on the proven facts, a judge or jury can form their own conclusions without help, the opinion of an expert is unnecessary."⁴⁷

What can an expert do?

- 3.13 An expert can perform a number of different functions, but does not have to be engaged for all of them.
- i) An expert can be engaged at an advisory stage, before litigation is contemplated, or if it is being considered or is in progress, but without commitment to the expert 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;

⁴⁷ [1975] Q.B. 834, 841 per Lawton LJ. Archbold (2020) para 4-394; *Blackstone's Criminal Practice* (2020) F11.

- 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 advice⁴⁸.

- ii) An expert can also be engaged for the purpose of giving expert evidence in the course of proceedings:
- to provide a written report on all or any 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;
 - 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.

Points to note in Family and Criminal Proceedings

- 3.14 Note, however, that in family cases concerning children a report commissioned in the course of proceedings will almost always be required to be disclosed. Further, note that in criminal cases, streamlined forensic reports (SFRs) are prepared containing a summary of the scientific evidence and a more detailed report is produced only when the defence have identified what is not admitted. SFRs are not intended for use at trial⁴⁹.

Choosing an expert: how expert is the expert?

- 3.15 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 GMC⁵⁰ 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

⁴⁸ See e.g. White Book para 31.3.5; and see paras 2.7 and 2.8 above.

⁴⁹ The SFR Guidance and Toolkit are on the CPS website at http://www.cps.gov.uk/legal/s_to_u/scientific_evidence/sfr_guidance_and_toolkit/

⁵⁰ [2006] EWCA1390.

deaths occurring in the same family which was outside of his expertise and misleading.⁵¹

Experts must not stray outside the discipline in which they practise⁵² and, as the Court of Appeal confirmed in *Meadow*, it is the duty of lawyers to ensure that they do not do so⁵³.

- 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 and up to date knowledge, and that where necessary they have 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?
 - 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?⁵⁴
 - 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?⁵⁵
 - 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?

⁵¹ 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.

⁵² In criminal proceedings, by Crim PR 19.4 the expert is obliged in his or her report to give details, inter alia, of "the expert's qualifications, relevant experience and accreditation" and in Crim PR 19.2 (2) to define the expert's area or areas of expertise— in the expert's report. For an example of an expert failing to remain within his field of expertise see *R v Pabon* [\[2018\] EWCA Crim 420](#).

⁵³ [\[2006\] EWCA 1390](#), para. 89 per Sir Anthony Clarke MR and para. 206 per Auld LJ.

⁵⁴ eg Guidance for the Instruction of Experts to give evidence in civil claims, para. 16(e)

⁵⁵ 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", R.19(4)(h) Criminal Procedure Rules

Instructing the expert

- 3.16 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, including e.g. whether a charging decision has been made in criminal proceedings, and if not whether they are contemplated). It should be clear whether the expert is being asked for advice only or whether a full report with a view to disclosure and use in proceedings is sought.
- 3.17 The instructions should provide an accurate summary of the relevant evidence and the issues to be addressed. They should also set out the time table within which the expert's work needs to be delivered. Advocates should be vigilant that the live issues are correctly identified, admissibility issues, the relevant substantive law⁵⁶ and any guidance checked, and, in the light of that, that the expert is or has been asked the correct questions. The Forensic Science Regulator has set out guidance for experts on their obligations in preparing reports.⁵⁷
- 3.18 In family cases this process is made more formal by the requirement to seek the permission of the Court to rely upon an expert's evidence referred to above. In addition to satisfying the statutory criteria referred to above, FPR 25 specifies what information the Court will require when determining the application⁵⁸. Most significantly this requires the applicant to identify and set out the questions that are to be put to the expert for the approval of the Court.

⁵⁶ 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”?

⁵⁷ <https://www.gov.uk/government/publications/expert-report-content-issue-4>

⁵⁸ FPR Part 25 PD25C in family cases concerning children and PD25D in family cases not concerning children e.g. financial remedy applications.

IV. The role and responsibilities of the expert witness

4.1 Many of the key points set out below on the role and responsibilities of the expert witness are 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*⁵⁹:

- "(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 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."*

Expert's Duties Checklist

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 (a) when they are interviewing and conferring with the expert who has been retained by their own client; (b) when preparing cross-examination of an

⁵⁹ [1993] 2 Lloyd's Rep 68 at 81-82

opposing expert and (c) 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 conclusion⁶⁰.

The content of the expert report

- 4.3 An expert witness is responsible for providing their evidence in a written report unless the court directs otherwise⁶¹. The Procedure Rules and the Practice Directions contain lists of detailed requirements concerning the contents of expert reports⁶². 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 truth⁶³, statements as to the absence of a conflict of interest, or to confirm that relevant standards have been applied⁶⁴.
- 4.4 Disclosure failures in relation to expert evidence have led to convictions being quashed in some of the gravest and most high profile of criminal cases⁶⁵. As such, advocates must ensure that a party calling contested expert evidence has met its disclosure obligations in relation to that evidence⁶⁶.
- 4.5 In criminal proceedings, the prosecution are under a general obligation to disclose to the defence any material in the possession of the prosecution that might reasonably be considered capable of undermining the case for the prosecution or assisting the case for the defence. In relation to expert evidence, a further specific rule of disclosure applies to *any party* who wants to introduce expert evidence (other than as admitted fact), that is that the report must be served with notice of anything of which the party serving it is

⁶⁰ Dingley v Chief Constable, Strathclyde Police [1998] SC 548, 604, approved by the Supreme Court in Kennedy v Cordia [2016] UKSC 6.

⁶¹ eg r.35.5 Civil Procedure Rules; r.25.9 Family Procedure Rules

⁶² R.19.4 Criminal Procedure Rules and PD19B and PD19C; r.35.10 and 35PD.3 Civil Procedure Rules; r.25.14 and PD25B Family Procedure Rules 2010

⁶³ 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.

⁶⁴ Family Procedure Practice Direction PD25B 9.1

⁶⁵ Judith Ward [1993] 1 WLR 619; Sally Clark [2003] EWCA Crim 1020.

⁶⁶ See <https://www.cps.gov.uk/legal-guidance/cps-guidance-experts-disclosure-unused-material-and-case-management> and Chapters 36 and 37, CPS Disclosure Manual, https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Disclosure-Manual-12-2018.pdf

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: Rule 19.3(3)(c), Crim PR 2015.

- 4.6 Whether calling or challenging an expert, an advocate should confirm whether the expert is aware of these disclosure obligations and has completed a schedule of disclosable material, and consider whether to examine the 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.
- 4.7 The duties on the expert are ongoing. For example in criminal proceedings Crim PD 19.2 (3) provides a duty on experts to, inter alia, (a) inform all parties and the court if the expert's opinion changes from that contained in a report served as evidence or given in a statement; and (b) disclose to the party for whom the expert's evidence is commissioned anything—(i) of which the expert is aware, and (ii) of which that party, if aware of it, would be required to give notice of any situation in which an expert seeks to withhold information from the another party. This might include, for example, that the confidential details as to encryption cracking techniques for mobile phones have not been disclosed in the report⁶⁷.

⁶⁷ See R v Kelly [\[2018\] EWCA Crim 1893](#).

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.
- 5.2 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.
- 5.3 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.
- 5.4 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

- 5.5 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.
- 5.6 Where there is no recognised proven methodology then the court may refuse to admit evidence based on a single, unproven methodology⁶⁸.
- 5.7 Advocates bear the responsibility of ensuring that any use of a database by experts is consistent with the experts' duties.
- 5.8 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

- 5.9 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

⁶⁸ *Various Claimants v Sir Robert McAlpine* [2016] EWHC 45.

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.

- 5.11 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.
- 5.12 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.
- 5.13 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.
- 5.14 In criminal cases it has been accepted that experts may testify as to the "ultimate issue"⁶⁹. Care will be needed, therefore, in the way a jury should be directed to reach their own decision taking into account such evidence⁷⁰.

⁶⁹ R v Robb (1991) 93 Cr App R 161..

⁷⁰ See in particular the guidance in *R v Golds* [2016] UKSC 61.

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 website⁷¹. 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 abbreviations⁷². 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 other disclosure obligations)⁷³. 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

⁷¹ <https://www.icca.ac.uk/promoting-reliability-in-expert-evidence/>

⁷² 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

⁷³ 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.

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.
- 6.8 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 for a party to family proceedings.
- 6.9 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.
- 6.10 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.
- 6.11 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 statements⁷⁴, or the giving of

⁷⁴ There is a power under CrimPR 19.6 for the court to direct a pre-hearing discussion between experts and require a report on issues agreed and in dispute. CrimPD 19C provides guidance on how such meetings should take place. For civil claims see CPR Part 35.12.

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.

- 6.12 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.
- 6.13 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
- Mr Justice Martin Griffiths
- 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

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