Factsheet 61: Record, retain, reveal

Or... Experts and disclosure: the rules for prosecution experts

Last reviewed: April 2018

Few can be unaware of the problems that arose in the Sally Clark case from the failure of the prosecution to disclose the existence of a bacteriology report on one of the Clark children. It was this sheet of paper that was ultimately to lead to the quashing of her conviction.

One result of this was that the Attorney General, as part of his investigation into Shaken Baby Syndrome cases, ordered a review of the legislation that controls the disclosure of evidence in criminal cases. At the same time there was a consultation carried out by the Crown Prosecution Service (CPS) under the chairmanship of the Director of Public Prosecutions (DPP) which dealt with procedures for instructing expert witnesses.

Following consultation, the results of the review chaired by the DPP were issued in the form of The Crown Prosecution Service Disclosure Manual (surf to https://www.cps.gov.uk). This applies to all investigations commenced on or after 4 April 2005.

Disclosure Manual and Guidance for Experts

The CPS will forgive the observation that the Manual is a bit of a hotch potch of regulations. In essence it draws together the relevant rules and guidance relating to disclosure. So far as expert witnesses are concerned, the CPS has produced a Guidance Booklet for Experts (Annex K: Disclosure: Experts’ evidence, case management and unused material; dated May 2010) which it says provides ‘comprehensive guidance setting out what prosecutors should expect from the expert witnesses they instruct’. This has been designed to identify the steps experts have to take when dealing with material in their possession which is ‘relevant to the investigation in question’, emphasising the need for them to record, retain and disclose that material to investigators and prosecutors. The separate guidance for prosecutors and police officers covers situations in which the competence and credibility of an expert is an issue, and includes specific mechanisms for the revelation by experts of material relevant to this. An expert will now be required to complete a certificate of competence and credibility and must also sign a declaration that he or she has fully complied with disclosure obligations.

Disclosure duties on experts

The duties and obligations of experts are now set out in Chapters 36 and 37 of Part 2 of the CPS Disclosure Manual. 36.1 states that:

‘The test for disclosure of unused material is the same in relation to material generated by an expert as for all other types of unused material. If unused material relating to an expert witness is relevant, the police must reveal it to the prosecutor and, if the material meets the disclosure test, it must be disclosed to the defence...’

The obligations of the expert are summarised in the manual as being to ‘record, retain and reveal’. The manual makes the point that experts who are not directly employed by the police are third parties and, as such, are not bound by the obligations set out in the 1996 Act1. Consequently, the CPS seeks to impose these obligations as part of the contractual relationship with the expert. When a member of the prosecution team instructs an expert, they are required to ensure that the expert understands the obligations placed upon them through the contract.

A duty that overrides any professional duty

This does, however, create a potential conflict: the expert owes an overriding duty to assist the court and, in this respect, the expert’s duty is to the court and not to the prosecution team. This potential conflict is dealt with in the Guidance Booklet. It affirms that the expert’s duty is owed to the court, but that part of that duty includes the obligation to assist in ensuring that the prosecution team can comply fully with their statutory disclosure obligations. Interestingly, the booklet says that these obligations take precedence over any internal codes of practice or other standards set by any professional organisations to which the expert may belong.

What material is covered?

The Guidance identifies the material to which the disclosure rules are designed to apply. The definition is a simple one:

‘During the course of any investigation material is generated. Some of it is used as evidence and other material is not used. The material that is not used as evidence is known as unused material, to which the disclosure regime applies’.

The Guidance goes on to say that:

‘... Unused material is material that is relevant to the investigation but which does not actually form part of the case for the prosecution against the accused. Even though the material may not be used as evidence, it is important that for the purposes of disclosure this material is retained.

‘It is not for you to determine whether the material generated in the course of an investigation is relevant to the investigation’.

The effect of this, then, is that the primary duty of disclosure remains with the prosecutor. However, the expert witness, as part of his or her overriding duty to the court, is under an obligation to assist the prosecutor in meeting the disclosure requirements. The materials the expert is required to retain, record and, in due course, reveal include materials that are relevant to the investigation but which do not actually form part of the prosecution case. It seems that the key word here is ‘relevant’, and that would be no more or less than was already required by the 2003 Act2.

The so-called ‘Golden Rule’ of disclosure was that enunciated by Lord Bingham in R -v- C & H (February 2004), when he said that ‘fairness requires that full disclosure should be made
of all material held by the prosecution that weakens its case or strengthens that of the defence’. The test is an objective one and is grounded on what is ‘reasonable’. However, the guidance makes it plain that an expert witness is no longer to be trusted to exercise his or her own judgment in deciding what falls within this definition and what is and is not relevant. As we have never advocated that experts should take this kind of legal decision, we are happy to see official prohibition of such an approach.

### Indexing unused material

Instead, the guidelines require that an expert must now compile an index of all unused material, and a specimen index is given in the Guide. The expert’s report must contain declarations that such an index has been kept and confirmation that the expert understands and has complied with his or her duty to the court to record, retain and reveal material. The booklet does not offer the expert any guidance in identifying materials other than the broad definition given above, and it seems to have removed any discretion that might previously have existed (if any).

It will be noted that the obligation is only to list unused material. There is no requirement to produce an index of used material. The expert will record, though, all material relied upon in the report, and is required:

- to record the receipt, and onwards transmission, of all used material and
- to describe any examination of such material that has been carried out.

The burden of compiling such an index is one that many experts might find onerous and time consuming. It would, however, be dangerous to shorten the exercise by leaving anything out or for the expert to apply any self-imposed test for reasonableness or relevance. Paragraph 3.1(1) of the Guide states that ‘You should retain everything, including physical, written and electronically captured material, until otherwise instructed and the investigator has indicated the appropriate action to take’. The advice to experts is that they should take instructions from the prosecutor before discarding or destroying anything.

If this were not onerous enough, the guidance has a further sting. In some cases an expert will need to start compiling an index of unused material before any investigation has begun and even before any instructions have been received from a prosecutor. The guide gives examples of these circumstances as where:

- as a pathologist, the outcome of a ‘routine’ post-mortem suggests to you that death has been caused under suspicious circumstances
- as a medical practitioner, you find injuries that are not consistent with the alleged cause
- as a fire scene examiner, you believe a fire to have been started deliberately.

It appears to us that the review has missed the opportunity of laying down some really useful guidance for experts. Moreover, we wonder whether it addresses the real problems of ‘blanket disclosure’.

### Breaking down the attrition mindset

The Attorney General himself identified that in heavy cases prosecutors might spend up to 80% of their time looking at material the prosecution has no intention of relying upon and to which the defence may barely refer. Defence lawyers are being paid to read through thousands of pages of documents which may never see the light of day in court.

The defence tactics in some cases are often to force the disclosure issue. Indeed, it has become a feature of many large cases to insist on disclosure of large quantities of material which it is said the prosecution (or a third party) has. Such applications for disclosure lead to other satellite litigation which sometimes justifies staying the whole proceedings without the case ever coming before a jury. It is clearly the aim of the guidance that prosecutors should play a greater role in deciding on the relevance of material and identifying this in the disclosure statement. They are not required to list everything. On the contrary, they must guide the defence to the relevant material and not hide it amid endless lists of irrelevant materials.

But what of the scientific evidence? Are prosecutors able to decide on the relevance, or otherwise, of such material? We suspect not. But the reason experts should not be left to make an objective decision in relation to this is that the courts require the prosecution to go through a proper disclosure exercise and to actively consider which materials satisfy the criteria for disclosure. This, it is hoped, will put an end to the current war of attrition between prosecution and defence teams in relation to disclosure of unused materials.

As it stands, you would be wise to retain and record all materials generated or used during an investigation, no matter how insignificant they might be. However, your overriding duty to the court and your obligation to assist the prosecutor in complying with the disclosure obligations mean that you should be proactive in helping the prosecutor identify the documents that fall within the accepted definitions of disclosable material.

### Rules and guidance relating to disclosure

2. Criminal Justice Act 2003

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