



Guidance Booklet for Experts

**Disclosure: Experts' Evidence,
Case Management and
Unused Material**

May 2010

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Foreword

By Keir Starmer QC, Director of Public Prosecutions (CPS) and Jim Barker-McCardle (ACPO) on behalf of the Prosecution Team

The scheme set out in the Criminal Procedure and Investigations Act 1996 ('the CPIA') as amended by the Criminal Justice Act 2003 and the revised Code of Practice issued under it ('the Code') is designed to ensure that there is a fair system for the disclosure of unused material, which assists the defence in the timely preparation and presentation of its case, does not overburden the parties and enables the court to focus on all the important issues in the trial. This endeavour is supported by compliance with the requirements of the Consolidated Criminal Procedure Rules 2010 (available from the Ministry of Justice website: www.justice.gov.uk).

The instructions contained in this booklet are designed to provide a practical guide to preparing expert evidence and the disclosure obligations for expert witnesses instructed by the Prosecution Team. When properly applied, these instructions will assist expert witnesses, investigators and prosecutors to perform their disclosure duties effectively fairly and justly, which is vitally important to the integrity of the criminal justice system.

The considered application of this guidance and appropriate management of the materials within the investigation by experts will enhance their credibility and promote confidence in the role of the expert witness within the prosecution process.

This booklet reflects the commitment of the Prosecution Team to working alongside expert witnesses and other agencies to ensure that case management and disclosure requirements are complied with fairly and properly.

A handwritten signature in black ink that reads "Keir Starmer". The signature is written in a cursive style with a horizontal line underneath the name.

Keir Starmer QC
Director of Public Prosecutions

A handwritten signature in black ink that reads "Jim Barker-McCardle". The signature is written in a cursive style with a horizontal line underneath the name.

Jim Barker-McCardle
Chief Constable, Essex Police
On behalf of the Association of
Chief Police Officers

1. Introduction

You are instructed by the Prosecution Team, which comprises the Police and the Crown Prosecution Service, as an expert in this investigation. It is important that you understand the obligations placed upon you by this status. As an expert witness you have an overriding duty to assist the court and, in this respect, your duty is to the court and not to the Prosecution Team instructing you. This will include obligations relating to disclosure.

The obligations which apply to you as an expert are to assist in ensuring that the Prosecution Team can comply fully with their statutory disclosure obligations. These obligations take precedence over any internal codes of practice or other standards set by any professional organisations to which you may belong. Your obligations are set out in part four of this booklet, but can be summarised in the key actions of **retain, record and reveal**.

A failure to comply with the guidelines in this booklet may have a number of adverse consequences which could include:

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

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

An expert employed by the police is not a third party and is already required to comply with the Criminal Procedure and Investigations Act 1996 and should comply with the detailed guidance in the Disclosure Manual (see below).

2. Criminal Procedure Rules: Guidance on the Overriding Objective

Part 1

2.1 The overriding objective, which is at the heart of the Criminal Procedure Rules (CrimPR), is that criminal cases be dealt with justly. The presumption of innocence and a robust adversarial process are essential features of the legal tradition in England and Wales and of the defendant's right to a fair trial. The overriding objective acknowledges those rights. It is not justice that questions of guilt or innocence are determined by procedural manoeuvres. On the contrary, justice is best served when the issues between the parties are identified as early and as clearly as possible.

2.2 What does dealing with the case justly mean?

Dealing with cases justly requires the court to consider those factors listed in Rule 1.1(2) of the CrimPR. This means that the court must be alert to the needs of everyone involved in a case. That includes, but it is not limited to, the interests of the defendant (including rights under Article 6 ECHR). It extends to the prosecution (entitled to a reasonable opportunity to

present the evidence against the defendant), the complainant, to every witness (whichever side is to call the witness), and in the Crown Court to the jury, or if the jury has not been sworn, to jurors in waiting, and to the needs of other cases. Finally, the court should not overlook the community's interest that justice should be done without unnecessary delay. A fair balance has to be struck between all these interests.

2.3 What is the duty of a participant?

All participants have a duty to deal with cases justly. Participants must ensure that they take or do any step which furthers the overriding objective. This means taking positive action to identify to the parties and the court any significant failure which will hinder the trial process. This duty extends to co-operating with each other and the court.

2.4 Who is a participant?

A participant is anyone who is involved in any way with the case. This includes the parties to the proceedings (the prosecuting authority and defendant) and extends to others such as the police, witnesses (prosecution and defence), defence representatives, court staff, jurors, custodial services, probation services and judges.

2.5 How should the courts apply the overriding objective?

The court must further the overriding objective in exercising any power given it by legislation (including any rule), practice direction or in interpreting any rule or practice direction. The “overriding objective” is not only a statement of the components which the court must take into account in

exercising its extensive discretion when applying the CrimPR but is also the major aid to interpreting the CrimPR themselves.

Further, the objective of “dealing with cases justly” overrides every other provision in the rules such that if another rule is, in its application to any particular case, considered by the court to prevent the court from dealing with that case justly, then the overriding objective will prevail.

Part 3

- 2.6** Parties must actively assist the court in furthering the overriding objective by complying with the case management process set out in CrimPR (Rule 3.1–3.11). Appendix E of this booklet sets out the requirements in more detail.

Part 33

- 2.7** This section of the CrimPR (Rule 33.1–33.9) sets out the obligations, processes to be applied and duties of Expert witnesses. Full details can be found at: www.justice.gov.uk/criminal/procrules_fin/rulesmenu.htm

3. Disclosure obligations under the criminal law

3.1 Aims of disclosure

The regime for disclosure is set out in the CPIA and the Code issued under it. This is designed to ensure that there is a fair system for the disclosure of unused material which assists the defence in the timely preparation of its case, does not overburden the parties and enables the court to focus on all the important issues in the trial.

3.2 The meaning of unused material

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.

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.

3.3 The Disclosure Manual/Attorney General's Guidelines

The Disclosure Manual ('the Manual') contains the operational instructions on disclosure which have been agreed between the CPS and the Association of Chief Police Officers (ACPO). It explains how the Prosecution Team have agreed to fulfil their duties to disclose unused material to the defence. These duties arise under statute and at common law.

The Manual contains practical guidance to the police and CPS practitioners which supplements the framework of the CPIA, the Code of Practice and the Attorney General's Guidelines. The Manual can be found at: www.cps.gov.uk
The Attorney General's Guidelines build on existing law to help ensure that the legislation is operated consistently and fairly by the Prosecution Team. They can be found at: www.ago.gov.uk

4. Discharging your obligations

There are three key obligations arising for you, as an expert, as the investigation progresses. Your understanding of these obligations and your delivery of them is the key to you adequately fulfilling your disclosure obligations. The relevant steps are to **retain**, to **record**, and to **reveal**.

The flowchart attached at Appendix D to this guidance illustrates this process.

4.1 Retain

4.1.1 What to retain

You should retain everything, including physical, written and electronically captured material, until otherwise instructed and the investigator has indicated the appropriate action to take.

4.1.2 How long to retain

The period of time for which materials are required to be retained will vary from case to case and will depend on a number of factors. Examples include the nature of the offence; the stage and status of any legal proceedings; whether the case is of special interest. It must also be remembered that the retention requirement may alter as a result of a change of circumstances during the course of the investigation.

You should, therefore, obtain advice from the investigator for the retention period that applies to this particular investigation and always before contemplating destruction of any material.

4.2 Record

4.2.1 When to record

The requirement for you to commence making records begins at the time you receive instructions and continues for the whole of the time you are involved.

Circumstances may exist, however, where practitioners should commence making records, in accordance with this guidance, prior to any instructions from the police. Examples of this would be:

- 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.

In all these examples the criminal investigation will start after the practitioner's original involvement but the results of the previous examinations will almost certainly be material to any investigation and subsequent prosecution. The list is not intended to be exhaustive.

If you have any doubts, start recording.

4.2.2 What to record

You should keep records of all the work you have carried out and any findings you make in relation to the investigation. The guidance provided below reflects best practice and your records, as a minimum, should contain information relating to:

- **the collection and movement of items**, including:
 - the date on which you take or receive material (physical items and information) and the date of subsequent movement of the material to another party;
 - from who or where and to whom or where material is moved;
 - the means by which you receive or pass material from/ to another party.
- **the examination of materials**:
 - your notes, and those of any assistant, should be signed, dated, attributable to the individual and produced contemporaneously, whenever practicable;
 - the notes should be sufficiently detailed and expressed in such a manner that another expert in your field can follow the nature of the work undertaken, any assumptions made and the inferences you have drawn from the work.
- **verbal and other communications**:
 - you should keep your own notes of all meetings you attend;
 - you should keep your own notes of telephone conversations and it is important that points of agreement, or disagreement and agreed actions are recorded;

- you should ensure that a record of all emails and other electronic transmissions (such as images), sent or received, is kept;
- you should keep clear notes of any witness accounts or explanations that you have been provided with, or any other information received.

4.2.3 How to record

The media you use for making your records should be capable of meeting all the requirements given above, be durable and provide a reliable means of retrieval.

Your notes, in whatever form, should also be structured in a manner that facilitates review, whilst complying with any necessary security requirements. Any updates, alterations or comments should be clear. It is important that your notes are clear and comprehensive. This will allow another person who may subsequently review them to have a full understanding of the position at any given time.

4.3 Reveal

4.3.1 What to reveal

You are required to reveal everything you have recorded.

It is a necessary and important part of your disclosure obligations to make the Prosecution Team aware of **all** the material you have in your possession in relation to the investigation. This will then enable them to make informed decisions as to what material is relevant, and then what material satisfies the disclosure test.

4.3.2 How to reveal

There are three ways in which you will reveal material to the Prosecution Team.

4.3.2.1 The Report

Your report(s) should contain information relating to the following:

- details of your qualifications, experience or accreditation relevant to the work performed;
- the range and extent of your expertise;
- details of any information upon which you have relied in arriving at your opinion;
- details of any statements of fact upon which you have relied in reaching your opinion;
- clarification of which of the facts are within your own knowledge;
- information relating to who has carried out measurements, examinations, tests etc and if under your supervision;
- your opinion(s) and a justification for these;
- where you have provided qualified opinions details of the qualifications;
- a summary of all your conclusions.

4.3.2.2 Statements

In addition to all of the above you may be required to make a formal statement. The statement should contain all of the above and the following:

- the declaration which confirms that you understand your duty to the court in respect of disclosure;
- an acknowledgement that you will inform all parties and, where appropriate, the court, in the event that your view changes on any material issue.

When compiling your report/statement you should ensure that due regard is given to any information that points away from, as well as towards, the defendant(s).

You must not give expert opinion beyond your area of expertise.

4.3.2.3 The Index of Unused Material

In order to reveal material to the Prosecution Team, it is necessary that you to complete an index of unused material, (the Index) describing all the unused material in your possession. All the material not identified in your report/statement should be placed on the Index.

The Index is designed to enable you to provide to the Prosecution Team a description of all the unused material in your possession in a structured, comprehensive and informative manner.

An example of a specimen Index is given in Appendix A. You will need to tailor the descriptions of the materials to meet

your specific case requirements. Your descriptions, however, must be full enough for others to clearly understand the nature of the material. Please note that this example is neither exhaustive nor exclusive.

You should not attempt to make judgements on the significance of material when producing the Index. Where you believe material may be confidential or sensitive, then this should be placed on a separate schedule and discussed with the Prosecution Team.

Revelation to the Prosecution Team does not necessarily mean disclosure to the defence.

5. Declaration of understanding

You are required to confirm your understanding of your disclosure obligations to the court, as set out in the guidance given in this booklet, by signing a declaration ('the Declaration') of understanding. This Declaration will be incorporated into your statement and the required form of words is given in Appendix B.

An expert employed by the police is obliged to comply with the disclosure regime as set out in the CPIA. All non-police experts will be expected to sign the Declaration confirming that they have done so.

6. The Expert's self-certificate

Upon receipt of instructions you are required to complete a self-certificate ('the Certificate') in every case that you are

instructed as an expert witness for the Prosecution. The completed Certificate should be sent to the disclosure officer or investigating officer. The Certificate can be found at Appendix C.

7. The Experts' revelation process flowchart

A flowchart summarising your obligations can be found at Appendix D.

8. Essential case management: Applying the Criminal Procedure Rules

Full details of the CrimPR Part 1 (overriding objective), Part 3 (case management) and Part 33 (Expert evidence) can be found at:
www.justice.gov.uk/criminal/procrules_fin/rulesmenu.htm.

Guidance from Lord Justice Leveson when he was the Senior Presiding Judge for England and Wales, December 2009, on important case management obligations can be found at Appendix E.

9. Queries

If you have any queries relating to the contents of this guidance, please contact the investigating officer, the disclosure officer or the prosecutor.

Appendix A: Expert’s index of unused material

This form is available at www.cps.gov.uk under Disclosure Manual, Annex K

A listing of all the unused material held in relation to this case by:
This list is an example and is not designed to be exhaustive or exclusive

The following is a suggested list of all the unused material in the possession of the NON-SENSITIVE, unless a specific flag exists to suggest it might be SENSITIVE). The Disclosure: Experts’ Evidence, Case Management and Unused Material’.

Expert’s use

No.	Description of material
1	FORMS detailing: Receipt and Dispatch of items to laboratory; movement of items within and between sites; Submission forms detailing nature of offence, work required and details of suspects, victims etc.
2	CASE NOTES made at the time of the examination of the items: provide details of dates of examinations; Case file details of packaging and integrity of items; records of work performed on the items, who was involved and dates; analytical and test results; details of quality checks.
3	DRAFT REPORTS: electronic and/or hard copy drafts of reports or statements sent out to police and CPS.
4	ADMINISTRATIVE DOCUMENTS: time recording sheets; case costings; delivery notes; invoices; records of enquiries with customer relating to costs etc.
5	MINUTES: of conversations with and instructions to other staff; [records of conversations with the OIC and other police personnel]; [records of conversations with Prosecutor and other CPS personnel].
6	RECORDS of: material submitted but not examined; of material examined but relating to suspects not included in reports or statements; of work carried out by others, including the results; of procedures and techniques used during the examinations.
7	RETAINED MATERIALS: material from Items.
8	SCENE OF CRIME related material: written notes, [voice recorded notes], diagrams, photographs/images taken at the time of the scene attendance
9	POST MORTEM related material: written notes, [voice recorded notes], diagrams, photographs/images taken during the post mortem examination of [name].
10	WITNESS STATEMENTS from the following people: [name, ...].
11	ADDITIONAL INFORMATION in the form of: maps, plans, photographs, videos relating to the scene of the offence; details of modus operandi; details of related offences
12	DATABASES , material from the following databases have been used: [name of database]
13	OTHER:

Completed by:	Signed:	Dated:
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Expert’s ref:

CJS URN:

above named expert in this case (Note, the material should be considered to be list is provided in accordance with the guidance given in ‘Guidance Booklet for Experts -

CPS use

Location	Insert C, I or CND	Comments
Case file		
Case file		
Case file/IT		
Case file		
Case file		
Case file		
Stores		
Case file/IT media		
Case file/IT media		
Case file		
Case file/Stores		
[Source]		

Reviewing lawyer (signature):

Date:

Appendix B: Declaration

This form is available at www.cps.gov.uk under Disclosure Manual, Annex K

I am an expert in [field of expertise] and I have been requested to provide a statement. I confirm that I have read guidance contained in a booklet known as Guidance Booklet for Experts - Disclosure: Experts' Evidence, Case Management and Unused Material which details my role and documents my responsibilities, in relation to revelation as an expert witness. I have followed the guidance and recognise the continuing nature of my responsibilities of revelation. In accordance with my duties of revelation, as documented in the guidance booklet, I

- (a) confirm that I have complied with my duties to record, retain and reveal material in accordance with the Criminal Procedure and Investigations Act 1996, as amended;
- (b) have compiled an Index of all material. I will ensure that the Index is updated in the event I am provided with or generate additional material;
- (c) that in the event my opinion changes on any material issue, I will inform the investigating officer as soon as reasonably practicable and give reasons.

Signed

Dated

Appendix C: Expert witnesses self-certificate

This form is available at www.cps.gov.uk under Disclosure Manual, Annex K

Revelation of information (Criminal Procedure and Investigations Act 1996)

Name of expert witness:

Date of birth:

Business address:

Defendant (if known):

I have been instructed to provide expert evidence in relation to the prosecution of the above-named, or an investigation into the following criminal offence:

I confirm that I have read the booklet known as Guidance Booklet for Experts - Disclosure: Experts' Evidence, Case Management and Unused Material that has been given to me with this form, and that I am aware of my responsibilities as an expert witness to reveal to the Prosecution Team any information that might undermine my evidence.

Personal Information

- | | | |
|----|--|----------|
| 1. | Have you ever been convicted of, cautioned for, or received a penalty notice for any criminal offence (other than minor traffic offences)? | Yes / No |
| 2. | Are there any proceedings pending against you in any criminal or civil court? | Yes / No |

- | | | |
|----|---|----------|
| 3. | Are you aware of any adverse finding by a judge, magistrate or coroner about your professional competence or credibility as a witness? | Yes / No |
| 4. | Have you ever been the subject of any adverse findings by a professional or regulatory body? | Yes / No |
| 5. | Are there any proceedings, referrals or investigations pending against you that have been brought by a professional or regulatory body? | Yes / No |
| 6. | Are you aware of any other information that you think may adversely affect your professional competence and credibility as an expert witness? | Yes / No |

Should you have any queries in relation to your answers to any of the above, please contact the investigator.

Please note that the questions above apply to any proceedings, findings or other relevant information in this or any other jurisdiction.

If you have answered **yes** to any of the questions numbered 1-6, please give details below:

Declaration

All the information I have given in this certificate is true to the best of my knowledge and belief.

I will notify those instructing me of any change in this information.

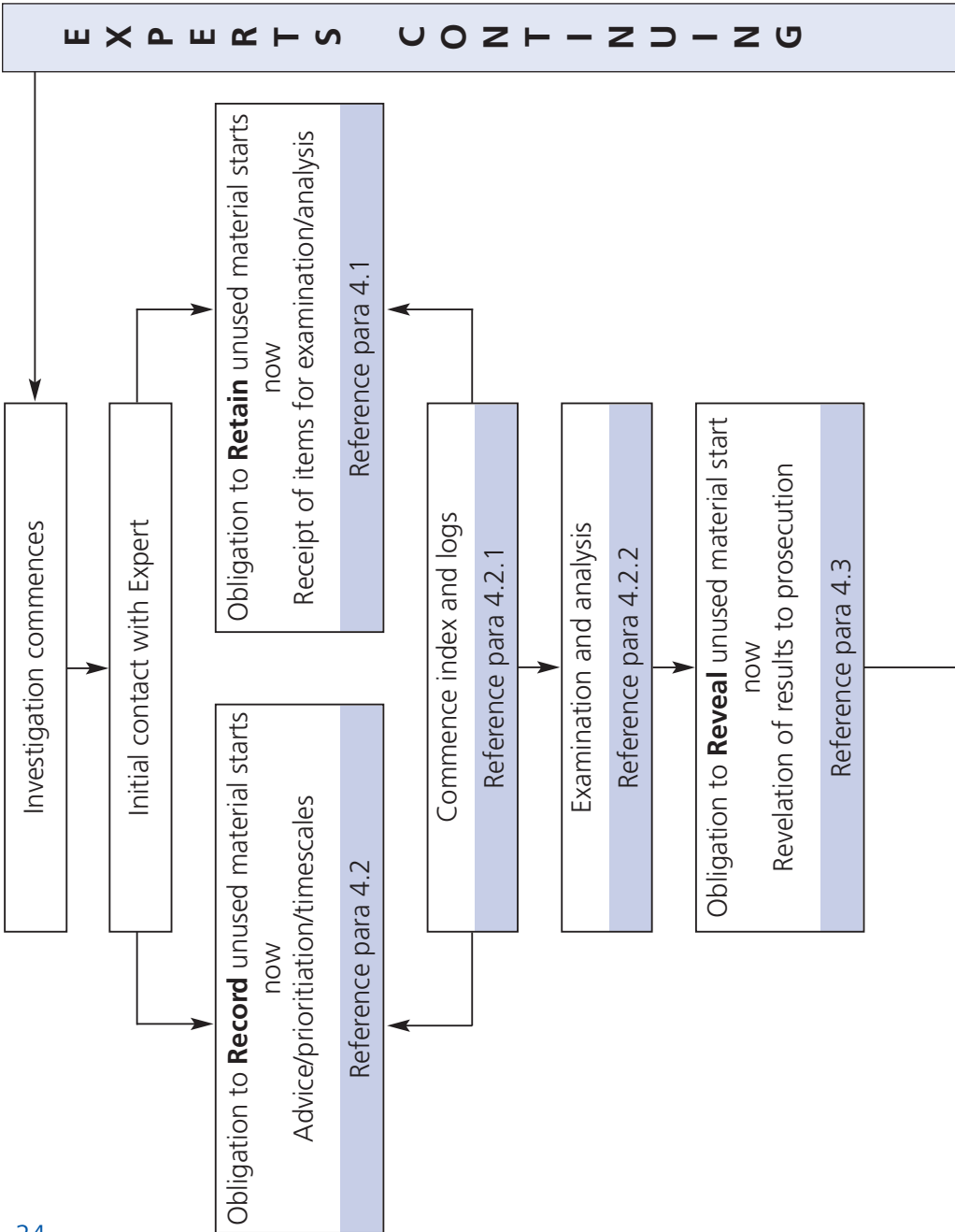
I am aware that any false or misleading information I have given in this document, or any deliberate omission of relevant information may lead to disciplinary or criminal proceedings.

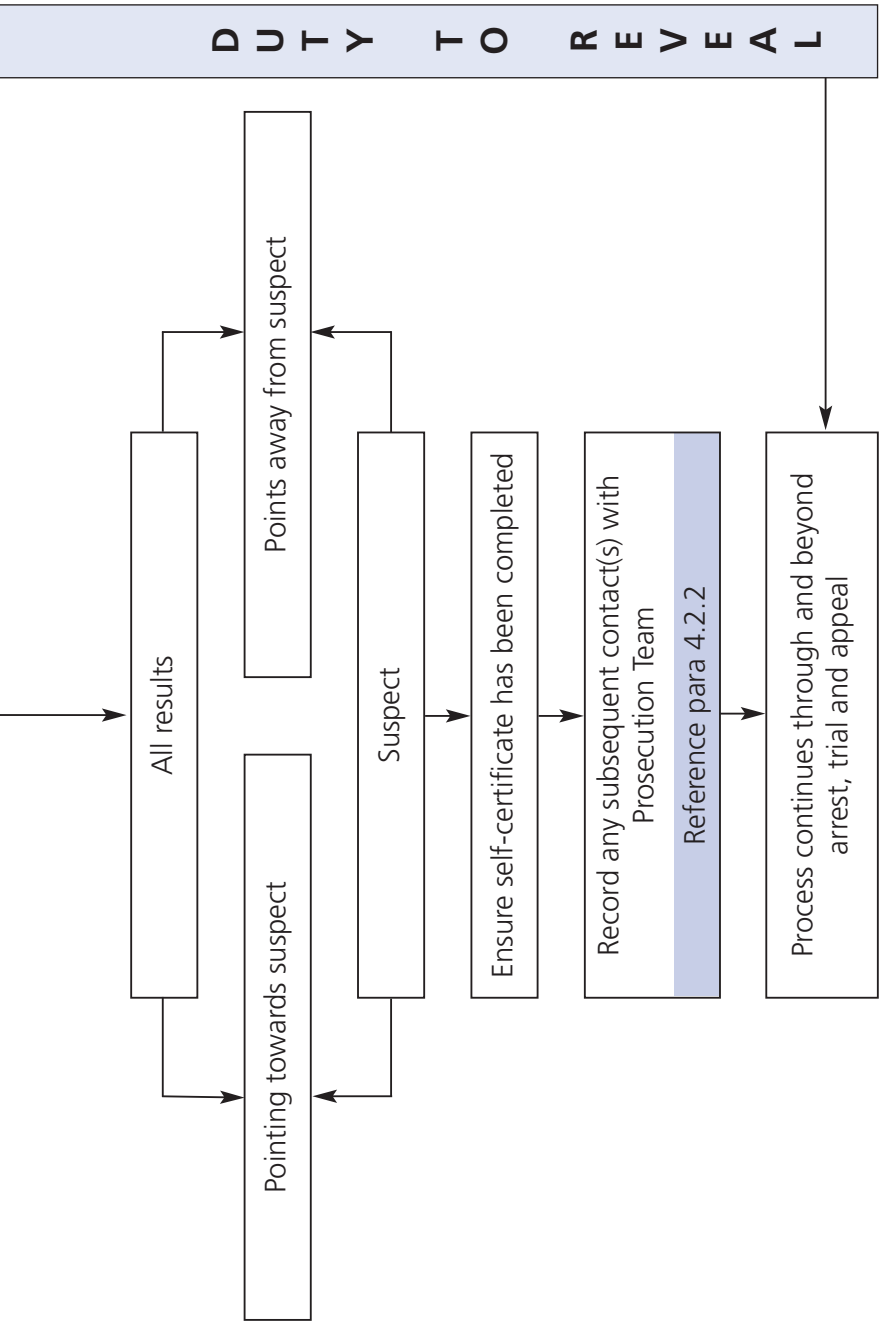
Signed:

Name (CAPITALS):

Date:

Appendix D: Experts' revelation process





Appendix E

Guidance from Lord Justice Leveson when he was the Senior Presiding Judge for England and Wales, December 2009

A) Generally

The court² must further the Overriding Objective of the Rules by actively managing each case [*Crim PR 3.2(1)*].

The parties must actively assist the court in this without being asked [*Crim PR 3.3(a)*]. But at every hearing, including at trial, it is the personal responsibility of the Magistrates or District Judge actively to manage the case [*Crim PR 3.2*].

Unnecessary hearings should be avoided by dealing with as many aspects of the case as possible at the same time [*Crim PR 3.2(2)(f)*].

B) The first hearing: taking the plea

At every hearing (however early):

Unless it has been done already, the court must take the defendant's plea [*Crim PR 3.8(2)(b)*]. This obligation does not depend on the extent of advance information, service of evidence, disclosure of unused material, or the grant of legal aid.

If the plea really cannot be taken³, or if the alleged offence is indictable only, the court must find out what the plea is likely to be [*Crim PR 3.8(2)(b)*].

C) If the plea is 'guilty'

The court should pass sentence on the same day, if at all possible (unless committing for sentence).

If information about the defendant is needed from the Probation Service, it may be that a report prepared for earlier proceedings will be sufficient or a 'fast delivery' report (oral or written) may be prepared that day, depending on local arrangements.

If a 'Newton' hearing is needed, the court, with the active assistance of the parties, must identify the disputed issue [*Crim PR 3.2(2)(a); 3.3(a)*] and if possible, determine it there and then or, if it really cannot be decided, give directions specifically relating to that disputed issue to ensure that the next hearing is the last.

D) If the plea is 'not guilty'

The key to effective case management is the early identification by the court of the relevant disputed issues [*Crim PR 3.2(2)(a)*]. From the start, the parties must identify those issues and tell the court what they are [*Crim PR 3.3(a)*]. If the parties do not tell the court, the court must require them to do so.

The relevant disputed issues must be explicitly identified and the case must be managed by the court to ensure that the 'live' evidence at trial is confined to those issues.

The parties must complete the prescribed case progression form [*Crim PR 3.11; Consolidated Practice Direction V.56.2*] and the court must rigorously consider each entry on the form in order to comply with its duty actively to manage the case by making properly informed directions specific to each case.

Only those witnesses who are really needed in relation to genuinely disputed, relevant issues should be required to attend. The court must take responsibility for this (and not simply leave it to the parties) in order to comply with the Overriding Objective of the Rules [*Crim PR 1.1(2)(d), (e)*].

The court's directions must include a timetable for the progress of the case (which can include a timetable for the trial itself) [*Crim PR 3.8(2)(c)*]. The time estimate for the trial should be made by considering, individually, how long each 'live' witness will take having regard to the relevant disputed issue(s).

E) The parties' obligations to prepare for trial include:

Getting witnesses to court [*Crim PR 3.9(2)(b)*].

Making arrangements for the efficient presentation of written evidence/ other material [*Crim PR 3.9(2)(c)*].

Promptly warning the court and other parties of any problems [*Crim PR 3.9(2)(d)*].

F) At trial

Before the trial begins, the court must establish, with the active assistance of the parties, what disputed issues they intend to explore [*Crim PR 3.10(a)*].

The court may require the parties to provide:

A timed, 'batting order' of live witnesses [*Crim PR 3.10(b)(i), (ii), (ix)*].

Details of any admissions/written evidence/other material to be adduced [*Crim PR 3.10(b)(vi), (vii)*].

Warning of any point of law [*Crim PR 3.10(b)(viii)*].

A timetable for the whole case [*Crim PR 3.10(b)(ix)*].

During the trial the court must ensure that the 'live' evidence, questions, and submissions are strictly directed to the relevant disputed issues.

G) The Rules

For a full version of the Rules, see:

www.justice.gov.uk/criminal/procrules_fin/rulesmenu.htm

Lord Justice Leveson

Senior Presiding Judge for England and Wales

December 2009

Essential Case Management: Applying the Criminal Procedure Rules¹

¹ It is important to note that all participants in criminal cases, including Magistrates, District Judges, and Justices' Clerks must follow and apply the Criminal Procedure Rules. The Rules are not mere guidance. Compliance is compulsory. The word "must" in the Rules means must.

² The expression 'court' includes Magistrates, District Judges, and Justices' Clerks exercising judicial powers [*Crim PR 2.2(1)*].

³ Exceptions to the rule requiring the plea to be taken are rare and must be strictly justified.

Further copies of this document are available from:

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Rose Court
2 Southwark Bridge
London SE1 9HS**

**Email: hqpolicy@cps.gsi.gov.uk
Tel: 020 335 70873**

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