

The Farquharson Guidelines



CROWN
PROSECUTION
SERVICE

The Role and Responsibilities of the Prosecution Advocate



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FOREWORD

The Prosecution Advocate plays an important public role and as such may be considered a cornerstone of an open and fair criminal justice system. The principles so well articulated by Farquharson LJ and his committee as to the role of the prosecution advocate have served us well since they were published in 1986. However, the time has come for new guidance which, whilst building on the established principles, reflects the changes that have occurred in the criminal courts, at the Bar and within the Crown Prosecution Service over recent years.

I welcome and commend the new Guidelines which, whilst not legally binding unless expressly approved by the Court of Appeal, nonetheless provide important practical guidance for practitioners involved in the prosecution process.



**LORD CHIEF JUSTICE OF
ENGLAND AND WALES**

INTRODUCTION

The work undertaken in 1986 by the committee chaired by Farquharson LJ has, for over 15 years, provided valuable guidance as to role of the prosecution advocate and their relationship with the Crown Prosecution Service (CPS).

However, the ever-evolving criminal justice system, changes at the Bar and developments in the CPS brought about by the implementation of Sir Iain Glidewell's Review, mean that the environment in which we all operate has radically changed since the original report was published.

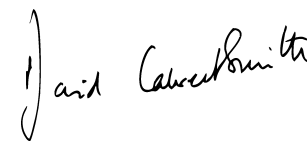
Whilst the principles established by Farquharson LJ's committee have been enormously helpful and will continue to apply, the time has come for new guidance that reflects the changes and emphasises the new relationship that is developing between CPS Areas and the local Bar.

The new Guidelines have therefore been developed to take account of the changes and are the result of the Bar and CPS working in partnership and in consultation with the judiciary, Bar Council and Law Society.

We commend the Guidelines as providing valuable guidance and a framework within which the Bar and the CPS can work effectively together.



ATTORNEY GENERAL



**DIRECTOR OF
PUBLIC PROSECUTIONS**

THE ROLE AND RESPONSIBILITIES OF THE PROSECUTION ADVOCATE

1. PRE-TRIAL PREPARATION

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(a) It is the duty of Prosecution Counsel to read the Instructions delivered to him expeditiously and to advise or confer with those instructing him on all aspects of the case well before its commencement.

- 1.1** The Crown Prosecution Service (CPS) will deliver instructions at a stage in the proceedings that allows sufficient time for the prosecution advocate adequately to consider, prepare and advise on the evidence before the court hearing or draft/agree the indictment.
- 1.2** Where a CPS Higher Court Advocate represents the prosecution at a Plea and Directions Hearing (PDH), the CPS will deliver instructions to the trial advocate no later than 10 working days after the date of the PDH.
- 1.3** The CPS will deliver instructions which:
 - i.** address the issues in the case including any strategic decisions that have been or may need to be made;
 - ii.** identify relevant case law;
 - iii.** explain the basis and rationale of any decision made in relation to the disclosure of unused material;
 - iv.** where practical, provide specific guidance or indicate parameters on acceptable plea(s); and

- v.** where a case is an appeal either to the Crown Court from the magistrates' court or is before the Court of Appeal, Divisional Court or House of Lords, address the issues raised in the Notice of Appeal, Case Stated, Application for Judicial Review or Petition.

Action on receipt of instructions

- 1.4** On receipt of instructions the prosecution advocate will consider the papers and advise the CPS, ordinarily in writing, or orally in cases of urgency where:
 - i.** the prosecution advocate forms a different view to that expressed by the CPS (or where applicable a previous prosecution advocate) on acceptability of plea;
 - ii.** the indictment as preferred requires amendment;
 - iii.** additional evidence is required;
 - iv.** there is an evidential deficiency (which cannot be addressed by the obtaining of further evidence) and, applying the *Code for Crown Prosecutors*, there is no longer a realistic prospect of conviction; or the prosecution advocate believes that it is not in the public interest to continue the prosecution;
 - v.** in order to expedite and simplify proceedings certain formal admissions should be made;
 - vi.** the prosecution advocate, having reviewed previous disclosure decisions, disagrees with a decision that has been made; or is not satisfied that he or she is in possession of all relevant documentation; or considers that he or she has not been fully instructed regarding disclosure matters;
 - vii.** a case conference is required (particularly where there is a sensitive issue e.g. informant/PII/disclosure etc);

viii. the presentation of the case to the court requires special preparation of material for the jury or presentational aids.

- 1.5 The prosecution advocate will endeavour to respond within five working days of receiving instructions, or within such period as may be specified or agreed where the case is substantial or the issues complex.
- 1.6 Where the prosecution advocate is to advise on a specific aspect of the case other than 1.4(i-viii), the advocate should contact the CPS and agree a realistic timescale within which advice is to be provided.
- 1.7 The prosecution advocate will inform the CPS without delay where the advocate is unlikely to be available to undertake the prosecution or advise within the relevant timescale.
- 1.8 When returning a brief, the advocate originally instructed must ensure that the case is in good order and should discuss outstanding issues or potential difficulties with the advocate receiving the brief. Where the newly instructed advocate disagrees with a decision or opinion reached by the original advocate, the CPS should be informed so that the matter can be discussed.

Case summaries

- 1.9 When a draft case summary is prepared by the CPS, the prosecution advocate will consider the summary and either agree the contents or advise the CPS of any proposed amendment.
- 1.10 In cases where the prosecution advocate is instructed to settle the case summary or schedules, the document(s) will be prepared and submitted to the CPS without delay.

Case Management Plan

- 1.11 On receipt of a Case Management Plan the prosecution advocate, having considered the papers, will contact the Crown Prosecutor within seven days, or such period as may be specified or agreed where the case is substantial or the issues complex, to discuss and agree the plan. The plan will be maintained and regularly reviewed to reflect the progress of the case.

Keeping the prosecution advocate informed

- 1.12 The CPS will inform the prosecution advocate of developments in the case without delay and, where a decision is required which may materially affect the conduct and presentation of the case, will consult with the prosecution advocate prior to that decision.
- 1.13 Where the CPS is advised by the defence of a plea(s) of guilty or there are developments which suggest that offering no evidence on an indictment or count therein is an appropriate course, the matter should always be discussed with the prosecution advocate without delay unless to do so would be wholly impracticable.

Victims and witnesses

- 1.14 When a decision whether or not to prosecute is based on the public interest, the CPS will always consider the consequences of that decision for the victim and will take into account any views expressed by the victim or the victim's family.
- 1.15 The prosecution advocate will follow agreed procedures and guidance on the care and treatment of victims and witnesses, particularly those who may be vulnerable or have special needs.

Appeals

- 1.16 Where the prosecution advocate forms a different view to that expressed by the CPS on the conduct/approach to the appeal, the advocate should advise the CPS within FIVE working days of receiving instructions or such period as may be specified or agreed where the case is substantial or the issues complex.

PDH and other preliminary hearings

- 1.17 The principles and procedures applying to trials as set out in the following paragraphs will be equally applicable where the prosecution advocate is conducting a PDH or other preliminary hearing.

2. WITHDRAWAL OF INSTRUCTIONS

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(b) A solicitor who has briefed Counsel to prosecute may withdraw his instructions before the commencement of the trial up to the point when it becomes impracticable to do so, if he disagrees with the advice given by Counsel or for any other proper professional reason.

- 2.1 The CPS will consult and take all reasonable steps to resolve any issue or disagreement and will only consider withdrawing instructions from a prosecution advocate as a last resort.
- 2.2 If the prosecution advocate disagrees with any part of his or her instructions, the advocate should contact the responsible Crown Prosecutor to discuss the matter. Until the disagreement has been

resolved the matter will remain confidential and must not be discussed by the prosecution advocate with any other party to the proceedings.

“Proper Professional Reason”

- 2.3 The prosecution advocate will keep the CPS informed of any personal concerns, reservations or ethical issues that the advocate considers have the potential to lead to possible conflict with his or her instructions.
- 2.4 Where the CPS identifies the potential for professional embarrassment or has concerns about the prosecution advocate’s ability or experience to present the case effectively to the court, the CPS reserves the right to withdraw instructions.

Timing

- 2.5 It is often difficult to define when, in the course of a prosecution, it becomes impracticable to withdraw instructions as circumstances will vary according to the case. The nature of the case, its complexity, witness availability and the view of the court will often be factors that will influence the decision.
- 2.6 In the majority of prosecutions it will not be practicable to withdraw instructions once the judge has called the case before the court as a preliminary step to the swearing of the jury.
- 2.7 If instructions are withdrawn, the prosecution advocate will be informed in writing and reasons will be given.
- 2.8 Instructions may only be withdrawn by or with the consent of the Chief Crown Prosecutor, Assistant Chief Crown Prosecutor, Head of a CPS Trials Unit or, in appropriate cases, Head of a CPS Criminal Justice Unit.

- 2.9 In relation to cases prosecuted by the CPS Casework Directorate, the decision may only be taken by the Director Casework or Head of Division.

3. PRESENTATION AND CONDUCT

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(c) While he remains instructed it is for Counsel to take all necessary decisions in the presentation and general conduct of the prosecution.

- 3.1 The statement at 3(c) applies when the prosecution advocate is conducting the trial, PDH or any other preliminary hearing, but is subject to the principles and procedures relating to matters of policy set out in section 4 below.

Disclosure of material

- 3.2 Until the conclusion of the trial the prosecution advocate and CPS have a continuing duty to keep under review decisions regarding disclosure. The prosecution advocate should in every case specifically consider whether he or she can satisfactorily discharge the duty of continuing review on the basis of the material supplied already, or whether it is necessary to inspect further material or to reconsider material already inspected.
- 3.3 Disclosure of material must always follow the established law and procedure. Unless consultation is impracticable or cannot be achieved without a delay to the hearing, it is desirable that the CPS and, where appropriate, the disclosure officer are consulted over disclosure decisions.

4. POLICY DECISIONS

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- (d) Where matters of policy¹ fall to be decided after the point indicated in (b) above (including offering no evidence on the indictment or on a particular count, or on the acceptance of pleas to lesser counts), it is the duty of Counsel to consult his Instructing Solicitor/Crown Prosecutor whose views at this stage are of crucial importance.*
- (e) In the rare case where Counsel and his Instructing Solicitor are unable to agree on a matter of policy, it is, subject to (g) below, for Prosecution Counsel to make the necessary decisions.*

Policy issues arising at trial

- 4.1 The prosecution advocate should alert the CPS at the first opportunity if a matter of policy is likely to arise.
- 4.2 The prosecution advocate must not give an indication or undertaking which binds the prosecution without first discussing the issue with the CPS.

¹ “policy” decisions should be understood as referring to non-evidential decisions on: the acceptance of pleas of guilty to lesser counts or groups of counts or available alternatives; offering no evidence on particular counts; consideration of a re-trial; whether to lodge an appeal; certification of a point of law; and the withdrawal of the prosecution as a whole.

CPS representation at Crown Court

- 4.3 Whenever possible, an experienced Crown Prosecutor will be available at the Crown Court to discuss and agree any issue involving the conduct or progress of the case.
- 4.4 When it is not possible to provide a Crown Prosecutor at court, an experienced caseworker will attend and facilitate communication between the prosecution advocate and the Crown Prosecutor having responsibility for the case.
- 4.5 In exceptional circumstances where it is not possible to contact a Crown Prosecutor, the prosecution advocate should ask the court to adjourn the hearing for a realistic period in order to consult with the CPS. Where an adjournment is refused, the prosecution advocate may make the decision but should record his or her reasons in writing.

Referral to senior CPS representative

- 4.6 Where an issue remains unresolved following consultation with a Crown Prosecutor; or where the case/issue under consideration is substantial, sensitive or complex; or the prosecution advocate disagrees with the advice of the Crown Prosecutor, the matter may be referred to the Chief Crown Prosecutor, the Director Casework or to a senior Crown Prosecutor with delegated authority to act on their behalf.
- 4.7 In order to ensure consultation takes place at the highest level appropriate to the circumstances and nature of the case, the court should be asked to adjourn if necessary. When an adjournment is sought, the facts leading to the application should be placed before the court only in so far as they are relevant to that application.

- 4.8 Where a Chief Crown Prosecutor has been directly involved in the decision making process and the issue remains unresolved, the matter may be referred to the Director of Public Prosecutions.

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(f) Where Counsel has taken a decision on a matter of policy with which his Instructing Solicitor has not agreed, then it would be appropriate for the Attorney General to require Counsel to submit to him a written report of all the circumstances, including his reasons for disagreeing with those who instruct him.

- 4.9 It will only be in exceptional circumstances that the Attorney General will require a written report. The prosecution advocate will first discuss the decision with the Chief Crown Prosecutor or the Director, Casework. Where, by agreement, the issue remains one that either party considers should be drawn to the attention of the Director of Public Prosecutions the prosecution advocate will, on request, provide a written report for submission to the Director of Public Prosecutions. If he considers it appropriate to do so, the Director of Public Prosecutions may refer the matter to the Attorney General.
- 4.10 Where there has been a disagreement on a matter of policy, provided that the CPS is satisfied that the prosecution advocate followed the principles set out in this document, the professional codes of conduct and was not *Wednesbury* unreasonable, the CPS will not apply sanctions in respect of any future work solely as a result of the decision in a particular case.

5. CHANGE OF ADVICE

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(g) When Counsel has had the opportunity to prepare his brief and to confer with those instructing him, but at the last moment before trial unexpectedly advises that the case should not proceed or that pleas to lesser offences should be accepted, and his Instructing Solicitor does not accept such advice, Counsel should apply for an adjournment if instructed so to do.

- 5.1 The CPS and the prosecution advocate should agree a period of adjournment that would allow a newly instructed advocate to prepare for trial. The period should be realistic and acknowledge that in such circumstances a case conference will usually be required.
- 5.2 The facts leading to the application for the adjournment should be placed before the court only in so far as they are relevant to that application.

6. PROSECUTION ADVOCATE'S ROLE IN DECISION MAKING AT TRIAL

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(h) Subject to the above, it is for Prosecution Counsel to decide whether to offer no evidence on a particular count or on the indictment as a whole and whether to accept pleas to a lesser count or counts.

- 6.1 The prosecution advocate may ask the defence advocate whether a plea will be forthcoming but at this initial stage should not suggest or indicate a plea that might be considered acceptable to the prosecution before a plea is offered.

- 6.2 Where the defence advocate subsequently offers details of a plea, the prosecution advocate may discuss the matter with a view to establishing an acceptable plea that reflects the defendant's criminality and provides the court with sufficient powers to sentence appropriately.

Responsibility of prosecution advocate to consult

- 6.3 Where the prosecution advocate forms the view that the appropriate course is to accept a plea before proceedings commence or continue, or to offer no evidence on the indictment or any part of it, the prosecution advocate should:
- i. whenever practicable, speak with the victim or victim's family attending court to explain the position;
 - ii. ensure that the interests of the victim or any views expressed by the victim or victim's family are taken into account as part of the decision making process; and
 - iii. keep the victim or victim's family attending court informed and explain decisions as they are made.
- 6.4 Where appropriate, the prosecution advocate may seek an adjournment of the court hearing in order to facilitate discussion with the victim or victim's family.
- 6.5 The prosecution advocate should always comply with paragraph 6.3 and, where practicable, discuss the matter with the CPS before informing the defence advocate or the court that a plea is acceptable.
- 6.6 Where the defendant indicates an acceptable plea, unless the issue is simple, the defence should reduce the basis of the plea to writing. The prosecution advocate should show the CPS any written record relating to the plea and agree with the CPS the basis on which the case will be opened to the court.

- 6.7 It is the responsibility of the prosecution advocate to ensure that the defence advocate is aware of the basis on which the plea is accepted by the prosecution and the way in which the prosecution case will be opened to the court.
- 6.8 It will not be necessary for the prosecution advocate to consult the CPS where the plea or course of action accords with the written instructions received from the CPS, although paragraph 6.3 may still apply.

Prosecution advocate's role in sentencing

- 6.9 The prosecution advocate should always draw the court's attention to any matters, including aggravating or mitigating features, that might affect sentence. Additionally, the advocate should be in a position to assist the court, if requested, with any statutory provisions or sentencing guidelines and should always draw attention to potential sentencing errors.
- 6.10 Where a discussion on plea and sentence takes place, the prosecution advocate must adhere to the Attorney General's *Guidelines on The Acceptance of Pleas* published on 7 December 2000.

7. SEEKING JUDICIAL APPROVAL

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- (i) ***If Prosecution Counsel invites the Judge to approve the course he is proposing to take, then he must abide by the Judge's decision.***

- 7.1 A discussion with the judge about the acceptability of a plea or conduct of the case should be held in the presence of the defendant unless exceptional circumstances² apply.
- 7.2 In exceptional circumstances, where the prosecution advocate considers it appropriate to communicate with the judge or seek the judge's view in chambers, the CPS should be consulted before such a step is taken.
- 7.3 Where discussions take place in chambers it is the responsibility of the prosecution advocate to remind the judge, if necessary, that an independent record must always be kept.
- 7.4 The prosecution advocate should also make a full note of such an event, recording all decisions and comments. This note should be made available to the CPS.

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- (j) ***If Prosecution Counsel does not invite the Judge's approval of his decision it is open to the Judge to express his dissent with the course proposed and invite Counsel to reconsider the matter with those instructing him, but having done so, the final decision remains with Counsel.***

² For the purposes of these guidelines, "exceptional circumstances" would include the following:

- i. Where there is material or information which should not be made public, e.g. a police text, or for some other compelling reason such as a defendant or witness suffering, unknown to them, from a serious or terminal illness; or
- ii. There are sensitivities surrounding a prosecution decision or proposed action which need to be explained in chambers with a view to obtaining judicial approval. Such approval may be given in open court where it is necessary to explain a prosecution decision or action in order to maintain public confidence in the criminal justice system.

- 7.5 Where a judge expresses a view based on the evidence or public interest, the CPS will carry out a further review of the case.
- 7.6 The prosecution advocate will inform the CPS in a case where the judge has expressed a dissenting view and will agree the action to be taken. Where there is no CPS representative at court, the prosecution advocate will provide a note of the judge's comments.
- 7.7 The prosecution advocate will ensure that the judge is aware of all factors that have a bearing on the prosecution decision to adopt a particular course. Where there is a difference of opinion between the prosecution advocate and the CPS the judge will be informed as to the nature of the disagreement.

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(k) In an extreme case where the Judge is of the opinion that the course proposed by Counsel would lead to serious injustice, he may decline to proceed with the case until Counsel has consulted with either the Director or the Attorney General as may be appropriate.

- 7.8 As a preliminary step, the prosecution advocate will discuss the judge's observations with the Chief Crown Prosecutor in an attempt to resolve the issue. Where the issue remains unresolved the Director of Public Prosecutions will be consulted. In exceptional circumstances the Director of Public Prosecutions may consult the Attorney General.

These Guidelines are subject to the Code of Conduct of the Bar of England and Wales (barrister advocates) and The Law Society's The Guide to the Professional Conduct of Solicitors (solicitor advocates). Whilst reference is made in the guidelines to the CPS and levels of authority within the Service, the guidelines may be adopted as best practice, with consequential amendments to levels of authority, by other prosecuting authorities.

These Guidelines may be amended at any time and copyright is waived.

These Guidelines are also available on the CPS Website: www.cps.gov.uk

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