



# **Forensic Science Regulator Guidance**

**Public Comment**

**FSR-G-205**

**Issue 2**

© Crown Copyright 2020

The text in this document (excluding the Forensic Science Regulator’s logo and material quoted from other sources) may be reproduced free of charge in any format or medium providing it is reproduced accurately and not used in a misleading context. The material must be acknowledged as Crown Copyright and its title specified.

## **PART 1 – INTRODUCTION**

### **1. PURPOSE**

- 1.1.1 This guidance provides advice on making public comments <sup>1</sup>, by an expert witness, in relation to any case in which he has been involved.
- 1.1.2 There is no intention to restrict the freedom of speech of expert witnesses. The aim is to provide guidance so that any comments are made in a manner which does not undermine the position of the expert witness and cause, consequential, problems for the Criminal Justice System (CJS)
- 1.1.3 This guidance has been issued to support the operation of the Codes of Practice and Conduct for Forensic Science Providers and Practitioners to the Criminal Justice System (the Codes).
- 1.1.4 This guidance provides support for, and clarification of, the operation of the Codes. In the event of any conflict with the provisions of the Codes the Codes shall prevail.
- 1.1.5 As a result of its status as guidance this document avoids the use of prescriptive language. This should not be taken to suggest that requirements set out in the Codes are not mandatory.

### **2. SCOPE**

- 2.1.1 This guidance is based, in part, on the obligations placed on expert witnesses within the CJS in England and Wales. Therefore the guidance only applies to cases within the CJS in that jurisdiction.
- 2.1.2 Whilst this guidance is only directly applicable as described above there is no reason why it should not be followed in the following areas.
  - a. Cases in the CJS in Scotland.
  - b. Cases in the CJS in Northern Ireland.
  - c. Coroner's inquests in England Wales and Northern Ireland.
  - d. Fatal accident inquiries in Scotland.

---

<sup>1</sup> Comments which could come into the possession of those outside the CJS (e.g. statements to the media, publications in books or journals or presentations).

### 3. MODIFICATION

3.1.1 This is the **second** issue of this document.

3.1.2 Significant changes to the text have been highlighted in grey

3.1.3 The modifications made to create Issue 2 of this document were to ensure compliance with The Public Sector Bodies (Websites and Mobile Applications) (No. 2) Accessibility Regulations 2018.<sup>2</sup>

3.1.4 The Regulator uses an identification system for all documents. In the normal sequence of documents this identifier is of the form 'FSR-#-###' where (a) the '#' indicates a letter to describe the type or document and (b) '###' indicates a numerical, or alphanumerical, code to identify the document. For example, the Codes are FSR-C-100. Combined with the issue number this ensures each document is uniquely identified.

3.1.5 In some cases, it may be necessary to publish a modified version of a document (e.g. a version in a different language). In such cases the modified version will have an additional letter at the end of the unique identifier. The identifier thus becoming FSR-#-####.

3.1.6 In all cases the normal document, bearing the identifier FSR-#-###, is to be taken as the definitive version of the document. In the event of any discrepancy between the normal version and a modified version the text of the normal version shall prevail.

### 4. IMPLEMENTATION

4.1.1 This guidance was published on **22 September 2020**.

## PART 2 – BACKGROUND

### 5. LEGAL INFORMATION

5.1.1 The information provided in this guidance is based, in part, on the legal position set out in the Appendix FSR-I-400 [1].

---

<sup>2</sup> To facilitate compliance with the Regulations changes to the document are noted here. The following sections of the document have been changed – 3.1.1, 3.1.2, 3.1.3, 3.1.4, 3.1.5, 3.1.6, 4.1.1 and 6.1.1.a. The following footnotes have been altered - 2.

## 6. LEGAL OBLIGATIONS

- 6.1.1 Expert witnesses are often subject to restrictions on what they can say in relation to their work. Sources of such restrictions include, but are not limited to, the following.
- a. Statutory provisions.
    - i. Official Secrets Acts 1911-1989.
    - ii. Data Protection Act 2018.
  - b. Court orders (e.g. imposing reporting restrictions).
  - c. Contractual, or similar, restrictions.
  - d. Legal professional privilege.
  - e. Medical confidentiality.
- 6.1.2 An expert will, normally, be instructed before the case has reached a conclusion and may be instructed before a prosecution has been initiated. There is a risk that public comment before the conclusion of a case can interfere with the operation of the CJS. As a result, persons making such statements can, in certain circumstances, be prosecuted for contempt of court.
- 6.1.3 While not a restriction in the sense of those discussed above witnesses should be aware of the risk of legal action for defamation in relation to any public statement.

## 7. EXPERT WITNESSES

- 7.1.1 Expert witnesses <sup>3</sup> within the CJS must provide objective, unbiased opinion on matters within their expertise to the court. This duty overrides any obligation the expert has to those instructing him [1].
- 7.1.2 This means that, and the courts have made clear that, an expert witness must not:
- a. Act as an advocate for any party to the case; or
  - b. Promote particular scientific theories. <sup>4</sup>

---

<sup>3</sup> Expert witness means any person who has been instructed as an expert (by the prosecution or defence) or knows he may be called as an expert witness, in relation to the case.

<sup>4</sup> In this regard promoting a theory would be presenting a theory to the court in a positive light without making clear any limitations or restrictions.

- 7.1.3 An expert witness should do nothing before, during or after the trial <sup>5</sup> which could bring into question his independence, impartiality and maintenance of the requirements set out above.
- 7.1.4 Failure to adhere to this guidance could lead to criticism of the expert and questions in relation to their professional conduct being raised. Indeed, given that experts' statements contain a confirmation that they will meet the required standards, failure to do so may give rise to attacks on their competence and integrity. It may also lead to challenges to the admissibility of their evidence.

## **PART 3 – GUIDANCE**

### **8. LEGAL OBLIGATIONS**

- 8.1.1 Expert witnesses should not do anything which could be construed as a violation of any legal obligations.

### **9. PUBLIC COMMENT – ACTIVE CASE**

- 9.1.1 As noted above any comment about a case at a stage before the case has reached a conclusion within the CJS may create a risk to the proper operation of the CJS. As a consequence, the following advice can be provided.
  - a. Under normal circumstances a witness should make no public comment about an active case.
  - b. Where a witness wishes to make a comment about an active case, he should seek advice from the party that instructed him as to whether the comment is appropriate.

### **10. PUBLIC COMMENT – CLOSED CASE**

#### **10.1 Risk**

- 10.1.1 An area where particular care should be taken by an expert to, avoid raising questions as the requirements set out above, is making public comments about a case in which they have been involved.

---

<sup>5</sup> This includes any other CJS disposal in the case.

10.1.2 Public comment should be interpreted as meaning any comment (whether written or verbal) made outside of the processes of the CJS (e.g. testimony) which is likely to become available to those outside the CJS.

## 10.2 Guidance

### Low Risk Areas

10.2.1 There is not likely to be any criticism of an expert for making public comments about a case where the following conditions are met.

- a. The comment does not disclose information which should not, at the time the comment is made, be in the public domain.
- b. The comments offer a fair and balanced view of the evidence adduced in the case (or the relevant parts).
- c. The comments set out the positive and negative aspects and relative merits of the evidence fairly.
- d. The comments do not include any that could give rise to suggestions of partiality or bias (see below).

### High Risk Areas

10.2.2 Areas where there is a particular risk of criticism include, but are not limited to, the following.

- a. Expressing a view as to any of the following.
  - i. The guilt or innocence of the accused.
  - ii. Whether a crime has been committed.<sup>6</sup>
  - iii. Whether a prosecution should have been initiated.
- b. Suggesting that the verdict of the court is wrong.

10.2.3 Where the accused has pled guilty, or confessed, and the trial has concluded then stating that he has committed the offence does not indicate bias or partiality. It is a reflection of accepted fact. In other cases is it safer, in any

---

<sup>6</sup> Whether a crime, or particular crime, has been committed often requires consideration of legal matters and the application of that consideration to the facts of the case. This often involves issues (e.g. the intention of the accused) which are outside the knowledge of the expert witness.

comment, to reflect the verdict of the court (that the accused was found guilty/not guilty or convicted/acquitted).

#### Advice

10.2.4 Expert witnesses are often in possession of facts in relation to one small part of a case. It follows that they may not appreciate the impact of a public comment. Further, the proposed comment may not properly reflect the whole picture.

10.2.5 It is advisable for an expert to check with the party that instructed him before making any public comment about a case.

### **10.3 Potential Miscarriage**

10.3.1 Where an expert believes the verdict of the court may be wrong (i.e. there may have been a miscarriage of justice) it is not advisable to make public comment on that basis. Instead the expert should set out his views, in detail, to the party that instructed him. This will allow the party to deal with the matter through the appropriate route.

10.3.2 If the expert believes a public comment is required it would be appropriate to adopt the following approach. The comment should:

- a. Set out the evidence within the expert's field in sufficient detail and in a balanced manner.
- b. Provide a balanced view of the support this evidence provided to the case set out by each party.
- c. Explain the impact of this evidence on the case and why, in the expert's view, it may raise concerns as to the safety of the outcome.

### **10.4 General Consideration**

10.4.1 Throughout this guidance there is reference to an expert making comment about a specific case. However, when making comment the expert must understand that there is a risk that statements relating to one case might be interpreted as relating to a different case.

## **11. REVIEW**

11.1.1 This document is subject to review at regular intervals.



11.1.2 If you have any comments please send them to the address or e-mail set out on the Internet at URL: <https://www.gov.uk/government/organisations/forensic-science-regulator>.

## **12. REFERENCES**

- 1 Forensic Science Regulator, Legal Obligations Information, FSR-I-400.

Published by:

The Forensic Science Regulator

5 St Philip's Place

Colmore Row

Birmingham

B3 2PW

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