



The
British
Psychological
Society

THE CENTRAL CRIMINAL COURT (THE OLD BAILEY)



Psychologists as Expert Witnesses: *Guidelines and Procedure for England and Wales*

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Professional Practice Board (PPB)
and Research Board (RB) of the
British Psychological Society.*

*Produced by the
British Psychological Society
Expert Witness Advisory Group.*

Background to the Advisory Group on Expert Witnesses

This report has been prepared by an Advisory Group of the Professional Practice Board and Research Board. The group was first convened as a Working Party at the request of the Professional Practice Board of the British Psychological Society and has been supported by the Research Board. The report is part of a quinquennial review cycle and supersedes the following individual reports: *Psychologists as Expert Witness* (1998) and *Psychologists and the New Rules of Civil Procedure* (1999) and the August 2007 and July 2009 *Psychologists as Expert Witnesses: Guidelines and Procedure for England and Wales*. The Advisory Group comprised representation from a range of applied Divisions and has attempted to capture issues of relevance for both civil and criminal proceedings. The document also has application to tribunals and oral hearings. The current document was developed to reflect recent changes to the Civil Procedure Rules which came into force in April 2010. The document has attempted to reflect these changes with Appendix 2a detailing some of the core amendments most pertinent to experts.

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1. What is an expert?

- 1.1 An expert is a person who, through special training, study or experience, is able to furnish the Court, tribunal or oral hearing with scientific or technical information which is likely to be outside the experience and knowledge of a judge, magistrate, convenor or jury. The expert's role is to *assist* the Court and not the party(ies) instructing them. The implementation of the revised Civil Procedure Rules in April 2010 extended the concept of 'expert witness' to include 'expert teams'. This was a reflection of the potential for teams of professionals within some services (e.g. NHS) to be serving as experts, producing team agreed reports. This was an additional role and does not replace the individual 'expert witness' role.
- 1.2 The main difference between expert witnesses and ordinary witnesses (i.e. witnesses to fact), is that the former are able to give an opinion, whereas ordinary witnesses can only give factual evidence. There is also a form of witness referred to as 'professional witnesses'. These are a less common class of witnesses whose remit can cross the boundary of both fact and opinion. Professional witnesses are formal employees of one side (e.g. a psychologist employed by a hospital who gives evidence about treatment progress regarding a client during a Mental Health Review Tribunal; a psychologist employed by HM Prison Service/NIPS giving evidence on a client's risk during an oral hearing). Professional witnesses are responsible to the Court in the same way that expert witnesses are; their function is to describe their clinical role in the case under consideration. Professional witnesses may also be expected to attend Court.
- 1.3 Although expert witnesses can be instructed within both civil and criminal proceedings, it is useful to understand the core distinction between these proceedings from the outset (see also Appendix 1, 2, 2a and 3 for details on procedure in criminal and civil proceedings). In civil proceedings (e.g. Family Court) decisions are made on the 'balance of probability' by a single decision-maker, namely the presiding judge, who considers all of the evidence presented by each party. There is no jury. In criminal proceedings there is a presiding judge and jury. This does not, however, apply to 'Fitness to Plead' hearings. The judge has the remit of ensuring a fair trial whereas the decision-making in terms of verdict is made by the jury. In such proceedings a decision is made 'beyond a reasonable doubt' which is a different (and higher) level of evidence to the 'balance of probability'. Usually the balance of probability test is interpreted as a probability of greater than 50 per cent, although an expert may be invited to estimate the probability more precisely.
- 1.4 Psychologists may also be called as experts in criminal proceedings in the Magistrates' Courts. Such Courts may be presided over by a stipendiary judge or by lay magistrates sitting in groups of three. The Magistrates' Court operates without a jury and judges make decisions 'beyond reasonable doubt'. Quasi-Court hearings¹ (see Glossary) are usually presided over by a judge or chairperson.
- 1.5 Expert witnesses have a duty to provide the Court with the necessary criteria so that the Court may be able to evaluate the basis of the expert's opinions and conclusions.
- 1.6 For expert evidence to be allowed in legal proceedings it has to be both relevant and admissible. Relevance is determined by the *probative value* of the evidence in a given case.

¹ There are currently no formal rules or guidelines for Quasi-Court hearings although it is recommended that the rules and procedures documented here are used as guidelines for good practice. It is also important to note that many Quasi-Court hearings are presided over by judges with experience in civil and criminal Court.

- 1.7 When lawyers seek to introduce expert psychological evidence, then it is the judge in the case who decides whether an individual has the requisite expertise to give evidence with the potential to be relevant to the case. However, the judge decides whether what the expert asserts is relevant and therefore admissible in law. There will be instances where the judge accepts the expert as such, but ultimately excludes the expert's evidence in part or in full.
- 1.8 Submissions and legal arguments concerning requisite expertise and admissibility of evidence are heard by the judge. Typically this may happen at the outset of the trial (criminal) or hearing (civil) but may occur at any time during the trial/hearing process. This process is termed '*voir dire*' or 'trial within a trial' within criminal proceedings. In civil family proceedings the situation will be laid out in the initiating letter of instruction supplied by the lead solicitor. In civil litigation these matters may be resolved or at least aired at case management conferences before a judge.
- 1.9 Psychologists are not normally permitted to give evidence about how an ordinary person is likely to react to stressful situations. Expert evidence about matters directly related to the likely truthfulness of witnesses or defendants (criminal proceedings) or applicants, claimants and respondents (civil proceedings) is allowed, but best undertaken only when the question has specifically been explored, and often using best practice tests of effort and malingering. Experts may be asked to comment on the truthfulness of witnesses when presented with video evidence that contradicts evidence from interviews.
- 1.10. It is important to emphasise that experts are not expected or permitted to comment on a question of fact under consideration by the judge or the jury, since this lies within the remit of the appointed decision makers, for example, in civil family cases, experts are not permitted to indicate where children should be placed or assert whether an alleged incident of abuse/neglect occurred since this is the remit of the judge. Experts may, however, find occasion to offer a psychological opinion on the reliability of child testimony; in criminal proceedings experts cannot reflect on the likely guilt of a defendant since this is the remit of the jury. The risk for prejudicing a trial by commenting on likely guilt is clear. If experts are asked to comment on such issues in the instruction letter then this should be discussed with the instructing solicitor from the outset, with experts identifying clearly to instructing parties what falls within the role of an expert and what does not.
- 1.11. Although the current section aims to outline role, duties and expectations of expert witnesses as applied across England and Wales, it recognises that there are many differences in procedure and terminology evident in the Scottish legal system. A separate document will outline the application to the Scottish system in detail.

2. Competence

- 2.1 A psychologist is responsible for ensuring that he or she is competent and expert in offering an opinion. Criteria for competence in respect of the knowledge required by the Court, and expertise within their own field, may include:
- Qualifications and/or degree(s) in the areas(s) in question;
 - A number of years of post-doctoral/post-qualification experience;
 - Academic/scientific publications in relevant area(s);
 - Other demonstrations of competence, specialist knowledge or expertise with a bearing upon the issues in the case; and
 - Current experience in applying psychology in the area of claimed expertise, for example, clinical, forensic, occupational, educational, health, sport and exercise, counselling.
- 2.2 Areas that you may find useful when asked to outline your experience and qualification prior to examination-in-chief can be found in Appendix 4. These are usually summarised at the start or end of a written report but you may be asked to outline your competence in brief during oral testimony.
- 2.3 It is also recognised that in order to provide services as expert witnesses you need to be qualified not only in content (i.e. a qualified psychologist covering the areas listed in 2.1) but also qualified in process. Process refers to the act of giving evidence in a legal forum, either orally or in written form. Expert witnesses are not expected to be lawyers but they are expected to understand the Court processes and how expert witnesses sit within these. They are expected to be skilled in the delivery of evidence. Thus curriculum vitae provided as part of Court instruction should reflect on experience both in terms of content and process. Evidence of the latter can include number of previous Court appearances as witnesses (including as professional witnesses or witnesses of fact).
- 2.4 If a psychologist is not experienced in preparing evidence for legal purposes then he or she is responsible for obtaining the appropriate advice and supervision in the preparation of the report. It is partly in this way that expertise is gathered. In any event it is incumbent upon the psychologist being called to secure appropriate support and supervision in order to meet professional standards.
- 2.5 Psychologists who lack experience in report preparation and giving evidence should not be intimidated by this. The Courts recognise that all experts have to start somewhere and gain experience cumulatively. The important issue is that lack of experience in these areas does not nullify the expertise of the psychologist, though robust cross-examination may seek to unsettle the psychologist on this matter and, if this happens, to raise doubts in the mind of the Court as to the standing of the psychologist's evidence. All that is necessary for the psychologist inexperienced in Court work is not to be disconcerted by questioning as to what experience he or she has had in giving evidence.
- 2.6 Psychologists need to remain aware, however, that many legal proceedings are protected with regards to disclosure (particularly family proceedings) and thus supervision should be obtained in Court *process* and *how* opinion can be stated and not on psychological *opinion* per se (i.e. what your opinion should be, providing a supervisor with access to Court documents without the permission of the Court). Experts are not expected to require supervision in their opinion and if you believe that you need this, you should question whether you are yet ready for expert witness work.

- 2.7 Further, psychologists need to be aware of the importance of performing appropriately in Court. Excellent work on the case, a faultless written report and substantial preparation prior to trial can be spoiled by poor Court performance. Poor Court performance subsumes lack of awareness concerning Court procedures and etiquette, inappropriate behaviour when giving evidence in chief and, most particularly, when being cross-examined.
- 2.8 Psychologists who are appearing for the first time as witnesses should take advantage of the available training materials and training events that can assist them in preparing for Court appearance. The Society and a number of other organisations produce materials, such as videos, and also provide training events. The Family Justice Council, for example, offers a ‘mini-pupillage’ scheme to new expert witnesses that includes shadowing barristers and judges during the conduct of a case. Information on this can be obtained from the British Psychological Society’s Royal Courts of Justice Representatives². Supervision and advice can also be another useful means of gathering expertise for Court appearances. This would come from colleagues with the appropriate experience.
- 2.9 Psychologists should ensure that they understand the distinctions in process between civil and criminal Court as this could influence the evidence that they give. As noted in paragraph 1.3 in criminal proceedings a decision is made ‘beyond a reasonable doubt’ which is a different level to the civil proceedings decision of ‘on the balance of probability’. This is an important distinction to make since ‘guilt’ is determined in a criminal Court beyond a reasonable doubt and leads to a conviction. In civil proceedings facts are determined via ‘Finding of Fact hearings’ which are determined on the balance of probability only. To illustrate, a defendant found guilty of an act of violence in a criminal Court will have a conviction associated with this. The act of finding that someone *probably* committed an act of violence in a civil case based on a ‘Finding of Fact’ hearing will not equate to a conviction or even a caution. Ensuring that you know the basis on which a fact has been established is important, particularly if you are completing assessments that require a conviction or charge to have been proven.
- 2.10 Psychologists should not offer opinions outside their area(s) of expertise. If the area(s) in question lie outside their expertise, they can refer clients to the Society’s List of Chartered Psychologists or other sources. This duty applies both to the provision of written reports, to oral evidence in Court and to the provision of opinion at any stage of the legal process (e.g. during pre-trial hearings, during professional meetings or counsel conferences in civil proceedings).
- 2.11 Psychologists need to be particularly aware of the danger of straying from their areas of expertise under cross-examination. They should always be prepared to decline to give an opinion.
- 2.12 A psychologist is responsible for ensuring that the expert evidence they give is of the proper quality and based on the appropriate research and applied evidence. They should anticipate, be aware of, and prepare for potential conflicts in expert opinions when preparing their evidence. The simplest approach is to identify counter-positions or counter-arguments and to accommodate these in their evidence. The Civil Procedure Rules encourage experts to consider a range of opinion in their conclusions and to explain to a Court why such a range arises.
- 2.13 A useful way of preparing for giving oral testimony in Court and ensuring competence can be via a process known as ‘reducing your evidence’: Instead of simply reading your report you will find the most useful preparation is one where you go through the report identifying what issues are likely to arise, the established facts and your stated psychological opinion. This ensures that you are well prepared and assists with competence in oral testimony. Appendix 5 outlines a template that can be completed for each report. The aim is to reduce the range of evidence to between three and five issues.

² Information on the representatives can be obtained from the Professional Practice Board of the British Psychological Society.

- 2.14 The academic quality of the expert evidence must be such that it is informed by latest evidence in the field. This includes the use of relevant assessments and tests based on accepted academic opinion. For example, completing a ‘psychological risk assessment of violence’ based on unstructured clinical judgment is not in keeping with developments in the risk field within the last 10 years where structured clinical guides are now employed (e.g. the Historical, Clinical and Risk Management Guide – HCR-20). Similarly, using a psychometric test (e.g. MCMI-III) for a purpose for which it was not designed or validated for (e.g. using it with children, with general samples) should be avoided. Basing an ‘expert’ opinion on dated or inappropriate assessment evidence may lead to a formal complaint being made in relation to the conduct of the psychological expert.
- 2.15. If an expert uses a test or assessment that falls below accepted standards then they should be prepared to justify and explain their use to the interviewee and in the report. There are criteria in existence which can prove of value when determining if a ‘test’ will provide scientific *or* specialised knowledge. If you are utilising a test in a report (e.g. psychometric, not a clinical guide), it should be expected to meet the criteria for scientific knowledge. If it does not, prepare to be questioned on its value. There are a set of US criteria which are particularly valuable in this instance, referred to as the Daubert criteria following the Daubert vs. Merrell Dow Pharmaceuticals Inc. case (1983: see Rogers, Salekin & Sewell, 1999). Put simply, the Daubert criteria refer to the standards evidence is expected to reach if it can be considered admissible expert evidence. In short in order to meet the criteria:
- The theory or technique must be, and has been tested – ‘Falsifiability’.
 - The theory or technique must have been subject to peer review and published in professional journals.
 - There must be a general acceptance of the theory and technique in the scientific community.
 - The theory or technique must have a known error rate (for the method as well as the technique).
 - There must exist standards to control the techniques operation.
 - The extent to which the technique relies upon the subjective interpretation of the expert must be clear.
 - The extent to which research on the technique extends beyond the Courtroom should be clear.
- 2.16 A psychologist should never change the substantive content of the report nor his or her opinion without appropriate grounds based on newly submitted evidence. Any request to modify an opinion, including removal of detail, should be firmly but politely refused: psychologists should remind those requesting this that they are instructed by the Court to provide an independent opinion. If new evidence is provided to a psychologist via an instructing party which causes the expert to alter their opinion, then this should be communicated in writing to the instructing party as soon as possible. (Obviously, minor errors in a report such as typographical errors, mis-datings, mis-spelling of names should be corrected promptly in case they lead to mis-understandings later on, and a clean copy of the report re-issued.)
- 2.17 Alterations in opinion are not unusual in light of new evidence and psychologists should be prepared to alter their opinion if they think it is appropriate to do so. Caution is expressed, however, in relation to *changing* opinion. If the evidence is sufficient for a *change* of opinion then it should be considered substantial enough for a re-assessment to be conducted. It is the duty of an expert to communicate alterations in opinion/a need for reassessment to those instructing them at the earliest opportunity.

- 2.18 Psychologists acting as expert witnesses should be fully familiar with the British Psychological Society's *Code of Conduct and Ethics* and the HPC's *Standards of Conduct, Performance and Ethics*. The importance of adhering to this code during working as expert witnesses is clear. Failure to do so can result in disciplinary proceedings being initiated. Expert witnesses will find themselves working in sensitive areas as part of their role and the need to protect clients from unsafe practice from psychological expert witnesses is paramount.
- 2.19 Failing to submit a report on time can be grounds for a formal complaint. If a psychologist is unable to submit the report on time then they have a responsibility to inform those instructing them at the earliest opportunity. A late report submission, depending on how essential it is viewed to the case, can result in proceedings being delayed at great expense and inconvenience to the legal system. This can also have implications for the psychologist expert, particularly if they are thought to have not informed parties of any difficulties at the earliest opportunity.
- 2.20. Finally, it is important that the conduct of the assessment is consistent at all times with the British Psychological Society's *Code of Conduct and Ethics* and the HPC's *Standards of Conduct, Performance and Ethics*. This includes the importance of gaining consent and witnesses may wish to consider the use of a standard information sheet/guide with which to aid with obtaining consent. This information can then be appended to the report. Witnesses should be assured that they have conducted themselves in a way that is consistent with the *Code of Conduct and Ethics* and should be prepared for possibly being questioned on this in Court if there are any concerns raised. Witnesses should be mindful in particular of the likely pressures on individuals to engage in assessments if Court-instructed to do so. Thus consent issues in particular become paramount.
- 2.21 However, the primary duty of all psychologists acting as experts is to the Court. It follows that psychologists have a duty to give their opinion to the Court, both in their report to the Court and when questioned in Court, whether that opinion agrees or disagrees with that of another psychologist. The only issue is how this is done and the language used. It is important to present your own opinion without resorting to abuse such as writing that the other opinion is ignorant, etc., or in Court by giving your own opinion and to do so politely and rationally without criticism or abuse. This is primarily in the interests of the Court, as a calm and measured approach will assist the Court/Judge to consider all the differing evidence presented. Resorting to abuse or open criticism is always likely to raise the temperature and make it more difficult for the Court/Judge to assess the real issue.

As a by-product of the above, psychologists will be faithful to the requirements of the British Psychological Society in not bringing the profession into disrepute.

- If you are asked 'Was the psychologist using the correct measures to assess this client?', you would not say 'No they were not, they were wholly inadequate' as this ensures that you are openly criticising. Rather you should say 'If I was asked to assess the client I would have used the following assessments ... these assessments are accepted in the field as more than adequate.' In this instance you leave the decision concerning poor practice to the Judge/ instructing party, but you have clearly indicated as a witness how things should have been done.
- If you are asked 'What do you think about the opinion of the previously instructed psychologist concerning our clients' psychological presentation? The previous psychologist seems to think they do not have a personality disorder but you do. Why would they say that?' You would reply 'I cannot comment on the opinion of the other psychologist and I suggest questions concerning their opinion are put to them. I completed an International Personality Disorder Examination assessment which

indicated that the client did present with a personality disorder.’ This ensures that you are remaining appropriately focused on your evidence and not that of others.

- If you are asked ‘The previous psychologist does not appear to have been as thorough as you and they appear to have missed important points. Would you agree?’ Your response would be ‘I cannot comment on the behaviour of another psychologist in an open forum, it is in breach of our *Code of Conduct and Ethics*. You can, however, ask me how I may have approached this assessment had you instructed me.’ Courts will not expect you to act outside your *Code of Conduct and Ethics* and are familiar with these issues. By responding in this way you are demonstrating that you are able to assist the Court by providing them with information which they can then use to evaluate the quality of the other psychological evidence.

3. Receiving instructions

- 3.1 Receiving instructions is the term which describes an explicit request to assist in a case by fulfilling the expert witnesses role. The identity of the instructing body necessarily differs, for example, a firm of defending solicitors, the Crown Prosecution Service managing the prosecution of the accused, a local authority legal department, insurance company, claimant solicitors, or the Court itself.
- 3.2 In civil proceedings there can be an emphasis on the notion of 'joint expert' where a legal team will agree on one expert, a single joint expert, to provide an opinion. One solicitor will then be appointed as the 'lead solicitor'. In cases where a party wishes to instruct another expert then this needs to be agreed separately by the judge with a clear rationale made. There are moves to utilise the same 'single joint expert' system in criminal proceedings.
- 3.3 In cases where there is a lead solicitor all correspondence and discussion should be via them. If a solicitor who is not the lead contacts you then you should request that they communicate with you via the lead solicitor. If this is not possible or practical then details of the correspondence should immediately be forwarded to the lead solicitor. If there is no lead solicitor (but you are still nonetheless instructed as a single joint expert) then all correspondence should be copied to both solicitors unless formally agreed in writing otherwise. This is designed simply to protect your impartiality as an independent expert. In criminal cases correspondence should only be via the solicitors instructing you.
- 3.4 The solicitor or instructing body will find it useful to have an itemised estimate of the time you estimate it will take with the piece of work. This should ideally include upper and lower estimates. As a minimum this should take account of:
- Background material, for example, reading material;
 - The assessment;
 - Analysis, scoring tests;
 - Writing the report;
 - Travel time and costs (e.g. hours travelling and mileage/fares, etc.).
 - Likely costs associated with a potential Court appearance. Most simply, this can refer to full-day and half-day rates, including preparation time. You can also note a fee for late cancellation for attendance at Court.
- 3.5 It is necessary to be clear as to what is being requested. The phrase a 'Psychologist's Report' does not carry a sufficient degree of specificity. The psychologist should ask for more detail, and in particular needs to know in which way psychology might relate to the particular case. Also the psychologist needs to know details of the specific legal issues and a summary of the case in addition to clarification of documentation such as solicitors' *Brief to Counsel*, the schedule and any details on 'Finding of Facts' hearings (civil proceedings). In other words, what is being asked for, and what are the established facts of the case to date?
- 3.6 Is there *Advice from Counsel*? If so, the psychologist is entitled to see it before agreeing to take on the case. This will enable the psychologist to judge that they are in fact able to offer expert comments in this field. It may also, however, influence the thinking of the psychologist who should be remaining objective.

3.7 The psychologist needs to know exactly what is being asked of him or her and to have to hand all the relevant materials which will be supportive. If the psychologist thinks that they require certain documentation then this should be requested for in writing, for example, medical records, conviction history. If a solicitor forwards only excerpts from these records you should request them in full. If requested for material does not appear you should be prepared to indicate this clearly in your report and note where you have been unable to provide an opinion because documentation was not forwarded to you, or that your opinion is provisional due to reduced information.

4. Responding to instructions

- 4.1 This may involve a dialogue to determine terms of engagement with the solicitor, insurer, employer or instructing body.
- 4.2 The psychologist should ask for the time frame and agree this at the same time as agreeing fees. At this stage it would be good practice to send your terms and conditions to the instructing party. This should include a time frame for Court appearances. Ensure that you agree a *realistic* time frame for submission of your report. The Court will take an adverse view of experts whose reports arrive late and consequently prevent a case from going ahead on the scheduled date, as noted in 2.19.
- 4.3 Some useful questions to ask could be:
- Is the case *listed for trial* or hearing?
 - If so, can the tasks the psychologist is being asked to do be completed in the time?
 - What are the critical deadlines? and
 - Is the psychologist available to give evidence in Court? When are the Court dates?

If you are not able to keep within the Court timetable, including attendance at Court, then you should not accept instructions. By accepting instructions you are indicating that you are able to comply with the Court timetable.

- 4.4 The psychologist should clarify the role which he or she is being asked to undertake:
- (a) an independent witness;
 - (b) as an employee of an organisation and as part of her or his contract;
 - (c) single or jointly instructed witness.
- 4.5 Psychologists instructed as experts need to ensure that they can provide an independent and impartial opinion and that their independence is clear to all. Any potential conflicts should be raised, for example, if you are asked to complete an expert assessment of a colleague or someone known to you it should be politely declined; if you are asked to complete an assessment of an individual who has connections with your current employer it should be declined (e.g. if you work for HM Prison Service/NIPS and you are asked to provide an independent expert opinion on a prisoner detained by HM Prison Service/NIPS; if you work for the NHS and you are asked to provide an independent expert report for a Mental Health Tribunal for a patient detained within the NHS Trust for which you work).
- 4.6 This can also extend to if you are asked to provide an expert report on someone whom you are providing treatment to (e.g. a claimant/a plaintiff). Such a position is not an acceptable conflict and psychologists working in this capacity should be mindful that it may not be appropriate to act as an expert witness in this instance but more as a professional witness. Expert witnesses should ensure that there are no conflicts of interest and report conflicts of interest as soon as they arise.
- 4.7 Witnesses acting independently will be required to sign a statement declaring their independence. The specific wording may be outlined in the instruction letter. In civil cases independent (i.e. expert) witnesses are asked to sign a statement of compliance and a statement of truth outlined at the end of their report as follows:

Statement of compliance

I understand that my duty as an expert witness is to the Court. I have complied with that duty and will continue to comply with it. I am aware of the requirements of part 35 and practice direction 35, this protocol and the practice direction on pre-action conduct. This report includes all matters relevant to the issues on which my expert evidence is given. Included in this report are those matters which might affect the validity of my conclusions. I understand that this report will form the evidence to be given under oath and that I may be cross examined on its contents. I confirm that I have not entered into any arrangement whereby the amount or payment of my fees is dependant upon the outcome of this case. This report is addressed to the Court.

Statement of truth

I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

In criminal proceedings, there is generally one declaration as follows:

I am an expert in the field of psychology and I have been requested to provide a statement. I confirm that I have read guidance contained in a booklet known as Disclosure: Experts Evidence and Unused Material – Guidance Booklet for Experts which details my role and documents my responsibilities in relation to my role as an expert witness. I have followed the guidance and recognise the continuing nature of my responsibilities of revelation. In accordance with the 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.*

Details on the *Disclosure: Experts Evidence and Unused Material – Guidance Booklet for Experts* can be located in Appendix 3.

- 4.8 The psychologist should not be tempted to give evidence in areas outside her or his expertise. He or she should be prepared to say when they cannot do so and should be able to say that they do not believe this is an area of his or her competence. On receiving instructions it is the responsibility of the psychologist to inform those instructing them of the areas they cannot complete. If you are instructed to answer a question that is not within your area of expertise then those instructing you need to be informed as soon as possible. You can ask for a question to be omitted from your instructions, suggest another expert to answer a question not within your area of expertise, and/or request clarification on what the instructing party are hoping to assess.
- 4.9. Expert witnesses should also be aware of their power to write to the Court to ask for clarification of any points raised during the process of instruction. There is clear provision within civil procedure for experts to contact the Court directly, although it is usually advised that the Court is contacted only when clarification from those instructing you has not been forthcoming and/or has been unsatisfactory. If you do choose to contact the Court direct, you should notify the parties of the nature of the guidance sought.

5. Confidentiality

- 5.1 There is no 'confidentiality' at all and a psychologist is not in a position ever to offer or guarantee confidentiality to a party.
- 5.2 Any information evidence in a report can be disclosed. Expert witnesses have a duty to disclose all of the evidence used to reach their opinion. It is also advised that expert witnesses who cite references in their report have sourced these references correctly and read them. Do not rely on second-hand or 'cited-in' evidence. It is good practice to supply copies of the material referred to within a report; in any event psychologists should be prepared to supply copies at short notice.
- 5.3 When a psychologist has been instructed by a party to litigation or his or her representatives, and prior to a Court hearing, the psychologist should maintain confidentiality of information, including results of investigations, and report only to those instructing him or her.
- 5.4 Any more peripheral discussion (e.g. with colleagues concerning finer points of cases) should only take place in circumstances where confidentiality can be ensured.
- 5.5 Discussion with other 'experts' concerning the specifics of the case, and particularly with colleagues instructed by other parties, should only take place with the express (and preferably written) permission of those instructing the psychologist (see also 2.4). The other 'experts' may not necessarily be psychologists but can include psychiatrists and social workers.
- 5.6 There are, however, accepted forums of discussion between experts. These can be in the form of 'experts meetings', 'professional meetings' or 'counsel conferences'. All of these are sanctioned by the Court. Experts meetings are used when there is a range of differing opinion and it is hoped that a meeting between experts can clarify opinions where there are agreement and identify opinions that differ. Professional meetings and counsel conferences are generally found in civil proceedings and are those where the legal representative and other professionals involved (including experts) meet. Each party provides an update on the case progress, and questions can be put to experts in attendance. Legal representatives keep minutes which are then agreed by all attendees.
- 5.7 Experts meetings differ from this. They should not have legal representatives present and are a meeting between experts only. Agreed minutes of experts meeting should be made and submitted. The minutes from both professional and expert meetings are bound by the same level of confidentiality as other Court documents. Both are submitted to Court as evidence.
- 5.8 When a psychologist has been instructed directly by the Court, the Crown Prosecution Service or solicitor, the psychologist is required to report or comment on any or all aspects of the case that appear to the psychologist as an expert in a field to be relevant or pertinent. In such circumstances, the psychologist is not in a position to offer 'confidentiality' to any person, and should make this position clear to any party with whom he or she has contact during psychological investigations.

6. Conflict of interests

- 6.1 The psychologist should spell out his or her independent position. The psychologist should not be manipulated or pressured (explicitly or implicitly) into producing a biased or compromised report or evidence.
- 6.2 The psychologist needs to be clear that s/he is acting as an independent expert, not as an advocate for a party. With regards to cases involving children, this is particularly apposite. Experts in such cases are not acting for the parents or the children but for the Court, who are acting in the best interests of the child.
- 6.3 Psychologists employed by a private or public body may experience conflict when the wishes and needs of the employer run counter to what is being asked by the 'client'. The financial aspects of the work need to be agreed, explicitly, with employer and solicitors. Specifically, the psychologist needs to identify whether this work is private work or part of his or her contract. See also the examples given in paragraphs 4.5 and 4.6 as potential conflicts of interest.
- 6.4 The individual psychologist should negotiate a change to an instructing contract if it is believed ethically appropriate to do so. This may involve ending the contract and renegotiating payment.
- 6.5 The psychologist should be clear with his or her client as to their relationship, roles and responsibilities, including consideration of ethical issues. The use of the term 'client' here refers to the Court (via those instructing you). Witnesses need to remain mindful that although their core client is the Court, they will have an ethical responsibility to the individual(s) whom they are assessing.

7. Appearance at Court

- 7.1 Psychologists should always arrange to arrive at the Court in good time. It is the case that expert witnesses are generally permitted to sit in Court whilst other experts are giving evidence both in the process of *voir dire* and when the trial itself is underway. Psychologists should, wherever possible, sit in the Court to listen to what is being said and to prepare themselves further to give evidence-in-chief and to prepare for cross-examination on issues raised by preceding witnesses.
- 7.2 Counsel frequently ask experts to attend Court on a 'just in case' basis, i.e. well ahead of the expected time that the expert actually enters the witness box to give evidence. It is also not unusual for ad-hoc professional meetings or meetings between counsel to be arranged immediately prior to the delivery of your evidence, or for new documentation to be submitted which you will need to consider. Thus arriving early can assist with this. The fundamental issue is your role in assisting the Court. You must be seen to be as accommodating and helpful as possible.
- 7.3 Decide in advance if you will take an oath or affirmation. You will be asked this on entering the witness box. This procedure generally does not apply to Quasi-Court.
- 7.4 The Court clerk keeps a note of the progress of the trial, logging the time each witness goes into and leaves the witness box. Only the Court clerk is able to endorse a later explanation by an expert that an extended period of waiting to give evidence was incurred by, say, an unanticipated prolongation of *voir dire* submissions or evidence by a preceding witness taking up much more time in cross-examination and re-examination. It is important that psychologists make a point of liaising with the Court clerk to ensure that the clerk will be in a position to provide the necessary evidence to justify a claim for a prolonged period of waiting.
- 7.5 Psychologists should think ahead concerning Court attendance. The solicitor should be asked on what day exactly it is anticipated the psychologist will start giving evidence and how long it is likely to take as the duration may well have been revised since the giving of original instructions. Hearings/trials/tribunals can take place over several days and thus psychologists are advised to indicate what days they can attend. Courts do try to be very accommodating to experts and will often build a witnesses timetable around the expert's availability.
- 7.6 Courts have the power to produce a witness summons if, for some reason, a psychologist is unable to attend Court. Thus to avoid such a situation thinking ahead is essential.
- 7.7 Preparing for your Court appearance and preparing to give oral evidence is essential. Appendix 6 provides some general guidance on attendance at Court and the delivery of oral evidence.

8. Practical and financial considerations

- 8.1 Fees should be negotiated in advance with the solicitor or instructing body. It can be valuable to provide a schedule of fees and also an outline of the expert's terms and conditions (e.g. what will be provided and when; when payment is expected, etc.).
- 8.2 If publicly funded the psychologist should ensure that the solicitor has authority for payment of experts' fees. It is appropriate to ask to see details. The psychologist should be sure that they understand the terms of the negotiated payment and the processes of legal aid, as the solicitor may not have ultimate control of payment. The fee may be affected by taxation (see Glossary).
- 8.3 Direct payment by the client (individual or group) should be considered to be part of the contract. However, in civil cases there is an increasing practice for invoices to be shared by the parties involved. This results in partial payments being received. This can cause the expert difficulty in gaining payment. There are two solutions to this; either the lead solicitor agrees to obtain the funds from all parties, or, you submit apportioned invoices to each firm involved.
- 8.4 The psychologist needs to clarify who is resourcing his or her time. Not only time writing the report is pertinent, but also materials, staff, giving evidence and waiting. In cases where an expert is jointly instructed, the administration of costs is completed by the lead solicitor.
- 8.5 If the likely cost of the work is likely to increase beyond the original estimate then the psychologist should inform those instructing them, specifically the lead solicitor in joint cases, *prior* to conducting the work. Costs can only be agreed at the outset of the case and not at its conclusion. Civil proceedings in particular are managed under very strict case management processes and thus it will not assist the Court if you have been unclear on your fees, and you may not be reimbursed.
- 8.6 It is important for psychologists to know that the Court Service will not reimburse expert witnesses called by the defence for such work in support of counsel or indeed waiting inordinate periods to give evidence. It will disregard any claim for reimbursement for long periods apparently waiting unless it can be demonstrated that the delay was unavoidable. The situation in regards to cases of personal injury vary from this as the defence is normally funded by an insurance company and fees can be readily obtained.
- 8.7 Once the expert is at Court and waiting to be called, counsel often seek to capitalise on the expert's ready availability. Psychologists who are unaware of this practice may well find themselves confronted with conferencing on a continuous basis, being asked to evaluate the emergent evidence presented by an opposing psychologist and to advise counsel on issues deemed to merit specific cross-examination. There is nothing underhand or untoward about doing this work. Resourcing it creates substantial problems when a psychologist is instructed by the defence. It is no problem when instructed by the Crown Prosecution Service/Public Prosecution Service Northern Ireland or in cases of personal injury (see also paragraph 7.2).
- 8.8 Psychologists should make sure that they keep copies of all receipts with a bearing upon attendance at Court. They should also be aware that the application of Court Service rules for remuneration of expert witnesses' claims varies greatly from Court to Court. It is particularly important to note that some Courts apply strict upper limits on accommodation costs and reimbursement of travelling time.

- 8.9 To avoid being left out of pocket in respect of this expenditure, guidance should be sought from the Court on this matter before booking accommodation.
- 8.10 In those instances where reimbursement of travelling time is refused or reduced, psychologists should insist on remuneration at least commensurate with that given to the Forensic Science Service or when appearing on instructions from the Crown Prosecution Service.
- 8.11 Legal aid cannot be granted if applied for retrospectively with regard to psychological services other than for the giving of evidence at Court. The only option is to submit a separate invoice in the hope that approval for payment may be made at taxation (see Glossary).
- 8.12 If counsel is adamant about being in attendance well in advance of giving evidence psychologists should ask the solicitor for details of the firm's position concerning the settlement of experts' costs for attendance at Court. It is essential for the psychologist to demonstrate awareness and assertion at this stage otherwise there is a distinct risk of the psychologist, or his or her employer, being faced with a protracted period of absence from the psychologist's usual base and being left to pick up the costs involved with little prospect of recovering even accommodation or travelling costs for the discounted days.
- 8.13 In those situations where a psychologist is unable to commit him or herself to an unspecified or extended period of time at Court, some solicitors will consult with counsel and subsequently amend the period which the psychologist is requested to attend. Others will continue with the requested attendance dates but indicate they will cover the entire sum incurred. If the solicitor does not indicate this, the firm should be reminded that the Court Service does not remunerate excessive waiting periods. The firm should be:
- Asked to give an undertaking that the solicitor will settle the total invoice immediately in respect of attendance at Court; and
 - Informed that the psychologist will make a claim in due course to the Court and any sums awarded by the Court will be forwarded to the solicitor.
- 8.14 The invoice for the report should be submitted at the same time that the report is submitted. This is particularly crucial for civil proceedings where the timetable for solicitors to regain costs spent is tightly controlled. If an invoice is submitted after the final records have been submitted by the instructing firm (e.g. a month or so after the final hearing) then you risk not being paid. In cases where errors have occurred, with responsibility for this lying with the solicitors, it is not unusual for solicitors firms to have to pay the experts cost themselves, at a loss to their firm.
- 8.15 Psychologists should prepare themselves to have to wait for payment from solicitors firms. You can request that payment is settled within 29 days of receipt of your report and also indicate that standard interest will be added onto the invoice for each day that it is overdue. This should be indicated in writing to the instructing party as *part* of agreeing instructions. Another alternative is to send reminders for payment on a monthly basis. If payment is not forthcoming after a time considered unreasonable (e.g. after a final hearing in a civil hearing) then speaking to the partner of the solicitor firm and advising them of the steps you will have to take to obtain payment (e.g. instructing a debt agency) can be helpful. It is important to note, however, that waiting six months for payment is not uncommon.

9. Glossary

Advice from Counsel

This is the instructed barrister's appraisal of the case, his or her specification of the key legal issues citing relevant case law, and actions to be taken, which include what experts need to be instructed to what end.

Brief

A document which states propositions of law to advance the case of a client.

Brief to Counsel

This is the document sent to counsel selected to represent the client in which the instructing body summarises the case and the potential issues which are perceived to be important, particularly in the light of instructions from its client.

Case Law

The body of law developed by Court decisions. Case law concerns the interpretation of circumstances in cases and statutes.

[Counsel] Conference

A meeting with counsel in the case to discuss the expert's evidence or expert evidence submitted by the other side. In some instances these conferences can be adversarial in nature and present very much like formal Court. This can be the case in contested hearings and compensation cases where your evidence may be examined by the legal representatives, often including barristers.

Court Service/Northern Ireland Court Service³

Part of the Lord Chancellor's Department, the Court Service/Northern Ireland Court Service is responsible for all aspects of Court administration. This includes remuneration of expert witnesses for their services rendered on behalf of the defence in criminal cases. Accounts departments in Courts are authorised to settle expert witnesses' invoices (i.e. pay 'on account' prior to the actual hearing of the case). Subsequently all invoices in a case are subject to an audit process called taxation.

Crown Prosecution Service/Public Prosecution Service Northern Ireland

The department responsible for bringing charged individuals to trial. It instructs prosecuting counsel. The CPS/PPSNI operates its own budget. Hence expert witnesses instructed by the CPS/PPSNI are remunerated by the CPS/PPSNI not by the Court Service.

Finding of Fact Hearing

A process in a civil Court where the presiding judge will consider the evidence submitted on a point under question (e.g. Was there neglect of a child? Was there domestic violence?) and make a judgment on the balance of probability. The outcome in a Finding of Fact Hearing does not equate to a conviction or caution.

Experts Meeting

A meeting between experts only. Called to assist with clarifying for the Court areas on which experts agree and areas on which agreement cannot be reached. Designed to help manage Court time more efficiently. Experts only attend these meetings. Minutes are kept, agreed and submitted to Court.

³ In Northern Ireland the Legal Services Commission is responsible for payment of fees in cases funded by legal aid.

Expert teams

Teams of professionals within some services (e.g. NHS) to be serving as experts, producing team agreed reports.

Expert witnesses

A person with special skill, experience or knowledge which is beyond that of the typical juror. The purpose of expert witnesses is to assist the jury or judge on technical matters.

Instructions

In precise terms the explicit request to assist in a case by fulfilling the expert witnesses role. In practice instruction is typically an extended process of contact and negotiation, involving an initial approach – a telephone conversation or unsolicited letter – followed by subsequent verbal and written exchanges. For practical purposes formal instructions are constituted, making the instructing body legally liable, when the body states it wishes the work specified in the work schedule to be done. It is incumbent on the psychologist to make sure that within these formal instructions there is an explicit acceptance to pay for the services to the amount invoiced by the psychologist in accordance with the work schedule.

Instructing body

The institution which requests assistance in a case. For example, a firm of solicitors instructs counsel to argue the case of its client at Court. Similarly expert witnesses are instructed with a view to their findings being of potential to advance the case of a client. An instructing body may be a legal department. In certain instances a Court, i.e. the judge in a case, will direct that an expert be instructed to assist by preparing a report for the Court.

Legal Services Commission

Part of the Lord Chancellor's Department which is responsible for the administration of the legal aid scheme. It is organised on an area office basis. Offices receive applications from solicitors for authorisation of money from the legal aid scheme. The preferred term now for Legal Aid is Publicly Funded.

Payment 'on account'

The process of submitting an invoice to the instructing body for immediate payment for expert witnesses services as specified in the work schedule. In the case of legal aid funded defence work the solicitor should submit the invoice, with a copy of the relevant legal aid certificate, to the Court where the case is to be heard. The staff in the accounts department issue payments on behalf of the Court Service. Some but not all Courts send a notification to the expert that the solicitor has been paid thus enabling the expert to request settlement by the solicitor if this has not been effected in the specified period.

Professionals Meeting

A meeting called prior to a final hearing in a civil case where all parties and instructed experts meet to obtain an update on the case. Experts may be asked to provide further opinion at such meetings. Minutes are kept, agreed and submitted to Court.

Quasi-Court

A legal hearing conducted outside of a formal Court setting (e.g. High Court, County Court) but conducted in accordance with the same legal processes. It includes oral hearings (HM Prison Service/Parole Commissioners for Northern Ireland) and Mental Health Review Tribunals (NHS/Private Health).

Relevant evidence

That evidence which addresses the legal issues before the Court. Evidence which is not relevant to a specific issue is not admissible.

Assessment (Not Northern Ireland)

The process of auditing and settlement by the Court Service of legal costs on the conclusion of a case. The solicitor submits a consolidated bill incorporating all costs incurred. It is important to note that the Court Service is not bound to endorse the full payment of a sum which has received prior authorisation from the Legal Aid Area Office. In instances where the service considers the sum paid unreasonable it will require repayment of a specified sum back to the Court.

Voir dire

The preliminary examination of witnesses (including expert witnesses) or jurors under oath to determine their competency or suitability. It consists of a series of oral questions asked of prospective jurors or witnesses to determine issues such as bias or previous association with counsel, parties or witnesses. This will then assist with determining if they are allowed to give evidence or, in the case of jurors, to form part of a jury.

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Further useful websites

www.cps.gov.uk/legal
www.dca.gov.uk/civil/final/index.htm

Appendix 1: Civil Procedure Rules (CPR)

In Northern Ireland there are no such Rules and High Court proceedings are governed by the Rules of the Court of Judicature (RCJ). However, most of the general principles in the CPR are applied in this jurisdiction by the RCJ. The High Court also issues practice directions in this sphere and these fill in some of the detailed matters contained in the CPR.

Civil Procedure Rules and their application to the expert role

In April 1999 a new set of rules were set in place to control the process by which civil disputes were managed and run. The Woolf Reforms, as they were known, have far reaching consequences for the work of psychologists as expert witnesses.

The over-riding objective of the new rules is to enable the Court to deal with cases justly by ensuring that parties are on an equal footing, that expenses are saved, and that cases are dealt with proportionately, fairly and expeditiously.

It has been instrumental in the notion of the 'single joint expert' and in avoiding 'trials by ambush'. It focuses on all parties having equal footings in proceedings in terms of being able to instruct the same expert and having access to all submitted evidence.

The Woolf Reforms say quite precisely what is to be expected of expert witnesses, particularly in terms of their duty to the Court. It is the purpose of this section to summarise the rules of civil procedure as they apply to expert witnesses with comments and interpretation as appropriate. Details on the full report can be found via the following link: www.dca.gov.uk/civil/final/index.htm

Although in place for a number of years, it has only been in the past few years that experts' roles have been considered most as part of these reforms. Psychologists acting as expert witnesses in civil matters should ensure that they are fully au fait with these reforms and what this means in relation to their practice. The majority of the rules relating to the role that psychologists will find themselves in as expert witnesses are found in Part 35.

The application of many aspects of Part 35 to criminal proceedings has now also been achieved. Criminal Courts have adopted the majority of the rules relevant to experts in civil proceedings. The Criminal Procedure Rules are referred to as Part 33.

The following section is a rule by rule look at the themes of these procedures. In parentheses are the relevant paragraph numbers of the Civil Procedure Rules (taken from Simons & Banks, 1999). Following this, in appendix 2a, will be a summary of the core amendments made to the practice direction for April 2010. Although many commercial providers are 'selling' the notion that the changes are fundamental, it is important to note that the fundamental changes relate primarily to the application of the rules by advocates, and not by experts. Indeed, the *Law Gazette* (2009) described these reportedly 'fundamental changes' as nothing more than 'tidying up'. For experts changes focus on new statements of compliance and truth, clearer stipulations of opinion, some revised definitions of experts and clearer and more proportionate questions to experts. The Civil Procedure Rules are presented here with Appendix 2a including a section covering the core amendments of relevance to experts following the amendments.

General duty of the Court and the parties (35.1)

Expert evidence should be restricted to that which is reasonably required to resolve the proceedings.

The introductory note to the *Practice Direction – Experts and Assessors* says ‘Part 35 is intended to limit the use of oral expert evidence to that which is reasonably required. In addition, where possible, matters requiring expert evidence should be dealt with by a single expert. Permission of the Court is always required either to call an expert or to put an expert’s report in evidence.’

Interpretation (35.2)

A reference to an ‘expert’ in this Part is a reference to an expert who has been instructed to give or prepare evidence for the purpose of Court proceedings.

Experts over-riding duty to the Court (35.3)

- (1) It is the duty of an expert to help the Court on matters within his expertise.
- (2) This duty over-rides any obligation to the person from whom he has received instructions or by whom he [sic] is paid.

This rule codifies what in theory has always been the case – the expert’s over-riding duty is to the Court. The balance of Part 35 is designed to put paid to the concept of the expert as a ‘hired gun’ or quasi-advocate by specifying how this duty is to be implemented (e.g. reports addressed to the Court, imposition of single experts, etc.).

Court’s power to restrict expert evidence (35.4)

- (1) *No party may call an expert or put in evidence an expert’s report without the Court’s permission.*
- (2) *When a party applies for permission he must identify:*
 - (a) *the field in which he wishes to rely on expert evidence; and*
 - (b) *where practicable the expert in that field on whose evidence he wishes to rely.*
- (3) *If permission is granted under this rule it shall be in relation to the expert named or the field identified under paragraph (2).*
- (4) *The Court may limit the amount of expert’s fees and expenses that the party who wishes to rely on the expert may recover from any other party.*

This rule reiterates the power the Court now has to decide which expert evidence can be called, how that evidence is to be presented (oral or written) and how much the expert can expect to be paid.

General requirement for expert evidence to be given in a written report (35.5)

This rule emphasises the increased importance of the written report now that the attendance of experts at Court will be discouraged.

Written questions to experts (35.6)

- (1) *A party may put to:*
 - (a) *an expert instructed by another party; or*
 - (b) *a single joint expert appointed under rule 35.7.*

Written questions about his [sic] report.

- (2) *Written questions under paragraph (1):*
 - (a) *may be put once only;*
 - (b) *must be in 28 days of service of the expert’s report; and*
 - (c) *must be for the purpose only of clarification of the report; unless in any case,*
 - (i) *the Court gives permission; or*
 - (ii) *the other party agrees.*
- (3) *An expert’s answers to questions put in accordance with paragraph (1) shall be treated as part of the expert’s report.*

- (4) *Where:*
- (a) *A party has put a written question to an expert instructed by another party in accordance with this rule; and*
 - (b) *The expert does not answer that question.*

The Court may make one or both of the following orders in relation to the party who instructed the expert:

- (i) *that the party may not rely on the evidence of that expert; or*
- (ii) *that the party may not recover the fees and expenses of that expert from any other party.*

This rule introduces a new element into procedure – the ability to ask questions of any other party’s expert. In addition there is a sanction for failure of the expert to respond. Clear implementation of the rule and its time limits will require experts to work much quicker in terms of reviewing opposing reports and suggesting further queries to those reports, as well as in answering queries which may be posed to them.

Court’s power to direct that evidence is to be given by a single joint expert (35.7)

- (1) *Where two or more parties wish to submit expert evidence on a particular issue, the Court may direct that the evidence on that issue is to be given by one expert only.*
- (2) *The parties wishing to submit the expert evidence are called ‘the instructing parties’.*
- (3) *Where the instructing parties cannot agree who should be the expert, the Court may:*
 - (a) *select the expert from a list prepared or identified by the instructing parties; or*
 - (b) *direct that the expert be selected in such other manner as the Court may direct.*

This rule introduces another innovation. The introduction of the single expert is intended to simplify and shorten litigation while also making it less costly. This has always been one of the hottest issues on the negotiating table during the consideration and proposing of the new rules. The keyword here is the ‘may’. Under what circumstances will the Court exercise its discretion? Only time will tell. Certainly in medical litigation a few opposing lawyers have for some time agreed on the use of a single expert for purposes of causation and/or condition and prognosis.

Instructions to a single joint expert (35.8)

- (1) *Where the Court gives direction under 35.7 for a single joint expert to be used, each instructing party may give instructions to the expert.*
- (2) *When an instructing party gives instructions to the expert he must, at the same time, send a copy of the instructions to the other instructing parties.*
- (3) *The Court may give directions about:*
 - (a) *payment of the expert’s fees and expenses; and*
 - (b) *any inspection, examination or experiments which the expert wishes to carry out.*
- (4) *The Court may, before the expert is instructed:*
 - (a) *limit the amount that can be paid by way of fees and expenses to the expert; and*
 - (b) *direct the parties to pay that amount into Court.*
- (5) *Unless the Court directs otherwise, the instructing parties are jointly and severally liable for the payment of the expert’s fees and expenses.*

This rule specifies how the single expert is to be instructed and paid. The rule reinforces the Court’s power to set expert fees.

Power of a Court to direct a party to provide information (35.9)

Where a party has access to information which is not – reasonably or recently – available to the other party, the Court may direct the party who has access to the information to:

- (a) *prepare and file a document recording the information; and*
- (b) *serve a copy of that document on the other party.*

Contents of the Report (35.10) (see also Section 1 of Practice Direction – Experts and Assessors supra.)

- (1) *An expert's report must comply with the requirements set out in the relevant practice direction.*
- (2) *At the end of an expert's report there must be a statement that:*
 - (a) *the expert understands his duty to the Court; and*
 - (b) *he has complied with that duty.*
- (3) *The expert's written report must state the substance of all material instructions, whether written or oral, on the basis of which the report is written.*
- (4) *The instructions referred to in paragraph (3) shall not be privileged against disclosure but the Court will not, in relation to those instructions:*
 - (a) *order disclosure of any specific document; or*
 - (b) *permit any questioning in Court, other than by the party who instructed the expert, unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete.*

It is critical that the expert meets these requirements in order to satisfy and assure the Court that the expert is discharging his overriding duty to the Court. The practice direction for experts and assessors are more specific in terms of identifying the form and content of the expert report:

- 1.1 *An expert's report should be addressed to the Court and not to the party from whom the expert has received instructions.*
- 1.2 *An expert's report must:*
 - (1) *Give details of the expert's qualifications;*
 - (2) *Give details of any literature or other material which the expert has relied on in making the report;*
 - (3) *Say who carried out any test or experiment which the expert has used for the report and whether or not the test or experiment has been carried out under the expert's supervision;*
 - (4) *Give the qualifications of the person who carried out any such test or experiment; and*
 - (5) *Where there is a range of opinion on the matters dealt with in the report:*
 - (i) *summarise the range of opinion; and*
 - (ii) *give reasons for his own opinion.*
 - (6) *Contain a summary of the conclusions reached;*
 - (7) *Contain a statement that the expert understands his duty to the Court and has complied with that duty (rule 35.10(2)); and*
 - (8) *Contain a statement setting out the substance of all material instructions (whether written or oral). The statement should summarise the facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those rules are based (rule 35.10 (3)).*
- 1.3 *An expert's report must be verified by a statement of truth as well as containing the statements required in paragraph 1.2 (7) and (8) above.*
- 1.4 *The form of declaration and the statement of truth is as follows:*

I understand that my duty as an expert witness is to the Court. I have complied with that duty and will continue to comply with it. I am aware of the requirements of part 35 and practice direction 35, this protocol and the practice direction on pre-action conduct. This report includes all matters relevant to the issues on which my expert evidence is given. Included in this report are those matters which might affect the validity of my conclusions. I understand that this report will form the evidence to be given under oath and that I may be cross examined on its contents. I confirm that I have not entered into any arrangement whereby the amount or payment of my fees is dependant upon the outcome of this case. This report is addressed to the Court.

I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

The requirement that the expert's report contain a statement of truth places an obligation on the expert to ensure that the instructions received appear to be complete, logical and accurate. If, as can happen, the expert is asked to prepare a report without having an opportunity to interview the party(ies), it is vital that the expert scrutinise the instructions for any apparent problems which may jeopardise the statement of truth after the report is prepared. The wise expert will seek these problems early and return to his instructing solicitor for clarification or further information before completing the report.

The practice direction for experts and assessors also goes a little way further to explaining (4) of 35.10. It states that while an expert's instructions are not privileged, cross-examination of the expert on the contents of his instructions will not be allowed unless the Court permits it or the party instructing you consents. The direction states that before the Court can give permission for cross-examination it must be satisfied that there are reasonable grounds to consider the statement of the substance of the instructions to be inaccurate or incomplete. Additionally, the Court will only allow cross-examination if it appears to be in the interests of justice to do so.

Use by one party of expert's reports disclosed by another (35.11)

Where a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial.

Discussions between experts (35.12)

- (1) *The Court may, at any stage, direct a discussion between experts to require experts to:*
 - (a) *identify the issues in the proceedings; and*
 - (b) *where possible, reach agreement on an issue.*
- (2) *The Court may specify the issues which the experts must discuss.*
- (3) *The Court may direct that following the discussion between the experts they must prepare a statement for the Court showing:*
 - (a) *those issues on which they agree; and*
 - (b) *those issues on which they disagree; and a summary of their reasons for disagreeing.*
- (4) *The content of the discussion between the experts shall not be referred to at trial unless the parties agree.*
- (5) *Where experts reach agreement on an issue during their discussion, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement.*

Again the new rules codify a process previously only undertaken extremely infrequently. It is the view of the drafters of the rules that where expert evidence is required, much can be done to narrow the issues and areas of disagreement if the experts themselves are given a forum within which to engage in candid discussions. As with the rule regarding single experts, the keyword here is 'may'. The Court has been empowered to direct these meetings, but it is uncertain as to what circumstances will lead to such a direction from the Court.

Consequence of failure to disclose expert's report (35.13)

A party who fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally unless the Court gives permission.

Expert's right to ask Court for directions (35.14)

- (1) *An expert may file a written request for directions to assist him in carrying out his functions as an expert.*
- (2) *An expert may request directions under paragraph (1) without giving notice to any party.*
- (3) *The Court, when it gives directions, may also direct that a party be served with:*
 - (a) *a copy of the directions; and*
 - (b) *a copy of the request for directions.*

This rule is yet another demonstration of the innovation which emphasises the expert's independence and ultimate duty to the Court. The expert now is empowered to seek the assistance of the Court at anytime following instructions. It is important to note that the ability of the expert to ask the Court for help is not dependent on who has instructed the expert. In other words, the expert need not have been appointed by the Court in order to seek directions from the Court. Indeed, the rule allows the expert to seek such assistance without notifying even the party which may have instructed him.

Assessors (35.15)

- (1) *This rule applies where the Court appoints one or more persons (an 'assessor') under section 70 of the Supreme Court Act 1981 or section 63 of the County Courts Act 1984.*
- (2) *The assessor shall assist the Court in dealing with a matter in which the assessor has skill and experience.*
- (3) *An assessor shall take such part in the proceedings as the Court may direct and in particular the Court may:*
 - (a) *direct the assessor to prepare a report for the Court on any matter at issue in the proceedings; and*
 - (b) *direct the assessor to attend the whole or any part of the trial to advise the Court on any such matter.*
- (4) *If the assessor prepares a report for the Court before the trial has begun:*
 - (a) *the Court will send a copy to each of the parties; and*
 - (b) *the parties may use it at trial.*
- (5) *The remuneration to be paid to the assessor for his services shall be determined by the Court and shall form part of the costs of the proceeding.*
- (6) *The Court may direct any party to deposit in the Court office a specified sum in respect of the assessor's fees and, where it does so, the assessor will not be asked to act until the sum has been deposited.*
- (7) *Paragraphs (5) and (6) do not apply where the remuneration of the assessor is to be paid out of the money provided by Parliament.*

Pre-action protocol and experts

Pre-action protocols have been designed to ensure that much of the process of dispute resolution is completed BEFORE a case is commenced in litigation. There is a separate pre-action protocol for general personal injury claims and clinical dispute claims. The protocol for personal injury claims addresses the role of the expert prior to the commencement of litigation:

- 5.1 *Before a party instructs an expert he should provide the other party with a list of one or more experts in that field who he considers to be suitable.*
- 5.2 *The other party has 14 days to object to anyone on the list. The first party should then instruct any of the experts on the list the other party has not objected to.*
- 5.3 *The other party will not be able to rely on his own expert evidence if he has not objected to the first party's nominated expert unless:*
 - (a) *the first party agrees; or*
 - (b) *the Court so directs; or*
 - (c) *the first party is not prepared to disclose the report.*

- 5.4 *Either party can send the expert written questions on the report via the first party's solicitors. The expert will respond directly to each party.*
- 5.5 *If the other party objected to all the first party's nominations, each party will instruct experts of their choice. If proceedings are subsequently commenced the Court will decide if one or both of the parties has been unreasonable.*

As with general personal injury claims, clinical negligence claims also have protocols. The protocol gives guidance on the use of expert evidence in such cases but 'does not attempt to be prescriptive'.

Trial and costs

The Court is empowered to decide what fees the expert can reasonably seek to recover for the contribution which they have made in Court. It is critical that the concept of proportionality not be forgotten here. If the amount of payment sought by the expert is disproportionately high relative to the importance, complexity or value of the claim, the expert and/or legal representative may have great difficulties persuading the Court to grant payment sought. It may well make little difference whether the expert was acting for the successful litigant.

Appendix 2: The Practice Direction for Experts in Family Proceedings Relating to Children⁴

In April 2008, The Practice Direction: Experts in Family Proceedings Relating to Children also came into effect. This Practice Direction supercedes all family proceedings relating to children, the previous guidance to experts contained in Appendix C of the Protocol for Judicial Case Management in Public Law Children Act Cases, and in the Practice Direction to Part 17 (Experts) of the Family Procedure (Adoption) Rules 2005.

The Practice Direction is presented here in full, save for a few minor areas of removed detail to aid brevity. It was made and authored by the President of the Family Division under the powers delegated to him by the Lord Chief Justice under Schedule 2, Part 1, paragraph 2(2) of the Constitutional Reform Act 2005, and is approved by the Lord Chancellor.

It also includes in an Annex some useful questions that could be posed to experts.

PRACTICE DIRECTION: EXPERTS IN FAMILY PROCEEDINGS RELATING TO CHILDREN

1. Introduction

- 1.1 This Practice Direction deals with the use of expert evidence and the instruction of experts in family proceedings relating to children. Where the guidance refers to ‘an expert’ or ‘the expert’, this includes a reference to an expert team.
- 1.2 For the purposes of this guidance, the phrase ‘family proceedings relating to children’ is a convenient description. It is not a legal term of art and has no statutory force. In this guidance it means:
 - placement and adoption proceedings; or
 - family proceedings held in private which
 - relate to the exercise of the inherent jurisdiction of the High Court with respect to children,
 - are brought under the Children Act 1989 in any family Court, or
 - are brought in the High Court and county Courts and ‘otherwise relate wholly or mainly to the maintenance or upbringing of a minor’.

Aims of the guidance

- 1.3 The guidance aims to provide the Court in family proceedings relating to children with early information to determine whether an expert or expert evidence will assist the Court to:
 - identify, narrow and where possible agree the issues between the parties;
 - provide an opinion about a question that is not within the skill and experience of the Court;
 - encourage the early identification of questions that need to be answered by an expert; and
 - encourage disclosure of full and frank information between the parties, the Court and any expert instructed.
- 1.4 The guidance does not aim to cover all possible eventualities. Thus it should be complied with so far as consistent in all the circumstances with the just disposal of the matter in accordance with the rules and guidance applying to the procedure in question.

⁴ Not Northern Ireland.

Permission to instruct an expert or to use expert evidence

- 1.5 In family proceedings relating to children, the Court's permission is required to instruct an expert. Such proceedings are confidential and, in the absence of the Court's permission, disclosure of information and documents relating to such proceedings risks contravening the law of contempt of Court or the various statutory provisions protecting this confidentiality. Thus, for the purposes of the law of contempt of Court, information relating to such proceedings (whether or not contained in a document filed with the Court or recorded in any form) may be communicated only to an expert whose instruction by a party has been permitted by the Court. Additionally, in proceedings under the Children Act 1989, the Court's permission is required to cause the child to be medically or psychiatrically examined or otherwise assessed for the purpose of the preparation of expert evidence for use in the proceedings; and, where the Court's permission has not been given, no evidence arising out of such an examination or assessment may be adduced without the Court's permission.
- 1.6 In practice, the need to have the Court's permission to disclose information or documents to an expert – and, in Children Act 1989 proceedings, to have the child examined or assessed – means that in proceedings relating to children the Court strictly controls the number, fields of expertise and identity of the experts who may be first instructed and then called.
- 1.7 Before permission is obtained from the Court to instruct an expert in family proceedings relating to children, it will be necessary for the party wishing to instruct an expert to make enquiries designed so as to provide the Court with information about that expert which will enable the Court to decide whether or not to give permission. In practice, enquiries may need to be made of more than one expert for this purpose. This will in turn require each expert to be given sufficient information about the case to enable that expert to decide whether or not he or she is in a position to accept instructions. Such preliminary enquiries, and the disclosure of anonymised information about the case which is a necessary part of such enquiries, will not require the Court's permission and will not amount to a contempt of Court: see sections 4.1 and 4.2 (Preliminary Enquiries of the Expert and Expert's Response to Preliminary Enquiries).
- 1.8 Section 4 (Preparation for the relevant hearing) gives guidance on applying for the Court's permission to instruct an expert, and on instructing the expert, in family proceedings relating to children. The Court, when granting permission to instruct an expert, will also give directions for the expert to be called to give evidence, or for the expert's report to be put in evidence: see section 4.4 (Draft Order for the relevant hearing).

When should the Court be asked for permission?

- 1.9 The key event is 'the relevant hearing', which is any hearing at which the Court's permission is sought to instruct an expert or to use expert evidence. Both expert issues should be raised with the Court – and, where appropriate, with the other parties – as early as possible. This means:
- in public law proceedings under the Children Act 1989, by or at the Case Management Conference: see the Practice Direction: Guide to Case Management in Public Law Proceedings, paragraphs 13.7, 14.3 and 25(29) which contains the definition of public law proceedings for the purposes of that practice direction;
 - in private law proceedings under the Children Act 1989, by or at the First Hearing Dispute Resolution Appointment: see the Private Law Programme (9th November 2004), section 4 (Process);
 - in placement and adoption proceedings, by or at the First Directions Hearing: see FP(A)R 2005 rule 26 and the President's Guidance: Adoption: the New Law and Procedure (March 2006), paragraph 23.

2. General matters

Scope of the Guidance

- 2.1 This guidance does not apply to cases issued before 1st April 2008, but in such a case the Court may direct that this guidance will apply either wholly or partly.
- 2.2 This guidance applies to all experts who are or have been instructed to give or prepare evidence for the purpose of family proceedings relating to children in a Court in England and Wales.

Pre-application instruction of experts

- 2.3 When experts' reports are commissioned before the commencement of proceedings, it should be made clear to the expert that he or she may in due course be reporting to the Court and should, therefore, consider himself or herself bound by this guidance. A prospective party to family proceedings relating to children (for example, a local authority) should always write a letter of instruction when asking a potential witness for a report or an opinion, whether that request is within proceedings or pre-proceedings (for example, when commissioning specialist assessment materials, reports from a treating expert or other evidential materials); and the letter of instruction should conform to the principles set out in this guidance.

Emergency and urgent cases

- 2.4 In emergency or urgent cases – for example, where, before formal issue of proceedings, a without-notice application is made to the Court during or out of business hours; or where, after proceedings have been issued, a previously unforeseen need for (further) expert evidence arises at short notice – a party may wish to call expert evidence without having complied with all or any part of this guidance. In such circumstances, the party wishing to call the expert evidence must apply forthwith to the Court – where possible or appropriate, on notice to the other parties – for directions as to the future steps to be taken in respect of the expert evidence in question.

Orders

- 2.5 Where an order or direction requires an act to be done by an expert, or otherwise affects an expert, the party instructing that expert – or, in the case of a jointly instructed expert, the lead solicitor – must serve a copy of the order or direction on the expert forthwith upon receiving it.

Adults who may be protected parties

- 2.6 The Court will investigate as soon as possible any issue as to whether an adult party or intended party to family proceedings relating to children lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings. An adult who lacks capacity to act as a party to the proceedings is a protected party and must have a representative (a litigation friend, next friend or guardian ad litem) to conduct the proceedings on his or her behalf.
- 2.7 Any issue as to the capacity of an adult to conduct the proceedings must be determined before the Court gives any directions relevant to that adult's role in the proceedings.
- 2.8 Where the adult is a protected party, his or her representative should be involved in any instruction of an expert, including the instruction of an expert to assess whether the adult, although a protected party, is competent to give evidence. The instruction of an expert is a significant step in the proceedings. The representative will wish to consider (and ask the expert to consider), if the protected party is competent to give evidence, their best interests in this regard. The representative may wish to seek advice about 'special measures'. The representative may put forward an argument on behalf of the protected party that the protected party should not give evidence.

- 2.9 If at any time during the proceedings there is reason to believe that a party may lack capacity to conduct the proceedings, then the Court must be notified and directions sought to ensure that this issue is investigated without delay.

Child likely to lack capacity to conduct the proceedings on when s/he reaches 18

2.10 Where it appears that a child is:

- a party to the proceedings and not the subject of them;
- nearing his or her 18th birthday; and
- considered likely to lack capacity to conduct the proceedings when he or she attains the age of 18,

the Court will consider giving directions for the child's capacity in this respect to be investigated.

3. The Duties of Experts

Over-riding duty

3.1 An expert in family proceedings relating to children has an over-riding duty to the Court that takes precedence over any obligation to the person from whom the expert has received instructions or by whom the expert is paid.

Particular duties

3.2 Among any other duties an expert may have, an expert shall have regard to the following duties:

- (1) to assist the Court in accordance with the overriding duty;
- (2) to provide advice to the Court that conforms to the best practice of the expert's profession;
- (3) to provide an opinion that is independent of the party or parties instructing the expert;
- (4) to confine the opinion to matters material to the issues between the parties and in relation only to questions that are within the expert's expertise (skill and experience);
- (5) where a question has been put which falls outside the expert's expertise, to state this at the earliest opportunity and to volunteer an opinion as to whether another expert is required to bring expertise not possessed by those already involved or, in the rare case, as to whether a second opinion is required on a key issue and, if possible, what questions should be asked of the second expert;
- (6) in expressing an opinion, to take into consideration all of the material facts including any relevant factors arising from ethnic, cultural, religious or linguistic contexts at the time the opinion is expressed;
- (7) to inform those instructing the expert without delay of any change in the opinion and of the reason for the change.

Content of the Expert's Report

3.3 The expert's report shall be addressed to the Court and prepared and filed in accordance with the Court's timetable and shall:

- (1) give details of the expert's qualifications and experience;
- (2) contain a statement setting out the substance of all material instructions (whether written or oral) summarising the facts stated and instructions given to the expert which are material to the conclusions and opinions expressed in the report;
- (3) identify materials that have not been produced either as original medical or other professional records or in response to an instruction from a party, as such materials may contain an assumption as to the standard of proof, the admissibility or otherwise of hearsay evidence, and other important procedural and substantive questions relating to the different purposes of other enquiries (for example, criminal or disciplinary proceedings);
- (4) identify all requests to third parties for disclosure and their responses in order to avoid partial disclosure which tends only to prove a case rather than give full and frank information;
- (5) make clear which of the facts stated in the report are within the expert's own knowledge;

- (6) state who carried out any test, examination or interview which the expert has used for the report and whether or not the test, examination or interview has been carried out under the expert's supervision;
- (7) give details of the qualifications of any person who carried out the test, examination or interview;
- (8) in expressing an opinion to the Court:
 - (a) take into consideration all of the material facts including any relevant factors arising from ethnic, cultural, religious or linguistic contexts at the time the opinion is expressed, identifying the facts, literature and any other material including research material that the expert has relied upon in forming an opinion;
 - (b) describe their own professional risk assessment process and process of differential diagnosis, highlighting factual assumptions, deductions from the factual assumptions, and any unusual, contradictory or inconsistent features of the case;
 - (c) highlight whether a proposition is an hypothesis (in particular a controversial hypothesis), or an opinion deduced in accordance with peer-reviewed and -tested technique, research and experience accepted as a consensus in the scientific community;
 - (d) indicate whether the opinion is provisional (or qualified, as the case may be), stating the qualification and the reason for it, and identifying what further information is required to give an opinion without qualification;
- (9) where there is a range of opinion on any question to be answered by the expert:
 - (a) summarise the range of opinion;
 - (b) highlight and analyse within the range of opinion an 'unknown cause', whether on the facts of the case (for example, there is too little information to form a scientific opinion) or because of limited experience, lack of research, peer review or support in the field of expertise which the expert professes;
 - (c) give reasons for any opinion expressed: the use of a balance sheet approach to the factors that support or undermine an opinion can be of great assistance to the Court;
- (10) contain a summary of the expert's conclusions and opinions;
- (11) contain a statement that the expert understands his or her duty to the Court and has complied and will continue to comply with that duty;
- (12) contain a statement that the expert:
 - (a) has no conflict of interest of any kind, other than any conflict disclosed in his or her report;
 - (b) does not consider that any interest disclosed affects his or her suitability as an expert witness on any issue on which he or she has given evidence;
 - (c) will advise the instructing party if, between the date of the expert's report and the final hearing, there is any change in circumstances which affects the expert's answers to (a) or (b) above;
- (13) be verified by a statement of truth in the following form:
 'I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.'

4. Preparation for the relevant hearing

Preliminary enquiries of the Expert

- 4.1 In good time for the information requested to be available for the relevant hearing or for the advocates' meeting or discussion where one takes place before the relevant hearing, the solicitor for the party proposing to instruct the expert (or lead solicitor or solicitor for the child if the instruction proposed is joint) shall approach the expert with the following information:

- (1) the nature of the proceedings and the issues likely to require determination by the Court;
- (2) the questions about which the expert is to be asked to give an opinion (including any ethnic, cultural, religious or linguistic contexts);
- (3) the date when the Court is to be asked to give permission for the instruction (or if – unusually – permission has already been given, the date and details of that permission);
- (4) whether permission is to be asked of the Court for the instruction of another expert in the same or any related field (that is, to give an opinion on the same or related questions);
- (5) the volume of reading which the expert will need to undertake;
- (6) whether or not permission has been applied for or given for the expert to examine the child;
- (7) whether or not it will be necessary for the expert to conduct interviews – and, if so, with whom;
- (8) the likely timetable of legal and social work steps;
- (9) when the expert’s report is likely to be required;
- (10) whether and, if so, what date has been fixed by the Court for any hearing at which the expert may be required to give evidence (in particular the Final Hearing).

It is essential that there should be proper co-ordination between the Court and the expert when drawing up the case management timetable: the needs of the Court should be balanced with the needs of the expert whose forensic work is undertaken as an adjunct to his or her main professional duties. The expert should be informed at this stage of the possibility of making, through his or her instructing solicitor, representations to the Court about being named or otherwise identified in any public judgment given by the Court.

Expert’s Response to Preliminary Enquiries

4.2 In good time for the relevant hearing or for the advocates’ meeting or discussion where one takes place before the relevant hearing, the solicitors intending to instruct the expert shall obtain confirmation from the expert:

- (1) that acceptance of the proposed instructions will not involve the expert in any conflict of interest;
- (2) that the work required is within the expert’s expertise;
- (3) that the expert is available to do the relevant work within the suggested timescale;
- (4) when the expert is available to give evidence, of the dates and times to avoid and, where a hearing date has not been fixed, of the amount of notice the expert will require to make arrangements to come to Court (or to give evidence by video link) without undue disruption to his or her normal professional routines;
- (5) of the cost, including hourly or other charging rates, and likely hours to be spent, attending experts’ meetings, attending Court and writing the report (to include any examinations and interviews);
- (6) of any representations which the expert wishes to make to the Court about being named or otherwise identified in any public judgment given by the Court.

Where parties have not agreed on the appointment of a single joint expert before the relevant hearing, they should obtain the above confirmations in respect of all experts whom they intend to put to the Court as candidates for the appointment.

The proposal to instruct an expert

4.3 Any party who proposes to ask the Court for permission to instruct an expert shall, by 11.00 a.m. on the business day before the relevant hearing, file and serve a written proposal to instruct the expert in the following detail:

- (1) the name, discipline, qualifications and expertise of the expert (by way of C.V. where possible);

- (2) the expert's availability to undertake the work;
- (3) the relevance of the expert evidence sought to be adduced to the issues in the proceedings and the specific questions upon which it is proposed that the expert should give an opinion (including the relevance of any ethnic, cultural, religious or linguistic contexts);
- (4) the timetable for the report;
- (5) the responsibility for instruction;
- (6) whether or not the expert evidence can properly be obtained by the joint instruction of the expert by two or more of the parties;
- (7) whether the expert evidence can properly be obtained by only one party (for example, on behalf of the child);
- (8) why the expert evidence proposed cannot be given by social services undertaking a core assessment or by the Children's Guardian in accordance with their respective statutory duties;
- (9) the likely cost of the report on an hourly or other charging basis: where possible, the expert's terms of instruction should be made available to the Court;
- (10) the proposed apportionment (at least in the first instance) of any jointly instructed expert's fee; when it is to be paid; and, if applicable, whether public funding has been approved.

Draft Order for the relevant hearing

4.4 Any party proposing to instruct an expert shall, by 11.00 a.m. on the business day before the relevant hearing, submit to the Court a draft order for directions dealing in particular with:

- (1) the party who is to be responsible for drafting the letter of instruction and providing the documents to the expert;
- (2) the issues identified by the Court and the questions about which the expert is to give an opinion;
- (3) the timetable within which the report is to be prepared, filed and served;
- (4) the disclosure of the report to the parties and to any other expert;
- (5) the organisation of, preparation for and conduct of an experts' discussion;
- (6) the preparation of a statement of agreement and disagreement by the experts following an experts' discussion;
- (7) making available to the Court at an early opportunity the expert reports in electronic form;
- (8) the attendance of the expert at Court to give oral evidence (alternatively, the expert giving his or her evidence in writing or remotely by video link), whether at or for the Final Hearing or another hearing; unless agreement about the opinions given by the expert is reached at or before the Issues Resolution Hearing ('IRH') or, if no IRH is to be held, by a specified date prior to the hearing at which the expert is to give oral evidence ('the specified date').

5. Letter of Instruction

5.1 The solicitor instructing the expert shall, within five business days after the relevant hearing, prepare (in agreement with the other parties where appropriate), file and serve a letter of instruction to the expert which shall:

- (1) set out the context in which the expert's opinion is sought (including any ethnic, cultural, religious or linguistic contexts);
- (2) set out the specific questions which the expert is required to answer, ensuring that they:
 - (a) are within the ambit of the expert's area of expertise;
 - (b) do not contain unnecessary or irrelevant detail;
 - (c) are kept to a manageable number and are clear, focused and direct; and
 - (d) reflect what the expert has been requested to do by the Court.
- (3) list the documentation provided, or provide for the expert an indexed and paginated bundle which shall include:

- (a) a copy of the order (or those parts of the order) which gives permission for the instruction of the expert, immediately the order becomes available;
 - (b) an agreed list of essential reading; and
 - (c) a copy of this guidance;
- (4) identify materials that have not been produced either as original medical (or other professional) records or in response to an instruction from a party, as such materials may contain an assumption as to the standard of proof, the admissibility or otherwise of hearsay evidence, and other important procedural and substantive questions relating to the different purposes of other enquiries (for example, criminal or disciplinary proceedings);
 - (5) identify all requests to third parties for disclosure and their responses, to avoid partial disclosure, which tends only to prove a case rather than give full and frank information;
 - (6) identify the relevant people concerned with the proceedings (for example, the treating clinicians) and inform the expert of his or her right to talk to them provided that an accurate record is made of the discussions;
 - (7) identify any other expert instructed in the proceedings and advise the expert of his or her right to talk to the other experts provided that an accurate record is made of the discussions;
 - (8) subject to any public funding requirement for prior authority, define the contractual basis upon which the expert is retained and in particular the funding mechanism including how much the expert will be paid (an hourly rate and overall estimate should already have been obtained), when the expert will be paid, and what limitation there might be on the amount the expert can charge for the work which he or she will have to do. In cases where the parties are publicly funded, there should also be a brief explanation of the costs and expenses excluded from public funding by Funding Code criterion 1.3 and the detailed assessment process.

Asking the Court to settle the letter of instruction to a joint expert

5.2 Where the Court has directed that the instructions to the expert are to be contained in a jointly agreed letter and the terms of the letter cannot be agreed, any instructing party may submit to the Court a written request, which must be copied to the other instructing parties, that the Court settle the letter of instruction. Where possible, the written request should be set out in an e-mail to the Court, preferably sent directly to the judge dealing with the proceedings (or, in the Family Proceedings Court, to the legal adviser who will forward it to the appropriate judge or justices), and be copied by e-mail to the other instructing parties. The Court will settle the letter of instruction, usually without a hearing to avoid delay; and will send (where practicable, by e-mail) the settled letter to the lead solicitor for transmission forthwith to the expert, and copy it to the other instructing parties for information.

Keeping the expert up to date with new documents

5.3 As often as may be necessary, the expert should be provided promptly with a copy of any new document filed at Court, together with an updated document list or bundle index.

6. The Court's control of expert evidence: Consequential issues

Written questions

6.1 Any party wishing to put written questions to an expert for the purpose of clarifying the expert's report must put the questions to the expert not later than ten business days after receipt of the report. The Court will specify the timetable according to which the expert is to answer the written questions.

Experts' Discussion or Meeting: Purpose

- 6.2 By the specified date, the Court may – if it has not already given such a direction – direct that the experts are to meet or communicate:
- (1) to identify and narrow the issues in the case;
 - (2) where possible, to reach agreement on the expert issues;
 - (3) to identify the reasons for disagreement on any expert question and what, if any, action needs to be taken to resolve any outstanding disagreement or question;
 - (4) to explain or add to the evidence in order to assist the Court to determine the issues;
 - (5) to limit, wherever possible, the need for the experts to attend Court to give oral evidence.

Experts' Discussion or Meeting: Arrangements

- 6.3 In accordance with the directions given by the Court, the solicitor or other professional who is given the responsibility by the Court ('the nominated professional') shall – within fifteen business days after the experts' reports have been filed and copied to the other parties – make arrangements for the experts to meet or communicate. Where applicable, the following matters should be considered:
- (1) Where permission has been given for the instruction of experts from different disciplines, a global discussion may be held relating to those questions that concern all or most of them;
 - (2) Separate discussions may have to be held among experts from the same or related disciplines, but care should be taken to ensure that the discussions complement each other so that related questions are discussed by all relevant experts;
 - (3) Five business days prior to a discussion or meeting, the nominated professional should formulate an agenda including a list of questions for consideration. The agenda should contain only those questions which are intended to clarify areas of agreement or disagreement. Questions which repeat questions asked in the letter of instruction or which seek to rehearse cross-examination in advance of the hearing should be rejected as likely to defeat the purpose of the meeting.
The agenda may usefully take the form of a list of questions to be circulated among the other parties in advance. The agenda should comprise all questions that each party wishes the experts to consider. The agenda and list of questions should be sent to each of the experts not later than two clear business days before the discussion;
 - (4) The nominated professional may exercise his or her discretion to accept further questions after the agenda with list of questions has been circulated to the parties. Only in exceptional circumstances should questions be added to the agenda within the two-day period before the meeting. Under no circumstances should any question received on the day of or during the meeting be accepted. Strictness in this regard is vital, for adequate notice of the questions enables the parties to identify and isolate the issues in the case before the meeting so that the experts' discussion at the meeting can concentrate on those issues;
 - (5) The discussion should be chaired by the nominated professional. A minute must be taken of the questions answered by the experts, and a Statement of Agreement and Disagreement must be prepared which should be agreed and signed by each of the experts who participated in the discussion. The statement should be served and filed not later than five business days after the discussion has taken place;
 - (6) In each case, whether some or all of the experts participate by telephone conference or video link to ensure that minimum disruption is caused to professional schedules and that costs are minimised.

Meetings or conferences attended by a jointly instructed expert

- 6.4 Jointly instructed experts should not attend any meeting or conference which is not a joint one, unless all the parties have agreed in writing or the Court has directed that such a meeting may be held, and it is agreed or directed who is to pay the expert's fees for the meeting or conference. Any meeting or conference attended by a jointly instructed expert should be proportionate to the case.

Court-directed meetings involving experts in public law Children Act cases

- 6.5 In public law Children Act proceedings, where the Court gives a direction that a meeting shall take place between the local authority and any relevant named experts for the purpose of providing assistance to the local authority in the formulation of plans and proposals for the child, the meeting shall be arranged, chaired and minuted in accordance with the directions given by the Court.

7. Positions of the Parties

7. Where a party refuses to be bound by an agreement that has been reached at an experts' discussion or meeting, that party must inform the Court and the other parties in writing, within ten business days after the discussion or meeting or, where an IRH is to be held, not less than five business days before the IRH, of his reasons for refusing to accept the agreement.

8. Arrangements for Experts to give evidence

Preparation

- 8.1 Where the Court has directed the attendance of an expert witness, the party who is responsible for the instruction of the expert shall, by the specified date or, where an IRH is to be held, by the IRH, ensure that:
- (1) a date and time (if possible, convenient to the expert) are fixed for the Court to hear the expert's evidence, substantially in advance of the hearing at which the expert is to give oral evidence and no later than a specified date prior to that hearing or, where an IRH is to be held, than the IRH;
 - (2) if the expert's oral evidence is not required, the expert is notified as soon as possible;
 - (3) the witness template accurately indicates how long the expert is likely to be giving evidence, in order to avoid the inconvenience of the expert being delayed at Court;
 - (4) consideration is given in each case to whether some or all of the experts participate by telephone conference or video link, or submit their evidence in writing, to ensure that minimum disruption is caused to professional schedules and that costs are minimised.

Experts attending Court

- 8.2 Where expert witnesses are to be called, all parties shall, by the specified date or, where an IRH is to be held, by the IRH, ensure that:
- (1) the parties' advocates have identified (whether at an advocates' meeting or by other means) the issues which the experts are to address;
 - (2) wherever possible, a logical sequence to the evidence is arranged, with experts of the same discipline giving evidence on the same day;
 - (3) the Court is informed of any circumstance where all experts agree but a party nevertheless does not accept the agreed opinion, so that directions can be given for the proper consideration of the experts' evidence and of the party's reasons for not accepting the agreed opinion;
 - (4) in the exceptional case the Court is informed of the need for a witness summons.

9. Action after the Final Hearing

- 9.1 Within ten business days after the Final Hearing, the solicitor instructing the expert shall inform the expert in writing of the outcome of the case, and of the use made by the Court of the expert's opinion.
- 9.2 Where the Court directs preparation of a transcript, it may also direct that the solicitor instructing the expert shall send a copy to the expert within ten business days after receiving the transcript.
- 9.3 After a Final Hearing in the Family Proceedings Court, the (lead) solicitor instructing the expert shall send the expert a copy of the Court's written reasons for its decision within ten business days after receiving the written reasons.

ANNEX

(Drafted by the Family Justice Council)

Questions in letters of instruction to child mental health professional or paediatrician in Children Act 1989 proceedings

A. The child(ren)

1. Please describe the child(ren)'s current health, development and functioning (according to your area of expertise), and identify the nature of any significant changes which have occurred.
 - Behavioural
 - Emotional
 - Attachment organisation
 - Social/peer/sibling relationships
 - Cognitive/educational
 - Physical
 - Growth, eating, sleep
 - Non-organic physical problems (including wetting and soiling)
 - Injuries
 - Paediatric conditions
2. Please comment on the likely explanation for/aetiology of the child(ren)'s problems/difficulties/injuries.
 - History/experiences (including intrauterine influences, and abuse and neglect)
 - Genetic/innate/developmental difficulties
 - Paediatric/psychiatric disorders
3. Please provide a prognosis and risk if difficulties not addressed above.
4. Please describe the child(ren)'s needs in the light of the above
 - Nature of care-giving
 - Education
 - Treatmentin the short and long term (subject, where appropriate, to further assessment later).

B. The parents/primary care-givers

5. Please describe the factors and mechanisms which would explain the parents' (or primary care-givers') harmful or neglectful interactions with the child(ren) (if relevant).
6. What interventions have been tried and what has been the result?
7. Please assess the ability of the parents or primary care-givers to fulfil the child(ren)'s identified needs now.
8. What other assessments of the parents or primary care-givers are indicated?
 - Adult mental health assessment
 - Forensic risk assessment
 - Physical assessment
 - Cognitive assessment
9. What, if anything, is needed to assist the parents or primary care-givers now, within the child(ren)'s time scales and what is the prognosis for change?
 - Parenting work
 - Support
 - Treatment/therapy

C. Alternatives

10. Please consider the alternative possibilities for the fulfilment of the child(ren)'s needs.
 - What sort of placement
 - Contact arrangements

Please consider the advantages, disadvantages and implications of each for the child(ren).

Questions in letters of instruction to adult psychiatrists and applied psychologists in Children Act 1989 proceedings

1. Does the parent/adult have – whether in his/her history or presentation – a mental illness/disorder (including substance abuse) or other psychological/emotional difficulty and, if so, what is the diagnosis?
2. How do any/all of the above (and their current treatment if applicable) affect his/her functioning, including interpersonal relationships?
3. If the answer to Q1 is yes, are there any features of either the mental illness or psychological/emotional difficulty or personality disorder which could be associated with risk to others, based on the available evidence base (whether published studies or evidence from clinical experience)?
4. What are the experiences/antecedents/aetiology which would explain his/her difficulties, if any (taking into account any available evidence base or other clinical experience)?
5. What treatment is indicated, what is its nature and the likely duration?
6. What is his/her capacity to engage in/partake of the treatment/therapy?
7. Are you able to indicate the prognosis for, time scales for achieving, and likely durability of, change?
8. What other factors might indicate positive change?

(It is assumed that this opinion will be based on collateral information as well as interviewing the adult.)

**The Right Honourable Sir Mark Potter, The President of the Family Division.
The Lord Chancellor.**

Appendix 2: The Practice Direction for Experts in Family Proceedings Relating to Children: Core amendments for April 2010

The following represent a summary of the core amendments/enforced elements of the CPR and Practice Direction in April 2010.

- Clarified the definition of an expert including provision of an 'expert team';
- Provided guidance to reduce any inconsistency in the appointment of single joint experts;
- Revised the expert's statement of truth and statement of compliance to:

Statement of truth

I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

Statement of compliance

I understand that my duty as an expert witness is to the Court. I have complied with that duty and will continue to comply with it. I am aware of the requirements of part 35 and practice direction 35, this protocol and the practice direction on pre-action conduct. This report includes all matters relevant to the issues on which my expert evidence is given. Included in this report are those matters which might affect the validity of my conclusions. I understand that this report will form the evidence to be given under oath and that I may be cross examined on its contents. I confirm that I have not entered into any arrangement whereby the amount or payment of my fees is dependant upon the outcome of this case. This report is addressed to the Court.

- Ensured that the questions posed to experts are proportionate and appropriate.
- Tightened up on opinion evidence.
- Made consequential amendments to the Annex, PD28 and PD29.
- Made it explicit that experts should express an opinion taking into account all material facts including any relevant factors arising from ethnic, cultural, religious or linguistic contexts at the time, and relevant literature.
- Made it explicit that experts should express an opinion describing their own professional risk assessment process and the process of differential diagnosis and any unusual or inconsistent features in the case.
- Made it explicit that opinions made should highlight whether it is speculative and/or based on research or a consensus of clinical opinion.
- Indicated that if an opinion is provisional AND what is needed to give the opinion without qualification.
- Stipulating that any range of opinion should be summarised, indicate why there is a range of opinion (e.g. absence of information?) and ask for reasons for any opinion (i.e. a balance sheet approach).

Further comments made by the *Law Gazette* (2009) include:

- New definitions of 'expert' and 'single joint expert', with the former including the concept of 'expert teams'.
- Typical tidying up amendments include:
 - (i) making provision for written questions to experts to be proportionate (rule 35.6(1));
 - (ii) amending rule 35.4(4) enabling the Court to limit the amount of an expert's fees and expenses that can be recovered from another party;
 - (iii) providing in small claims and fast-track cases that permission will normally only be given to call expert evidence on a particular issue from one expert (rule 35.4(3A));

- (iv) providing that where an application is made for permission to rely on an expert the application must identify the field in which expert evidence is required and, where practicable, the name of the proposed expert; and
- (v) amending rule 35.7 (Court's power to direct that evidence is to be given by a single joint expert).

Appendix 3: Criminal Procedure: Application of Civil Rules and Disclosure Duties

There are two core areas of procedure/practice to consider in particular for experts working in Criminal Courts. The first is the proposal for rules parallel to those outlined in Appendix 1 in relation to Civil Courts being applied to Criminal Courts. The second is the issue of 'Disclosure Duties'. Both will be outlined in brief here.

Criminal Procedure Rules

The Criminal Procedure Rule Committee was established in 2004 to make rules of procedure for all criminal Courts in England and Wales. In 2005 the Committee proposed procedural rules for experts (a Part 33, 'Expert Evidence') designed to follow the Civil Procedure Rules, Part 35 (see Appendix 1).

A number of revised rules were introduced by the Criminal Procedure Committee in April 2006 (see www.dca.gov.uk/criminal/procrules_fin/rulesmenu.htm to locate all rules).

In November 2005 the British Psychological Society was asked to provide an opinion on the proposed Part 33 of these rules. It was noted that the proposed Part 33 is virtually identical to Part 35 of the Civil Procedure Rules with regards to experts. The Criminal Procedure Rule Committee noted that this was their intention, recognising a need to align with civil procedure, to work towards the appointment of single joint experts and to make the duty of experts explicit. It is argued that, currently, the latter has not been sufficiently achieved in criminal Courts. The only differences between the proposed Part 33 of the Criminal Procedure Act and Part 35 of the Civil Procedure Act are:

- A proposal that in criminal proceedings a 'summary of experts conclusions' will be provided before the final report to expedite process. The British Psychological Society has raised concerns in relation to this as part of the consultation process, noting the potential difficulties in presenting a summary of opinion in the absence of the complete evidence (i.e. in the absence of the full psychological report).
- Discussions between experts will be evident although they may not be as formalised as they currently are within the Civil Procedure Rules, Part 35.

Disclosure Duties in Criminal Court

The publication of *Disclosure: Experts' Evidence and Unused Material – Guidance Booklet for Experts* by the Crown Prosecution Service is an important source for **all** experts, regardless of their practice in civil or criminal Courts. However, the manual was written as a guide particularly for experts who practice in the criminal Courts. The publication outlines three core expert duties:

1. Retain

Retain everything until otherwise instructed. Retention periods are determined by the investigator. When in doubt consult the instructing party.

2. Record

The requirement to record starts from instruction. This includes:

- When you took, received and delivered material and the means.
- Notes and those of assistants. These should be detailed enough for another expert to follow.
- Keeping your own notes of all meetings attended.
- Telephone conversations noting points of agreement, disagreement and agreed actions.
- Record all e-mails.

3. Reveal

Requirement to reveal everything that you have recorded. The Prosecution Team should be aware of all information in your possession. There are three ways in which information can be revealed:

- In your report.
- In any formal statement you may make, namely formal declaration of your understanding of your Court duty and an acknowledgement that you will inform the Court if your opinion changes on a material issue.
- Complete an Index of Unused Material.

With regards to the latter, the Index is reproduced from the Disclosure Manual in Table 3.1. It is comprehensive and psychologists acting as expert witnesses are not expected to have to complete all sections since many do not apply.

The Crown Prosecution Service notes how failing to attend to the three core duties of Retain, Record and Reveal can have a range of serious consequences, for example, leading to unsafe convictions, prosecutions being halted, an adverse judicial judgement being made against you.

Also outlined in the manual is the importance of complying with the Criminal Procedure and Investigations Act, expert witnesses not being considered as third parties in the legal process, and the importance of self-certification. With regard to the latter, all experts are expected to complete this certificate and to submit this. The certificate is reproduced from the disclosure manual in Table 3.2.

Full details on the specifics and importance of disclosure are outlined in *Disclosure: Experts' Evidence and Unused Material – Guidance Booklet for Experts*. Experts should ensure that they familiarise themselves with this manual. A copy can be downloaded from:
www.cps.gov.uk/legal/section20/chapter_a_annex_k.html

Table 3.1. Index of Unused Material

Experts Index of Unused Material

Experts reference: CJS URN.

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 above named expert in this case. (Note: The material should be considered to be NON-SENSITIVE, unless a specific flag exists to suggest it might be SENSITIVE.) The list is provided in *Disclosure: Experts Evidence and Unused Material: Guidance Booklet for Experts*.

EXPERTS USE		CPS USE	
No.	Description of material	Location	
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.	Case File	
2	CASE NOTES made at the time of the examination of the items; provide details of dates of examinations; details of packing and integrity of items; records of work performed on the items, who was involved and dates; analytical and test results; details of quality checks.	Case File	
3	DRAFT REPORTS electronic and/or hard copy drafts of reports or statements sent out to police and CPS	Case File/ IT	
4	ADMINISTRATIVE DOCUMENTS time recording sheets, case costings, delivery notes, invoices, records of enquiries with customer relating to costs, etc.	Case File	
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]	Case File	
6	RECORDS OF material submitted but not examined; of material examined but relating to suspects not included in reports or statements; or work carried out by others, including the results; of procedures and techniques used during the examinations.	Case File	
7	RETAINED MATERIALS Material from items ...	Stores	
8	SCENE OF CRIME related material; written notes [voice recorded notes], diagrams, photographs/images taken at the time of the scene attendance.	Case File/ IT Media	
9	POST MORTEM related material: written notes [voice records notes], diagrams, photographs/images taken during the post mortem examination of [name]	Case File/ IT Media	
10	WITNESS STATEMENTS from the following people: [name]	Case File	
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	Case File/ Stores	
12	DATABASES material from the following databases have been used: [name of database]	[source]	
13	OTHER		
Completed by:		Reviewing Lawyer	
Signed:		Signature:	
Dated:		Date:	

NB: Any information that is considered confidential or sensitive should be placed on a separate schedule and discussed with the Prosecuting Team.

Table 3.2: Self-certificate

Expert Witnesses Self-Certificate

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 *Disclosure: Experts Evidence and Unused Material: Guidance Booklet for Experts*, 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.

1	Have you ever been convicted or, 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 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.

Appendix 4: Qualifications and Experience

Give your: Name; Professional Address; Qualifications; Experience.

Qualifications	Experience
Degrees	What you have done as a qualified psychologist, for whom and for how long.
Publications	Experience in legal process, e.g. experience of giving evidence [written and/or oral].
Memberships	
Training	
Awards	
Committee Memberships	
Licences	

Appendix 5: Reducing your evidence

When preparing your report for oral testimony, list below the likely issues that you think may be raised, the established facts and your stated psychological opinion.

List the issue	Facts	Stated opinion
List the issue	Fact	Stated opinion
List the issue	Fact	Stated opinion
List the issue	Fact	Stated opinion
List the issue	Fact	Stated opinion

Appendix 6: Oral witness skills

Areas to remember

- **Prepare your evidence and how it will be delivered**
 - Identify the issues, facts and opinions in your report.
Reduce it to these three to five areas.
 - Identify questions that you may be asked and prepare an answer.
 - Know where the Court is and who will be there.
 - Choose what you will wear.

- **Delivering your evidence**
 - Make use of your qualifications and experience: include content and process (i.e. qualifications as a psychologist and qualification in Court processes, including Quasi-Court).
 - Answer all questions asked with courtesy.
 - Deliver questions at a suitable pace and clearly (remember judges will be writing down what you say).
 - Avoid verbosity.
 - Explain any jargon that you have to use succinctly.
 - Maintain confident body posture.
 - Remain objective.
 - Do not tell untruths.
 - Answer all questions asked.
 - Address the main issues – don't digress.
 - Make good use of facts to support opinion.
 - Deal with attacks on evidence and report without arrogance or anger.
 - Remember to use your report – refer to it a couple of times at least.
 - Stay within your area of expertise.
 - Remember that you are assisting the Court. You are not an advocate.

(Taken from J.L. Ireland, 2008)

Notes

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