The British Psychological Society

Promoting excellence in psychology

Psychologists as Expert Witnesses: *Guidelines and Procedure*

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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 report: Psychologists as Expert Witnesses: Guidelines and Procedure for England, Wales and Northern Ireland (2010). The Advisory Group comprised representation from across the discipline and has attempted to capture issues of relevance for both civil and criminal proceedings. The document also has application to tribunals and oral hearings.

This document will be subject to a mid-term review in August 2017 and a full review in March 2020.

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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 and opinion based on this which is likely to be outside the experience and knowledge of a Judge, magistrate, convenor or jury. Expert evidence should be independent and uninfluenced by the pressures of litigation. The experts role is to assist the Court or other Quasi-Judicial body[1,2]. It is not to act as an advocate for any party. 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. National Health Services) to be serving as experts, producing agreed reports as a team. This was an additional role and does not replace the individual 'expert witness' role. For further detail on the role of an expert in civil proceedings see *Practice Direction 35* (This is currently available at www.justice.gov.uk/courts/procedure-rules/civil/rules/part35/pd_part35).

1.2 The main difference between an expert witness and ordinary witness (i.e. a witness 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 witnesses remit can also cross the boundary of both fact and opinion. Professional witnesses are generally formal employees of one party. For example a psychologist employed by a specific hospital or Trust who gives evidence about treatment progress, regarding a patient under the care of that hospital or Trust during a Mental Health Review Tribunal. Another example might be a psychologist employed by HM Prison Service/the Northern Ireland Prison Service/Scottish Prison Service, giving evidence on a patient detained in custody by their employing service, at an oral hearing of the Parole Board. Professional witnesses are responsible to the Court in the same way that an independent expert witnesses is.

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 the Appendices for further detail and resources on procedure in family, criminal and civil proceedings). In civil proceedings decisions are generally 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 Crown Court proceedings there is normally a presiding judge and jury, except in 'fitness to plead' hearings where a judge will sit without a jury. The judge has the remit of ensuring a fair trial. The decision-making here, in terms of verdict, is by the jury. In criminal proceedings a decision is made on the basis of being 'beyond reasonable doubt', a higher level of proof than the 'balance of probability' used in civil cases. Usually the balance of probability test is interpreted as a probability of greater than 50 per cent, although expert and professional witnesses may be invited to estimate the probability more precisely.

1.4 Psychologists may also be called as experts in 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 decisions are made on the basis of being 'beyond reasonable doubt'. Quasi-Judicial bodies vary in practice but are typically presided over by a judge or chairperson sitting with psychological, medical and/or lay members.

[1] There is currently no single formal set of rules or guidelines for Quasi-Judicial bodies. It is therefore recommended that the rules and procedures documented here are used as guidelines for good practice and that psychologists familiarise themselves with the relevant rules and guidelines for specific types of hearing as necessary. It is also important to note that many Quasi-Judicial hearings are often presided over by Judges or Lawyers with experience in civil and criminal court.

[2] Unless otherwise stated the term Court should be taken to include Courts and other Quasi-Judicial Bodies.

1.5 In undertaking work as an expert or professional witness psychologists should conduct themselves in a manner that does not bring the profession of psychology into disrepute. They have a duty of courtesy towards and cooperation with colleagues.

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.

1.7 When lawyers seek to introduce expert psychological evidence, 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. The judge also 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'* 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 reliability 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 reliability of witnesses when presented with, for example, surveillance evidence that contradicts or supports evidence from interviews or to offer a psychological opinion on the reliability of child testimony.

2. Academic and professional competence

2.1 Psychologists are responsible for ensuring they are sufficiently competent and expert in offering an opinion. Indications of competence in respect of the knowledge required by the Court, and expertise within a specialised 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, professional andscientific publications in relevant areas;
- Demonstrations of professional practice, competence, specialist knowledge and expertise with a bearing upon the issues in the case; and
- Current experience in applying psychology in the area of claimed expertise. Examples here may include evidence of expertise in risk assessment, treatment, neuropsychology, assessment of memory and so on.

2.2. Qualifications are usually summarised somewhere in a written report, but an expert witness may be asked to outline their competence in brief during oral testimony.

2.3 In order to provide services as expert witnesses psychologists should ensure that they have appropriate indemnity insurance and where appropriate that they meet any necessary safeguarding standards that apply within the jurisdiction they are working within. They should also ensure that they are qualified not only in content 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 legal processes and how expert and professional witnesses sit within these. They are expected to be skilled in the delivery of evidence. Thus curricula vitae provided as part of Court instruction should reflect on experience both in terms of content and process. Evidence of the latter may include number of previous Court appearances as witnesses (including as professional witnesses or witnesses of fact). 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 through training, supervision and cumulatively through practice.

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 or mentoring in the preparation of the report for legal purposes. 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 training as necessary in relation to the legal process in order to meet professional standards.

2.5 Psychologists need to remain aware that many legal proceedings are protected with regards to disclosure (particularly family proceedings) and thus supervision should be obtained in legal *process* and *how* opinion can be stated and not on psychological *opinion* per se. 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 or professional witness work.

2.6 Psychologists need to be aware of the importance of performing appropriately in a 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 procedures and etiquette, inappropriate behaviour when giving evidence in chief and, most particularly, when being cross-examined.

2.7 Psychologists who are appearing for the first time as witnesses should take advantage of 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 training events and other learning materials. The Family Justice Council, for example, offers a 'mini-pupilage' 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 Representatives[3]. Supervision, mentoring and advice may be another useful means of gathering expertise for court appearances.

2.8 Psychologists should ensure that they understand the distinctions in process between different Legal Systems, Courts and Quasi-Judicial bodies, as this could influence the evidence they give. For example, the act of finding that someone probably committed an act of violence in a civil case based on a 'Finding of Fact' hearing does **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.

2.9 Psychologists should not offer opinions outside their area(s) of expertise. If the area(s) in question lies outside their expertise, they should make this clear and should where appropriate refer on to a suitably qualified and experienced colleague and/or to the Society's *Directory of Expert Witnesses*, *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).

2.10 In citing references in any report psychologists are expected to ensure that any sources and references are correctly reported and should be familiar with them. It is not acceptable professional practice to rely on second-hand or 'cited-in' research evidence. Psychologists should be prepared provide full details of any cited references at short notice.

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 when this is appropriate.

2.12 Psychologists are 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 or professional witness opinions when preparing their evidence. The simplest approach is to identify counter-positions or counter-arguments and to seek to accommodate these in their evidence. The Civil Procedure Rules encourage experts to consider a range of reasonable professional opinion in their conclusions, and to explain to a Court why such a range may arise in addition to giving their own view.

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.

2.14 The academic quality of expert or professional evidence must be such that it is informed by current evidence in the field. This includes the use of relevant assessments and tests, based on accepted academic and clinical opinion. 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 or professional witness.

[3] Information on the representatives can be obtained from the Professional Practice Board (PPB) of the British Psychological Society.

2.15. Where uses of a test or assessment differs from commonly accepted standards, then psychologists should explain and justify this adequately, to clients and in the report. There are criteria in existence which can prove of value when determining if a 'test' or 'assessment' will provide scientific or specialised knowledge. Use of psychometric assessments are widely expected to meet specific criteria. If this is not the case the value of the assessment must be justified. A set of criteria arising from the United States are of value in considering this and are referred to as the Daubert criteria (see Daubert vs. Merrell Dow Pharmaceuticals Inc case 1983: see also Rogers, Salekin and Sewell, 1999). In essence these refer to the standards evidence is expected to reach to be admissible expert testimony. They require that a theory or technique should be open to falsification, has been peer reviewed, is generally accepted by the scientific community, has a known error rate, with existing standards of use. The extent of subjective interpretation must also be explicit.

2.16 Psychologists should not change the substantive content of the report, nor their opinion, without appropriate grounds, based on newly submitted evidence. Discussions with colleagues or other experts or professionals may constitute such new information. Psychologists can legitimately modify their opinion on this basis, Any request to for removal of detail, should generally be refused, except where the report has gone beyond the relevant instructions or there is a good basis for the removal of material. Psychologists should be aware that they are required by the Court to provide an independent opinion. If new evidence is provided to a psychologist which causes the expert to alter their opinion, then this should be communicated, normally in writing, to the instructing party as soon as possible. Minor errors in a report such as typographical errors, spelling of names, incorrect dates and so on should though be corrected as early as possible and a corrected copy of the report provided. In entering into discussions with colleagues or other experts, psychologists are expected to recognise the fundamental purpose of expert and professional witness meetings and discussions. They are expected to balance the requirement of entering into such a process with an open mind, whilst also not allowing themselves to be pressured into surrendering their opinions in the absence of good evidence.

2.17 Alterations in opinion are not unusual in light of new evidence and psychologists should be prepared to alter their opinion where they feel it is appropriate to do so. Caution is expressed, however, in relation to *changing* opinion. It is the duty of a psychologist acting as an expert or professional witness to communicate alterations in opinion and where appropriate the need for reassessment to those instructing them at the earliest opportunity.

2.18 Psychologists acting as expert or professional witnesses should be fully familiar with the British Psychological Society's *Code of Ethics and Conduct* and and also where appropriate the Health and Care Professions Council (HCPC) *Standards of Conduct, Performance and Ethics for Practitioner Psychologists*. The importance of adhering to the requirements of statutory regulation and to the Society's codes during working as an expert or professional witnesses should be clear. Failure to do so can result in disciplinary proceedings and professional sanctions. 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 and professional 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 a report within an agreed timeframe then they have a responsibility to inform those instructing them at the earliest opportunity. A late report submission, depending on how central it is to the case, can result in proceedings being delayed at great expense and inconvenience. This can also have professional implications for the psychologist, particularly if they are thought to have not informed parties of any difficulties at the earliest opportunity.

2.20 Gaining informed consent for any assessments is a requirement and psychologists acting as expert and professional witnesses may wish to consider the use of a standard information sheet/guide with which to aid obtaining such consent. Information provided should make clear the differences from normal clinical consent. Specifically it should be made explicit that the results of any assessment may be used for legal purposes. It should also be made explicit that any assessment is conducted on an independent professional basis and may be favorable or unfavorable to the person being assessed. Psychologists should be prepared for possibly being questioned on the process of consent if there are any concerns raised. Psychologists should be mindful in particular of the likely pressures on individuals to engage in assessments if instructed by a Court to do so.

2.21 Following the case of *Jones v Kaney* [2011] UKSC 13, a decision was made by the Supreme Court of the United Kingdom on whether expert witnesses retained by a party in litigation can be sued for professional negligence, or whether they have the benefit of immunity from suit. The case involved a psychologist instructed as an expert witness in a personal injury claim, who was said to have negligently signed a statement of matters agreed with the expert instructed by the opposing side, in which they made a number of concessions that weakened the claim considerably. As a result, according to the injured claimant, they had to settle the claim for much less than he would have obtained had his expert not acted in this manner. To succeed in the claim, they had to overturn an earlier Court of Appeal decision that had decided that preparation of a joint statement with the other side's expert was covered by immunity from suit. Following this case expert witnesses no longer have immunity.

2.22 The criminal and civil legal systems in Scotland are separate and different from those that apply in the other nations of the UK. Psychologists acting as an expert or professional witness in Scotland have a duty to familiarise themselves with the relevant principles, structures, procedures and terminology. It is recommended that advice about specific cases and the applicable rules and processes should always be sought from the relevant solicitor or Procurator Fiscal.

2.23 Psychologists should be aware that in Scotland, in normal circumstances, expert and professional evidence is given only by oral testimony. Experts in Scotland are instructed to produce written reports and these are normally lodged with the Court as productions. However, these reports are regarded only as precognitions, to give notice of what the evidence of the expert is likely to be. They become evidence only when they are spoken to by the expert in oral evidence. Expert reports are rarely seen by the jury in Scotland and those parts of the expert report which are not spoken to in Court will generally not be referred to by the prosecution and defence advocates, and will not be referred to in the 'charge' to the jury by the judge/sheriff[4]. Although, prior to the Court proceedings, expert reports will normally have been disclosed and may have been evaluated in writing by the 'opposing' expert, only what each expert says in Court is normally used as evidence.

2.24 Another feature of the judicial system in Scotland of particular relevance to psychologists is that, in criminal proceedings for alleged sexual offences, it is open to the Crown to lead expert evidence relating to any behaviour or statement of a 'Complainer', subsequent to an alleged offence, to rebut any inferences adverse to his/her credibility or reliability which might otherwise be drawn. The expert's evidence is intended to give information about the 'generality' of victim behaviour (i.e. what victims often do after an offence has been committed). Frequent examples are the long delays which can occur before victims disclose or report their allegations and the demeanour of the Complainer after the alleged offence. The intention is to enable members of the jury better to understand any behaviour by the complainer which might have seemed to them to be counterintuitive and which might have led them to discredit the complainer's evidence. The expert does not of course offer an opinion about the truth of the allegations.

[4] A useful introduction to the Scottish Legal System is given by McManus, J.J. (2005). Chapter 2: The Scottish Legal System, in J.J. McManus & L.DG. Thomson, *Mental health and Scots Law in practice*. Edinburgh: Green & Son Ltd.

2.25 Psychologists acting as experts or professional witnesses owe a primary duty to the Court. Psychologists have a duty to give their opinion honestly and accurately to the Court, both in their report and when questioned, whether that opinion agrees or disagrees with that of another expert psychologist. Psychologists should present their own opinion and to do so in a professional and professionally competent manner, informed clearly by the evidence base.

2.26 Psychologists should avoid *ad hominem* attacks on colleagues or other behaviours which serve to bring the profession into disrepute.

2.27 Psychologists acting as expert or professional witnesses are not expected to comment on some questions of fact under consideration by the judge or the jury. This lies within the remit of the appointed decision makers. For example, 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 party at the earliest opportunity. Psychologists should identify clearly any questions of fact under consideration that fall outside the role of their role as an expert or professional witness.

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 may differ and could include parties such as a firm of defending solicitors, the Procurator Fiscal or Crown Prosecution Service managing the prosecution of the accused, a Local Authority legal department, insurance company, claimant solicitors, a litigant in person, or the Court itself.

3.2 In civil proceedings there can be an emphasis on the notion of 'single joint expert' where legal representatives will agree on a single expert, to provide an opinion. One solicitor will typically 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 on the basis of a clear rationale. 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 an expert then they should request that they communicate 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 psychologists 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 the impartiality of the psychologist as an independent expert. In criminal cases correspondence should only be via the instructing solicitor.

3.4 The solicitor or instructing body will generally find it helpful to have an itemised breakdown of any estimate for expert witness 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 Psychologists should be clear what is being requested by any instructing party. The phrase a 'Psychologist's Report' does not carry a sufficient degree of specificity. Psychologists should clarify the requirements and ask for more detail where necessary. In particular there is a need to know in which way psychology might relate to the particular case. Psychologist should clarify any specific legal issues and obtain 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). *Psychologists should be clear what* is being asked for, and what are the established facts of the case to date.

3.6 Where there is *Advice from Counsel* psychologists acting as expert witnesses are entitled to see this before agreeing to take on the case. This will enable the psychologist to determine that they are in fact able to offer expert opinion and comment within their competence.

3.7 Psychologists should seek to obtain any materials that they feel are relevant and necessary. If the psychologist thinks that they require certain documentation then this should be requested in writing. If a solicitor forwards only excerpts from records or reports these should request in full. If requested material is not supplied psychologists should be prepared to indicate this clearly in their report and note where you have been unable to provide an opinion, because relevant documentation was not available or forwarded. Psychologists should also state where an opinion is provisional due to missing information. Psychologists should generally list any information that they feel is relevant but has not been seen (e.g. health or educational records) particularly where these have been requested but not disclosed.

4. Responding to instructions

4.1 Psychologists should engage in a dialogue to determine terms of engagement with the instructing party wherever necessary.

4.2 Psychologist should normally clarify the time frame for work to be undertaken. This should be agreed at the same time as agreeing fees where appropriate. At this stage it is good practice to clarify any terms and conditions to the instructing party. This should include, where appropriate, a time frame for Court appearances. Any time frame should be an agreed and *realistic* one for submission of reports. Courts will generally take an adverse view of psychologists acting as expert or professional witnesses whose reports arrive late and consequently cause delay to the Court.

4.3 In responding to any instructions psychologists may wish to clarify:

- Is the case *listed for trial* or hearing?
- If so, can the tasks the psychologist is being asked to do be completed satisfactorily in the time available?
- What are the critical deadlines? and
- Is the psychologist available to give evidence in Court?

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

4.4 Psychologists should clarify whether the role which they are being asked to undertake is as:

(a) a professional witness employed by an organisation and as part of their contract of employment; and

(b) a single or jointly instructed expert witnesses.

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 of interest should be made explicit and should be reported as soon as they arise. Requests to complete an expert assessment of someone employed as a colleague or someone known to you should be declined. Requests to complete an assessment of an individual who has connections with your current employer should also be declined.

4.6. This can also extend to being asked to provide an expert report on someone you are providing with treatment as an 'Applicant', 'Claimant' or 'Complainer'. This would involve a dual relationship and is not an acceptable conflict. Psychologists working in such a capacity should be mindful that it is not appropriate to act as an expert witness. In such cases it may be appropriate to act as a professional witness.

4.7. Witnesses acting independently will generally be required to sign a statement declaring their independence. The specific wording may be outlined in the instruction letter. In civil cases experts acting as independent witnesses are asked to sign a statement of compliance and a statement of truth outlined at the end of their report. Specific forms of wording may vary between jurisdictions and change over time and psychologists have a duty to check the correct form of statement. The examples given below are correct at the time of writing and are given only for illustrative purposes.

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 a single declaration, an example of which is provided below.

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 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.

Such statements should be included immediately at the end of the report and signed.

4.8 Psychologists acting as expert or professional witnesses should 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 practice directions 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.

4.9. Often, in an attempt to narrow issues and identify areas of agreement and disagreement, a Court will direct discussions between experts, leading to a joint statement. Such discussions may be helped by the provision of an agenda. It is expected that psychologists would fully comply with such directions.

4.10 At any stage in the proceedings the Court may direct that some or all of the experts from like disciplines shall give their evidence concurrently. This has arisen from the Jackson Reforms, and is sometimes referred to as ‘hot-tubbing’. It is expected that psychologists would fully comply with such directions.

5. Confidentiality

5.1 No information relating to an assessment or report should be disclosed outside the relevant proceedings without agreement. Psychologists should normally seek permission to disclose any information to another health care professional with the instructing party. Any information contained in evidence in a report can potentially be disclosed. Psychologists acting as expert or professional witnesses have a duty to disclose all of the evidence used to reach their opinion where directed by the Court to do so. This would normally include the sharing of details of any tests and assessments administered with professional colleagues. In reporting the results of assessment psychologists should act in accordance with the current Society Statement on the Conduct of Psychologists providing Expert Psychometric Evidence to Courts and Lawyers.

5.2 Any more peripheral discussion (for example, with colleagues concerning finer points of cases) should only take place in circumstances where confidentiality can be ensured.

5.3 Discussion with other 'experts' concerning the specifics of the case, and particularly with colleagues instructed by other parties, should only take place with the consent of the instructing party. Other experts witnesses may not necessarily be psychologists but may include physicians, social workers and other professions.

5.4 There are accepted forums of discussion between experts. These include 'experts meetings', 'professional meetings' or 'counsel conferences'. All of these are sanctioned by the Courts. Expert meetings are used when there is a range of differing opinion and it is hoped that a meeting between experts can clarify: opinions, areas of agreement and areas of disagreement. 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. The minutes are bound by the same level of confidentiality as other Court documents and are submitted to Court as evidence.

5.5 Experts meetings differ in that they should not have legal representatives present and are a meeting between experts only undertaken on a 'without prejudice' basis. This means that anything discussed at the meeting by either party is without prejudice to their respective legal positions. Such discussions are entered into with the hope of resolving or minimising any potential disputes between the parties. The parties will not be able to refer to such proceedings in any subsequent court or tribunal proceedings relating to the disputed matters. Psychologists should restate the point at the meeting.

5.6 Where a psychologist has been instructed directly by the Court, the Crown Prosecution Service, Procurator Fiscal 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 they have contact during psychological investigations or assessment.

5.7 Where Court bundles and other materials are received in electronic format, psychologists should ensure that these are stored in a secure password protected format. This may require the addition of additional security to documents that arrive in an unsecured form.

5.8 Where psychologists submit reports in an electronic format they should ensure that these are in a secure password protected format.

6. Conflict of interests

6.1 Psychologists should spell out their independent or professional position and should not accept being pressured (explicitly or implicitly) into producing a biased or compromised report or evidence by any party.

6.2 Psychologists should be clear that they are acting as an independent expert or an independent professional and not as an advocate for a particular party. With regards to cases involving children, this may be particularly apposite. Experts in such cases are not acting for the parents, or for the children, but for the Court, who are acting in the best interests of the child.

6.3 Psychologist should negotiate a change to an instructions if it is ethically appropriate to do so. For example, where the psychologist becomes aware of a dual relationship or other conflict of interest (e.g. providing expert testimony against a current employer). This may involve ending the contract and renegotiating or reducing payment.

6.4 Psychologists should be clear about their relationships, roles and responsibilities, including full consideration of relevant professional ethical issues. In this they need to remain mindful that although their core responsibility as an expert or professional witness is to the Court, they also have overarching professional responsibilities to any individual(s) they engage with as a psychologist, as set out in the HCPC Standards and the Society's *Code of Ethics and Conduct*.

7. Appearance at Court

7.1 Psychologists should always act in such a way as to maintain the repute of the profession when working as an expert or professional witness. This includes being punctual and arranging to arrive at the Court in good time, being appropriately dressed and conducting themselves appropriately towards the Court, colleagues and all other participants. It is the case that expert and professional witnesses are generally permitted to sit in Court whilst other experts are giving evidence, both in the process of *voir dire* and in the trial or hearing itself. Psychologists should, wherever possible, sit in the Court to listen to what is being said and to prepare themselves further to give evidence and to prepare for cross-examination on issues raised by preceding witnesses.

7.2 Psychologists acting as expert or professional witnesses may be asked to attend Court on a 'just in case' basis, i.e. well ahead of the expected time that the expert actually gives evidence. It is also not unusual for *ad-hoc* professional meetings or meetings between counsel to be arranged immediately prior to the delivery of evidence, or for new documentation to be submitted for consideration. Arriving early may assist with this. The fundamental issue is your role in assisting the Court. Psychologists should where possible be accommodating and helpful to the Court.

7.3 Psychologists are always expected to provide truthful testimony. Where relevant psychologists should decide in advance if they will take an oath or affirmation.

7.4 In Court proceedings 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 make reasonable efforts to plan ahead concerning Court attendance. Where appropriate witness summons may be issued with a broad time frame covering multiple dates. The instructing party should be asked on what day exactly it is anticipated the psychologist will start giving evidence and how long it is likely to take. Often a psychologist will be asked about availability in advance and requested to reserve dates in the diary. Courts can be very accommodating to experts and will often build a witnesses timetable around the expert's availability.

7.6 Psychologists are expected to preparing adequately for a Court appearance and the provision of oral evidence.

8. Practical and financial considerations

8.1 Where appropriate psychologists are advised to negotiate fees in advance with the instructing party and obtain a formal contract or letter of instruction. It can be useful 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 and so on).

8.2 Psychologists should be sure that they understand the terms of the negotiated payment and where appropriate the processes of Legal Aid. Any negotiated fee may also be affected by *taxation*. Taxation here refers to a system of controlling costs operated in some Courts, whereby agreed fees that are felt to be excessive may be reduced by the Court. The Legal Services Commission of the Ministry of Justice publish schedules of fees and normal time requirements for a range of legally aided work. This is currently available at www.gov.uk/expert-witnesses-in-legal-aid-cases.

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 may result 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, experts submit apportioned invoices to each party.

8.4 Psychologist should clarify who is resourcing their time. This includes time writing the report but also covers materials, staff costs, giving evidence and waiting time. In cases where an expert is jointly instructed, the administration of costs is completed by the lead solicitor, although fees may be equally split between the parties.

8.5 If the cost of the work is likely to increase beyond the original estimate then the psychologist should inform those instructing them as early as possible. Specifically they should advise the instructing party or the lead solicitor in joint cases. This should be done *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. In such cases psychologists may not be reimbursed.

8.6 Psychologists should make themselves familiar with any financial or cost limits and keep copies of all receipts with a bearing on 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. 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.

8.7 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 (CPS).

8.8 Legal Aid cannot be granted if applied for retrospectively with regard to psychological services other than for the giving of evidence at Court.

8.9 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

clarity 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 associated costs involved with little prospect of recovering these for the discounted days.

8.10 Where a psychologist is unable to commit 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.

8.11 Psychologists should normally invoice for any work undertaken promptly. This is particularly important in some 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 party then there is a risk of non-payment. In cases where court attendance is to be paid for by the instructing party, or where there is a sequence of other work extending beyond submission of a report, psychologists should liaise with the instructing solicitor or other party, particularly if court attendance is scheduled soon after a report is submitted, or supplementary work is anticipated.

8.12 Following appearances in Court the Clerk to the Court may provide a claim form for all fees and expenses incurred on the day.

8.13 Psychologists should be aware that payment for work as an expert may be significantly delayed and may involve deferment of fees until settlement of the case. Waiting six months or longer for payment is not unusual. Psychologists can request in advance that payment is settled within a fixed period of receipt of their report and also indicate that standard interest will be added onto the invoice for each day that it is overdue. This should be agreed in writing to the instructing party as part of your terms and conditions when accepting instructions. 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 can be helpful.

9. References and bibliography

British Psychological Society (2014). *Statement on the conduct of psychologists providing expert psychometric evidence to Courts and lawyers.* Psychological Testing Centre. Available from www.bps.org.uk

British Psychological Society (2002). *Advice to members on acting as an expert:* Lillie & Reid vs. Newcastle City Council. Available from www.bps.org.uk

Brodsky, S.L. (2003). *The expert expert witness: More maxims and guidelines for testifying in Court.* Washington, DC: American Psychological Association.

Bond, C., Solon, M. & Harper, P. (2007). *The expert witness in Court: A practical guide.* Kent: Shaw & Sons.

Carson, D. (1990). *Professionals and the Courts – a handbook for expert witnesses.* Birmingham: Venture Press.

Ceci, S.J. & Hembrooke, H. (1998). *Expert witnesses in child abuse cases.* Washington, DC: American Psychological Association.

Civil Justice Council, (2009). *Protocol for the instruction of experts to give evidence in civil claims.* Available from www.civiljusticecouncil.gov.uk

Colman, A.M. (1995). Testifying in Court as an expert witness. In *Professional Psychology Handbook* (Section II, pp.70–79). Leicester: BPS Books.

Crighton, D. (2013). Expert witness work – time to step up to the plate. *The Psychologist, 26*(7), 486–487.

Dror, I.E., Kassin, S.M. & Kukucka, J. (2013). New application of psychology to law: Improving forensic evidence and expert witness contributions. *Journal of Applied Research in Memory and Cognition, 2*(1), 78–81.

Faulkner, D. (2010). The Justice System in England and Wales. In G.J. Towl & D.A.Crighton (Eds.) *Forensic Psychology.* Oxford: Wiley-Blackwell.

Gudjonsson, G.H. & Haward, L.R.C. (1998). *Forensic psychology: A guide to practice.* London: Routledge.

Heaton-Armstrong., A, Shepherd, E., Gudjonsson, G. & Wolchover, D. (Eds.) (2006). *Witness testimony: Psychological, investigative and evidential perspectives.* Oxford: Oxford University Press.

McKimmie, B.M., Newton, S.A., Schuller, R.A. & Terry, D.J. (2013). It's not what she says, it's how she says it: The influence of language complexity and cognitive load on the persuasiveness of expert testimony. *Psychiatry, Psychology and Law, 20*(4), 578–589.

Richards, P.M. & Tussey, C.M. (2013). The neuropsychologist as expert witness: Testimony in civil and criminal settings. *Psychological Injury and Law, 6*(1), 63–74.

Rogers, R., Salekin, R.T. & Sewell, K.W. (1999). Validation of the Millon Clinical Multiaxial Inventory for Axis II disorders: Does it meet the Daubert standard? *Law and Human Behaviour, 23*(4), 425–442.

Simons, D.S. & Banks, M.H. (1999). *Psychologists and the new rules of civil procedure.* Leicester: The British Psychological Society, August.

Further useful websites

Ministry of Justice: www.justice.gov.uk

The Scottish Courts: www.scotcourts.gov.uk

Crown Prosecution Service for England & Wales: www.cps.gov.uk/legal

Crown Office and Procurator Fiscal: www.copfs.gov.uk

Courts Service of Northern Ireland: www.courtsni.gov.uk/en-GB/pages/default.aspx

European Court of Human Rights: www.echr.coe.int/Pages/home.aspx?p=home

The Supreme Court: www.supremecourt.uk

BPS CPD approved events: www.bps.org.uk/events/cpd-approved-events/cpd-approved-events

The Expert Witness Institute: www.ewi.org.uk

Appendix 1: Civil Procedure Rules (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**

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 rules have been modified on a number of occasions subsequently, but the latest version may be found on the Ministry of Justice website: **www.justice.gov.uk/courts/procedure-rules/civil#pagetop**

The most relevant section for the psychological expert will be Part 35, the section encompassing the role of experts.

The rules seem, and are, complex and sometimes difficult to comprehend. Thankfully, most of the legal legwork will be undertaken by the solicitors instructing the expert. However, psychologists should read the section carefully, paying particular attention to:

- The expert's declaration;
- Relationships with other experts including meetings; and
- Dealing with and responding to written questions.

Appendix 2: The Practice Direction for Experts in Family Proceedings Relating to Children[4]

Readers should be aware that this guidance does not cover Northern Ireland. Further guidance is available from the Ministry of Justice website and psychologists undertaking work in relation to family proceedings have a professional duty to make themselves aware of current guidance.

In April 2008, The Practice Direction: Experts in Family Proceedings Relating to Children also came into effect and amended in April 2010. 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 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 i. In family proceedings relating to children, the Court's permission is required to instruct an expert (which includes 'expert teams') or a 'single joint expert';

ii. rule 34.4(4) is amended enabling the Court to limit the amount of an expert's fee 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. amendment to rule 35.6(1) makes provision for written questions to be proportionate.

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. All experts should be registered with the Health Profession Council. 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; 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;

(6) give details of the qualifications of any person who carried out the test, examination or interview;

(7) 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;

(8) tightened up on opinion evidence;

(9) make 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;

(10) make it explicit that opinions made should highlight whether it is speculative and/or based on research or a consensus of clinical opinion;

(11) indicated that if an opinion is provisional **and** what is needed to give the opinion without qualification:

  (a) 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;

  (b) 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 and 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;

  (c) 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;

  (d) where there is a range of opinion the 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).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;

  (e) 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;

(12) contain a summary of the expert's conclusions and opinions;

(13) 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;

(14) 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;

(15) be verified by a statement of truth in the following form:

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.

(16) Made consequential amendments to the Annex, PD28 and PD29.

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
   - Treatment

   in 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.

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