Submission to PAB/SAB of Draft document prepared by the working party on

Psychologists as Expert Witnesses

Andrea Pecherek
Adrian Skinner
Graham Powell
Michael Pearn
Gisli Gudjonsson
Eric Shepherd
Jamie Furnell
Debra Bekeian
Graeme Geldart

Chair/Convenor

Paul -
may interest you.

[Signature]

[Note: Paper]
Glossary

Advice from counsel

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

Brief

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

Brief to counsel

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

Case law

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

Conference

A meeting with counsel in the case to discuss the expert’s evidence or expert evidence submitted by the other side.

Court Service

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

The department responsible for bringing charged individuals to trial. It instructs Prosecuting Counsel. Typically when the defence offer expert witness reporting the CPS instructs its own expert(s).

The CPS operates its own budget. Hence expert witnesses instructed by the CPS are remunerated by the CPS not by the Court Service.

Expert witness

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

The process of submitting an invoice to the instructing body for immediate payment for expert witness services as specified in the work schedule.

In the case of Legal Aid funded defence work the solicitor should submit the invoice, with a copy of the relevant Legal Aid certificate, to the court where the case is to be heard. The staff in the accounts department issue payments on behalf of the Court service. Some but not all courts send a notification to the expert that the solicitor has been paid thus enabling the expert to request settlement by the solicitor if this has not been effected in the specified period.

Instructions

In precise terms the explicit request to assist in a case by fulfilling the role of expert witness. In practice instruction is typically an extended process of contact and negotiation, involving an initial approach - a telephone conversation or unsolicited letter - followed by subsequent verbal and written exchanges.

For practical purposes formal instructions are constituted, making the instructing body legally liable, when the body states it wishes the work specified in the work schedule to be done. It is incumbent on the psychologist to make sure that within these formal instructions there is an explicit acceptance to pay for the services to the amount invoiced by the psychologist in accordance with the work schedule.

Instructing body

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

*Legal Aid Board*

Part of the Lord Chancellor’s Department which is responsible for the administration of the Legal Aid Fund. It is organised on an area office basis. Offices receive applications from solicitors for authorisation of money from the Legal Aid Fund.

*Relevant evidence*

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

*Taxation*

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

*Voir dire*

Literally “to speak the truth”. The preliminary examination of witnesses, including expert witnesses, to establish their competency and the relevance of their evidence.
Psychologists as Expert Witnesses
Report of the SAB / PAB Working Party

1. What is an Expert?

1.1 An expert is a person who through a special course of study or experience is able to furnish the Court or Tribunal with scientific or technical information which is likely to be outside the experience and knowledge of a judge, magistrate, convenor or jury.

1.2 The main difference between an expert witness and an ordinary witness (i.e. a witness to fact), is that the former is able to give an opinion, whereas ordinary witnesses can only give factual evidence.

1.3 The expert witness has a duty to provide the Court with the necessary scientific criteria for the judge and jury to be able to evaluate the basis of the expert’s opinion and conclusions.

1.4 When describing a specific clinical condition, the admissibility of their evidence follows the path already established by psychiatrists.

1.5 The evidence of psychologists and psychiatrists departs when the former begin to comment on the development and mental functioning of ordinary individuals. Psychologists do devote more of their training to the understanding of normal human behaviour than their psychiatrist colleagues, who focus principally on the presence or absence of mental disorder.

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, then it is the judge in the case who decides whether an individual has the requisite expertise to give evidence with the potential to be relevant to the case. However, the judge decides whether what the expert asserts is relevant and therefore admissible in law. There will be instances where the judge accepts the expert as such but ultimately excludes the expert’s evidence in part or in full.

1.8 Submissions and legal arguments concerning requisite expertise and admissibility of evidence are heard by the judge in the absence of the jury. Typically this may happen at the outset of the trial but may occur at any time during the trial. This process is termed ‘voire dire’ or ‘trial within a trial’.
2.8 If a psychologist is not experienced in preparing evidence for medico-legal purposes then he or she is responsible for obtaining the appropriate advice and supervision in the preparation of the report. It is partly in this way that expertise is gathered. In any event it is incumbent upon the psychologist being called to secure appropriate support and supervision in order to meet professional standards.

2.9 Psychologists need to be aware of the importance of performing appropriately in court. Excellent work on the case, faultless written reporting and substantial preparation prior to trial can be spoiled by poor court performance. Poor court performance subsumes lack of awareness concerning court procedures and etiquette, and inappropriate behaviour when giving evidence in chief and, most particularly, when being cross-examined.

2.10 Psychologists who are appearing for the first time as witnesses should take advantage of the available training materials and training events than can assist them in preparing for court appearance. The Society and a number of other organisations produce materials, such as videos, and also provide training events. Supervision and advice can also be other useful means of gathering expertise for court appearances. This would come from colleagues with the appropriate experience.

2.11 Psychologists who are not experienced in preparing and giving evidence for medico-legal purposes are responsible for obtaining the appropriate advice and supervision. It is partly in this way that expertise is gathered and experience gained in report preparation and giving evidence in court. Psychologists who lack experience in report preparation and giving evidence should not be intimidated by this. The courts recognise that all experts have to start somewhere and gain experience cumulatively.

The important issue is that lack of experience in these areas does not nullify the expertise of the psychologist, though robust cross-examination may seek to unsettle the psychologist on this matter and, if this happens, to raise doubts in the mind of the court as to the standing of the psychologist’s evidence. All that is necessary is for the psychologist inexperienced in court-work is to acquit himself or herself appropriately, not to be disconcerted by questioning as to what experience he or she has had in giving evidence and to be extremely well-prepared.

2.12 Psychologists must also ensure that they are well prepared and clear in the evidence being given. This refers to both written and oral evidence.
3. Receiving Instructions

3.1 Receiving instructions is the term which describes an explicit request to assist in a case by fulfilling the role of expert witness. The identity of the instructing body necessarily differs, e.g. a firm of defending solicitors, the Crown Prosecution Service managing the prosecution of the accused, a local authority legal department, or the court itself.

3.2 The solicitor or instructing body will find it useful to have an itemised estimate of the time you will take with the piece of work. This should include an estimate for:
- Receiving instructions
- Reading material
- Examining audio or visual exhibits
- The assessment
- Analysis, scoring tests
- Research / checking accuracy
- Attending conferences
- Meetings to review
- Writing the report
- Travel time

3.3 It is necessary to be clear as to what is being requested. The phrase a ‘Psychologists report’ does not carry a sufficient degree of specificity. The psychologist should ask for more detail, and in particular needs to know in which way psychology might relate to the particular case. Also the psychologist needs to know details of the specific legal issues and a summary of the case in addition to clarification of documentation such as solicitors Brief to Counsel. In other words, what is being asked for?

3.4 Is there Advice from Counsel? If so the psychologist is entitled to see it before agreeing to take on the case. This will enable the psychologist to judge that they are in fact able to offer expert comments in this field. It may also however influence the thinking of the psychologist who should be remaining objective.

3.5 The psychologist needs to know exactly what is being asked of him or her and to have to hand all the relevant materials which will be supportive.
5. Confidentiality

5.1 If or when the psychologist is placed under oath as a witness, no privilege of confidentiality of information exists and the psychologist is, under circumstances, bound in principle to disclose all information.

5.2 Once the above point has been reached there is no ‘confidentiality’ at all and a psychologist is not in a position ever to offer or guarantee confidentiality to a party.

5.3 Even information gained originally for wider professional or ‘clinical’ purposes is not protected or privileged once the psychologist is under oath, and lack of divulgence may place the psychologist in contempt of court.

5.4 When a psychologist has been instructed by a party to litigation or his or her representatives, and prior to a court hearing, the psychologist should maintain confidentiality of information, including results of investigations, and report only to those instructing him or her.

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

5.6 Discussion with other ‘experts’ concerning the specifics of the case, and particularly with colleagues instructed by other parties, should only take place with the expressed (and preferably written) permission of those instructing the psychologist.

5.7 When a psychologist has been instructed directly by the Court or the Crown Prosecution Service the psychologist is required to report or comment on any or all aspects of the case which appear to the psychologist as an expert in a field to be relevant or pertinent. In such circumstances, the psychologist is not in a position to offer ‘confidentiality’ to any person, and should make this position clear to any party with whom he or she has contact during psychological investigations.
6. **Conflict of Interests**

6.1 Psychologists employed by a private or public body may experience conflict when the wishes and needs of the employer run counter to what is being asked by the 'client'. The financial aspects of the work need to be agreed, explicitly, with employer and solicitors. Specifically, the psychologist needs to identify whether this work is private work or part of his or her contract.

6.3 The individual psychologist should feel free to negotiate a change to this contract if it is felt to be ethically appropriate to do so. This may involve ending the contract and renegotiating payment.

6.4 The psychologist needs to be clear that s/he is acting as an expert, not as an advocate. With regards to cases involving children, this is particularly apposite.

6.6 What is the contractual arrangement? This needs to be clarified and the solicitors and/or Court needs to be aware of this.

6.7 Also, the psychologist should be clear with his or her client as to their relationship, roles and responsibilities, including consideration of ethical issues.

6.8 The psychologist should spell out his or her independent position.

6.9 The psychologist should not be manipulated into producing a biased or compromised report or evidence.
7. Appearance at Court

7.1 Psychologists should always arrange to arrive at the court in good time. It is the case that expert witnesses are permitted to sit in court whilst other experts are giving evidence both in the process of *voir dire* and when the trial itself is underway. Psychologists should wherever possible sit in the court to listen to what is being said and to prepare themselves further to give evidence in chief and to cope with cross-examination on issues raised by a preceding witness or witnesses.

7.2 Arriving in good time is not the same as arriving a long time ahead of giving evidence. Counsel frequently ask experts to attend court on a “just in case” basis, i.e. well ahead of the expected time that the expert actually enters the witness box to give evidence.

7.3 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 endorsement of a prolonged period of waiting which is justified.

7.4 Psychologists should think ahead concerning court attendance. The solicitor should be asked on what day exactly it is anticipated the psychologist will start giving evidence and how long it is likely to take as the duration may well have been revised since the giving of original instructions.
8. **Practical and Financial Considerations**

8.1 Fees should be negotiated in advance with the solicitor or instructing body.

8.2 If legally aided the psychologist should ensure that the solicitor has authority for payment of experts' fees. It is appropriate to ask to see details. The psychologist should be sure that they understand the terms of the negotiated payment and the processes of Legal Aid, as the solicitor may not have ultimate control of payment. The fee may be affected by taxation.

8.3 Direct payment by the client (individual or group) should be considered to be part of the contract.

8.4 The psychologist needs to clarify who is resourcing his or her time. Not only time writing the report is pertinent, but also materials; staff; giving evidence and waiting. The psychologist and employer need to be clear.

8.5 It is important for psychologists to know that the Court Service will not reimburse expert witnesses called by the defence for such work in support of counsel or indeed waiting inordinate periods to give evidence. It will disregard any claim for reimbursement for long periods apparently waiting unless it can be demonstrated that the delay was unavoidable. The situation in regards to cases of personal injury vary from this as the defence is normally funded by an insurance company and fees can be readily obtained.

8.6 Once the expert is at court and waiting to be called, counsel often seek to capitalise on the expert’s ready availability. Psychologists who are unaware of this practice may well find themselves confronted with conferencing on a continuous basis, being asked to evaluate the emergent evidence opposing psychologist and to advise counsel on issues deemed to merit specific cross-examination. There is nothing underhand or untoward about doing this work. Resourcing it creates substantial problems when a psychologist is instructed by the defence. It is no problem when instructed by the Crown Prosecution Service or in cases of personal injury.

8.7 If counsel is adamant about being in attendance well in advance of giving evidence psychologists should ask the solicitor for details of the firm’s position concerning the settlement of experts’ costs for attendance at court. It is essential for the psychologist to demonstrate awareness and assertion at this stage otherwise there is a distinct risk of the psychologist, or his or her employer, being faced with a protracted period of absence from the psychologist’s usual base and being left to pick up the costs involved with little prospect of recovering even accommodation or travelling costs for the discounted days.

8.8 In those situations where a psychologist is unable to commit him or herself to an unspecified or extended period of time at Court some solicitors will consult with counsel and subsequently amend the period which the psychologist is requested to attend. Others will continue with the requested attendance dates but indicate they will cover the entire
sum incurred. If the solicitor does not indicate this, the firm should be reminded that the Court Service does not remunerate excessive waiting periods. It should be:

- asked to give an undertaking that the solicitor will settle the total invoice immediately in respect of attendance at court.
- informed that the psychologist will make a claim in due course to the Court and any sums paid by the Court will be forwarded to the solicitor.

8.9 Psychologists should make sure that they keep copies of all receipts with a bearing upon attendance at court. They should also be aware that the application of Court Service rules for remuneration of expert witnesses’ claims varies greatly from court to court. It is particularly important to note that some courts apply strict upper limits on accommodation costs and reimbursement of travelling time.

9.0 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.

9.1 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 CPS. In the case of the Forensic Science Service personnel the rate is £45 per hour at the time this document was prepared.

9.2 Legal Aid cannot be applied for retrospectively to cover services other than the giving of evidence but which was conducted at court, e.g. conferencing, examining further written evidence and exhibits. Unless the psychologist has obtained prior undertaking by the solicitor that all aspects of attendance at court will be reimbursed, the only option is to submit a separate invoice in the hope that approval for payment will be made at taxation.