



Council
1 May 2014

Professional Conduct Committee Practice Note: Evidence

Classification	Public
Purpose	For decision
Issue	The paper proposes the introduction of a Practice Note to assist the Professional Conduct Committee (PCC).
Recommendation	To approve the Practice Note at Annex A to this paper.
Financial and resourcing implications	Costs could be incurred by the use of video-link evidence and the provision of a legal representative for cross examination purposes outlined at paragraph 41 of the Practice Note. Further information is provided in the paper.
Equality and diversity implications	The Practice Note includes information about using special measures for witnesses who have intelligence and social functioning impairments or mental or physical disorders, or who may be otherwise vulnerable.
Communications implications	Views from the PCC and FTP users' forum have been sought and taken into account in the draft before Council.
Annexes	Annex A – PCC Practice Note: Evidence Annex B – Extract from the Fitness to Practise Policy Committee meeting held on 16 January 2013 Annex C – Extract from the PCC Notice to osteopaths and legal representatives, November 2011
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Background

1. The Professional Conduct Committee (PCC) considers allegations about a Registrant's fitness to practise at hearings. The procedures followed at the hearing are set out in the GOsC (Professional Conduct Committee) (Procedure) Rules 2000 (PCC Rules). These provide some but limited information about the evidential procedures that should be followed by the PCC at a hearing.
2. In October 2013, the Council agreed to replace the PCC's Notice to osteopaths and legal representatives with Practice Notes. It agreed the Practice Note *Preparing for a PCC hearing* and agreed that a further note should be drafted to cover the use special measures and the way in which witnesses give their evidence. The draft Practice Note at Annex A aims to achieve this.
3. The Practice Note will form part of a suite of Practice Notes that have and are being prepared for the fitness to practise committees.

Discussion

4. The Practice Note is designed to guide the PCC through the evidential procedures that may arise during a PCC hearing. It will help the PCC achieve consistency at hearings and allow parties and witnesses to know how a hearing may proceed.
5. The rules of evidence that should be followed at a PCC hearing are not clearly defined in the PCC Rules. It has been necessary, therefore, to also draw upon relevant case law and legislation and the guidance provided by other healthcare regulators and the Medical Practitioners Tribunal Service (MPTS).

Video-link evidence

6. In January 2013, the Fitness to Practise Policy Committee considered the use of video-link evidence at PCC hearings and the extract of the relevant Minute is attached at Annex B. This clearly identifies that the use of video-link evidence should made available so that witnesses can give evidence remotely for their convenience. The Fitness to Practise Policy Committee was provided with cost information at the time that it made this decision.
7. The GOsC does not currently have the facilities available to provide a video link. Our options would be to either purchase the equipment (a cost of £5-7,000) so that it can be made available at hearings (and other meetings) that are held in the GOsC offices, or to hire the equipment (a cost of £200 per day) when it is needed.
8. The Practice Note explains that the party calling the witness who will give their evidence via a video-link will be responsible for the costs of those facilities in the witness's location. This cost is likely to outweigh or be equal to travel and accommodation costs of the witness attending the hearing, which would also be met by the party calling them.

9. The Minute of the January 2103 meeting recommends that a policy should be produced setting out the circumstances in which a witness may give evidence via video-link and provides guidance on how the process should be managed. It is hoped that the information provided in the Practice Note achieves this. No other policy or guidance has been drafted.

Special measures

10. The PCC's approach to special measures was set out in its Notice to osteopaths and legal representatives. The relevant extract can be found at Annex C. The Practice Note expands upon this and provides a clearer guide of the qualities of a vulnerable or intimidated witness and the types of special measures that could be employed to assist them.
11. Provision of special measures at fitness to practise hearings, where required, is an important part of complying with our duties under equalities legislation.

Cross examination of complainants in cases of a sexual nature

12. The Practice Note specifically prohibits an accused Registrant from cross-examining a complainant who has made allegations of a sexual nature. In such circumstances the Registrant will be asked to appoint a legal representative. If the Registrant cannot appoint one, the Note requires the GOsC to appoint one.
13. It is not common for a Registrant to represent themselves at a PCC hearing as they will often be provided with a legal representative via their professional indemnity insurance. This situation will not, therefore, be common. When it does occur, however, there may be a cost for the GOsC if it has to appoint a legal representative. The legal representative's role would be limited to the cross-examination of the relevant witness and would not be extended to provide representation throughout the hearing. The representative would need to prepare the cross-examination and receive instructions from the Registrant in relation to it. Taking account of these preparation costs and the attendance at a hearing to cross-examine the witness, it is envisaged that these costs would be in the region of £1-2,000.

Views from the PCC and the FTP users' forum

14. The draft Practice Note was provided to Chair and Panel Chairs of the PCC, and to the FTP Users forum which includes GOsC and Defence representatives who regularly appear before the PCC.
15. The Chair of the PCC noted that "The Practice Notes are building up into a most useful set of information and guidance for the parties and the PCC."
16. A GOsC representative stated "these are excellent documents that will provide extremely useful guidance to all. They are an entirely appropriate extension of the Rules and lay down clear expectations on some key issues."

17. A number of minor drafting amendments and comments were made which have now been incorporated into the draft before Council.
18. Comments and suggestions were also received on the following paragraphs of the draft Practice Note:
 - a. Paragraph 8. Concern was expressed about the wording used in relation to the standard of proof.
 - b. Paragraph 10 should be amended to make it clear that a certificate is sufficient to enable the Committee to find the fact of the conviction to be proved.
 - c. Paragraph 28. Reference was made to the current practice of asking witnesses to read out their statement as evidence in chief.
 - d. Paragraph 31. Queries were made about why the use of Skype should not be permitted, given the cost of the service.
 - e. Paragraph 40. A divergence of views as to whether the paragraph should make reference to any scope for prior agreement between the parties.
 - f. Paragraph 42. Reference should be made to the issues of cross examination and the need for the Committee to attach weight to the evidence given.
 - g. Paragraph 44. Clarification should be made as to who is to be responsible for the costs of legal representation.
 - h. Paragraph 49. The Committee was not comfortable with the expert giving an opinion on the "ultimate question" and would prefer the guidance to state "an expert is not expected to comment on UPC..."
19. In addition, it was suggested that the draft Practice Note should emphasise that all legal advice should be provided (or repeated) in public, and that the parties should have the opportunity of commenting on the that advice before the Committee takes its decision.

Consideration by the Osteopathic Practice Committee (OPC)

20. The draft Practice Note was considered by the OPC at its meeting on 27 February 2014.
21. The OPC agreed with the comments relating to a, b, f and g above. The draft before Council incorporates changes made to these paragraphs, and the wording of paragraph 8 has been checked against the relevant case law.
22. However, the OPC did not agree with the comments relating to c, d, e and h above.

23. In relation to paragraph 28 of the draft Practice Note, the OPC was strongly against the current practice of reading witness statements into the record. Nor was it persuaded that the decision as to whether to examine the witness in chief, or to have the witness statement read, should be at the discretion of Counsel acting for the GOsC. The OPC strongly recommended that all witness evidence should be by way of examination- in-chief and cross-examination.
24. In relation to paragraph 31 of the draft Practice Note and the use of Skype, the Committee noted concerns about the unreliability of the medium expressed in the minutes of the Fitness to Practise Policy Committee dated 16 January 2013. The Committee also noted concerns about the security of the medium, and therefore decided not to recommend the inclusion of references to Skype in the draft Practice Note.
25. The OPC recommended that the amended Practice Note should be approved by Council.

Recommendation: to approve the Practice Note at Annex A to this paper.

Professional Conduct Committee

Practice Note 2014/04

Evidence

Effective from: 1 May 2014

Introduction

1. This Practice Note sets out the evidential considerations that apply to hearings before the Professional Conduct Committee (PCC) of the General Osteopathic Council (GOsC).
2. The procedures followed by the PCC are set out in section 22 of the Osteopaths Act 1993 (the Act), and in the GOsC (Professional Conduct Committee) (Procedure) Rules 2000 (PCC Rules). Both of these documents are available in full on the GOsC website: www.osteopathy.org.uk.
3. The PCC has the power under paragraph 21 of the Schedule to the Act to regulate its own procedures. It uses this power to manage the procedures that are followed at a hearing.
4. The parties to the PCC hearing are the GOsC (bringing the case against the registrant) and the registrant. Both parties are entitled to be, and are usually, legally represented. The information in this Practice Note will assist both parties and their legal representatives in meeting the requirements of the legislation and the PCC's expectations. It is not, however, a comprehensive guide and the parties should also consult the full relevant legislation mentioned above.
5. This Practice Note should be read in conjunction with the Practice Note 'Preparing for the Hearing.'

Burden of proof

6. The burden of proving the facts alleged (the alleged events) is on the Council. The Registrant does not need to prove anything.

Standard of proof

7. The standard of proof used in regulatory proceedings to decide the facts alleged against the registrant, including those before the PCC, is the civil standard.
8. There is only one unvarying civil standard, which is the balance of probabilities. This means that if the PCC, on the evidence, is satisfied that it is more likely than not that the facts are true or the events occurred, then it will find them proved.

9. The standard of proof applies to those alleged facts that are in dispute. It does not apply to the decision as to whether the facts that have been found proved amount to the allegation¹. That is decided by the PCC applying its judgment, based on its expertise and knowledge.
10. The Standard of Proof does not apply to the decision on sanction or the decision on whether or not an Interim Suspension Order should be imposed.

Evidence of a criminal conviction

11. In accordance with Rule 26(b) of the PCC Rules, the production of a certified copy of a certificate of conviction is sufficient to enable the Committee to find the fact of the conviction proved.

Admitted facts

12. At the start of the hearing, the allegation and facts will be read out. If the allegation is that the Registrant has been guilty of Unacceptable Professional Conduct or been Professionally Incompetent, the Chair will ask the Registrant to confirm whether they admit any or all of the alleged facts. If so, the PCC should record that those facts have been proved, in accordance with Rule 27 of the PCC Rules.

Affirmation and Oaths

13. Each person who gives oral evidence will give that evidence on oath or be affirmed.

Summoning witnesses

14. The PCC has the power to compel a witness to attend a hearing and give evidence and/or produce documents in their possession or under their control. These powers are set out in Rule 57.
15. The PCC can decide on its own motion to issue a witness summons. Either party can apply to the PCC for a witness summons to be issued. Such applications should be made to the PCC well in advance of the relevant substantive hearing.
16. The party making the application should inform the PCC of the steps it has taken to secure the witness's attendance at the hearing. They should also explain why the witness's evidence is necessary.
17. If the summons is issued, the party seeking it will be responsible for serving the summons on the witness. This must be done at least seven days in advance of the date on which they are summonsed to appear. The party

¹ Unacceptable Professional Conduct; Professional Incompetence or that a Criminal Conviction is material to the Registrant's practise of osteopathy.

seeking the summons will also be responsible for the witness's expenses for attending the hearing.

18. Any person who is summonsed must be informed that if they fail to comply with the summons, without reasonable excuse, they will be committing an offence under section 32(2) of the Osteopaths Act 1993.

Admissibility of evidence

19. When exercising its discretion to admit evidence, the PCC will consider whether the evidence on which a party seeks to rely is relevant to the allegations being considered by the PCC, and whether it would be fair to the Registrant and in the interests of justice to admit it.
20. Any questions of admissibility of evidence should be decided by the PCC, having first received advice from its legal assessor.

Documentary evidence

21. Rule 57 of the PCC rules provide for the PCC, if it is satisfied that the interest of justice will not be prejudiced, to admit into evidence without strict proof, copies of documents which are themselves admissible, photographs, certificates of conviction and sentence, the records and Registers of the GOsC, notes of proceedings before the PCC and before other tribunals, or any other material.
22. The bundle of documentary evidence before the PCC will often contain:
 - Signed witness statements
 - Medical records or reports
 - Expert reports and a joint statement prepared by the experts.
23. All written witness statements must be signed and dated, and must contain a statement of truth.
24. The evidence of some witnesses, as set out in the statement of the witness may not be disputed and may be agreed by the parties in advance of the hearing without the need to call the witness.
25. All documentary evidence should be provided to the other party and the PCC in advance of the hearing and in accordance with Rule 13. Any party who wishes to rely on documentary evidence which has not been served in accordance with this Rule, will need the PCC's leave to admit that evidence. The PCC should hear from both parties and seek advice from its legal assessor before deciding whether to provide or refuse its leave.

Oral evidence

26. Witnesses may attend the hearing to give oral evidence. Oral evidence is generally given in four stages: the witness will first give their evidence in chief; they may then be cross-examined by the other party; they may then be re-examined and, finally, the PCC may also ask questions of the witness. With the leave of the Chair, the legal assessor may also ask questions of the witness. The parties may ask further questions arising from any questions asked by the PCC or the Legal Assessor.
27. Unless the witness is the Registrant or an expert witness, they should not be allowed to observe the hearing until they have completed their evidence and been formally released by the PCC.
28. Any witness that is called to give evidence must first be examined by the party calling that witness. The witness's signed written witness statement shall not be allowed to stand as their evidence-in-chief unless that witness is a vulnerable witness giving evidence subject to special measures in accordance with paragraph 42.
29. When there is a break in the witness's oral evidence, the Chair should warn the witness that they remain under oath and must not talk to anyone about the case until they have completed their evidence and been formally released by the PCC.

Evidence provided via a video-link

30. A party may apply to the PCC for a witness to give their evidence via a video-link. This may be because the witness is vulnerable or because of the witness's location or convenience.
31. Video-link facilities are not routinely provided at GOsC hearings and applications for evidence to be given this way should be made well in advance of the hearing. The GOsC will need to be satisfied that the arrangements are of a suitably high-quality; the use of Skype is not currently permitted. Applications made during the hearing may be refused or may result in an adjournment of the hearing.
32. When considering an application for the use of a video-link for a vulnerable or intimidated witness, the PCC should refer to the section on vulnerable and intimidated witnesses and special measures in this Practice Note.
33. When considering an application for the use of a video-link for non-vulnerable witnesses, the PCC should consider whether video-link evidence will be more likely to be beneficial to the efficient, fair and economic disposal of the case. For example, there may be arguments in favour of receiving evidence via a video link from a witness based overseas and where the cost of the individual's travel to the hearing is expensive.

34. The PCC should hear from both parties and receive advice from its legal assessor before making a decision on whether the application to use a video-link should be granted.
35. Witnesses give evidence in a controlled environment and it is important that this environment remains when witnesses give their evidence via a video-link. Normal practice, such as administering oaths and ensuring that the witness has access to any documents to which the parties will refer during their evidence, must be maintained.
36. Before they begin giving evidence, the witness should be asked to identify any person who is the room with them and give the reason for that person's presence. A valid reason for the presence of another person would include the provision of support for a vulnerable witness. It is important that the person present is not also a witness in the case.
37. Provided that there is no reason why the person should not be present whilst the witness gives their evidence, the Chair should ensure that the person understands that they cannot speak to, pass notes or give any signals to the witness whilst they give their evidence. The person should be asked to sit where they can be seen by the panel.
38. It is the responsibility of the party calling the witness to ensure that they have access to the relevant documents. It is also the responsibility of that party to identify a suitable video link facility and location. The party calling the witness will be responsible for the costs of those facilities and location.

Vulnerable or intimidated witnesses

39. The PCC Rules do not identify a category of person who may be considered vulnerable or intimidated. The PCC can be guided, however, by the definitions provided in the Youth Justice and Criminal Evidence Act 1999, Safeguarding Vulnerable Groups Act 2006 and Protection of Freedoms Act 2012. It can also be guided by the Rules of other regulatory bodies. These include the following categories of witness as vulnerable or intimidated:
 - Any witness aged 17 or under at the time of the hearing;
 - Any witness whose quality of evidence is likely to be diminished because they:
 - are suffering from a mental disorder as defined by the Mental Health Act 1983,
 - have a significant impairment of intelligence and social functioning,
 - have a physical disability or are suffering from a physical disorder; or
 - Complainants in cases where the allegation against the Registrant is of a sexual nature

40. The decision to allow special measures is at the discretion of the PCC. When a vulnerable witness is to give evidence at hearing, the party calling that witness can apply to the PCC for a special measure or a combination of measures to be used. The PCC, in deciding whether to grant the application, will want to be satisfied that the special measure or combination of special measures is likely to maximise the quality of the witness's evidence.

Special measures

41. Special measures are a series of provisions that help a vulnerable or intimidated witness give their best evidence and to help relieve some of the stress associated with giving evidence. These measures can apply to both party's witnesses, but not the Registrant.
42. Special measures are used at the discretion of the PCC and may include:
- Use of a screen to shield the witness from the Registrant and public
 - Use of a video-link so that the witness can give their evidence from a different room or location to the hearing
 - The ability to give evidence in private, as set out in Rule 17 of the PCC Rules
 - Video recorded interview that will stand as the witness's evidence-in-chief²
 - Use of communication aids, such as an interpreter or intermediary.

Cross-examination of complainants in cases of a sexual nature

43. In cases involving allegations of a sexual nature, the accused Registrant should not be allowed to cross-examine the complainant.
44. If the Registrant is representing themselves at the hearing, they should be asked to appoint a legally qualified person to cross-examine the witness on their behalf. If the Registrant cannot appoint such a person, the GOsC will appoint one to act on their behalf and to cross-examine the witness. In such circumstances, the GOsC will pay the reasonable costs of legal representation for this limited purpose.

² Where a witness gives evidence by way of recorded interview, the Committee will attach such weight to that evidence as it sees fit, in the light of any arrangements for the testing of such evidence by way of cross examination.

Expert evidence

45. Either party may appoint an expert to provide an opinion on the matters that are within their expertise to assist the PCC. Opinion evidence of an expert is admissible when it relates to a matter that requires specialised knowledge.
46. The requirements placed on an expert witness that appears before the PCC are set out in the Practice Note: Requirements on expert witnesses in fitness to practise proceedings.
47. Expert witnesses are not required to read their report into the record.
48. Where each party instructs an expert, those experts will be asked to produce an agreed joint statement setting out the areas that are agreed upon and those that remain in dispute. This joint statement and each expert's written report will be provided to the PCC in advance of the hearing.
49. Although an expert may comment on the ultimate question – that is whether the Registrant has been guilty of Unacceptable Professional Conduct or Professional Incompetence – this decision is a question of judgment for the PCC.
50. Where there are two experts who give conflicting evidence, the PCC will decide whose evidence and opinions it accepts. The PCC should explain in its reasons why it preferred the evidence of one expert over another.

Character evidence and testimonials

51. Evidence as to the Registrant's character will usually be provided at the sanction stage of the proceedings and as part of the Registrant's mitigation. In some cases, however, this evidence may be relevant and admissible at an earlier stage.
52. Where the facts alleged requires proof of a state of mind, such as dishonesty or sexual motivation, then evidence of good character may be relevant and taken into account by the PCC when deciding whether the alleged facts are proved.

Advice provided by the Legal Assessor

53. All advice provided by the Legal Assessor should be provided (or repeated) in public.
54. The parties shall have the opportunity of commenting on the advice provided by the Legal Assessor before the Committee makes a decision based upon that advice.

General Osteopathic Council

Fitness to Practise Policy Committee

Extract from the minutes of the meeting held on 16 January 2013

ITEM 5 – WITNESSES’ EVIDENCE AT HEARINGS BY VIDEO LINK OR SKYPE

10. The Committee was asked to consider whether a policy should be developed relating to the ability of witnesses to give evidence via video link or Skype at PCC hearings. It noted that the purpose of such a policy would be for witnesses’ convenience and not to save costs. This policy was not to be used in place of a determination as to whether a witness requires special measures.
11. The Regulation Manager explained that this issue first arose when the PCC allowed a registrant to give evidence at a review hearing via Skype. The Council had concerns about this decision at the time for a number of reasons, which had been highlighted in the paper. There was no policy providing for witnesses to give evidence in this way.
12. The Committee considered the different options available for witnesses to give evidence at hearings and agreed that the option of giving evidence remotely for convenience should be made available and a policy should be produced setting out the circumstances in which a witness may give evidence via video link and provides guidance on how the process should be managed.
13. It agreed that Skype was not a suitable medium because of its unreliability and that it should not, therefore, be used. A more stable video-link should be used if deemed appropriate.

Extract from the Professional Conduct Committee's Notice to osteopaths and legal representatives (November 2011)

Measures for witnesses with special needs or who are vulnerable

The GOsC is concerned to provide for the comfort and access of witnesses with special needs, which may arise, for example, due to a witness's age, physical or mental disability, fear or language. The GOsC is also concerned to make appropriate arrangements for vulnerable witnesses and, for example, can arrange the use of screens where the allegation involves a matter of a sexual nature.

The GOsC will seek to accommodate the needs of witnesses on an individual basis but requires sufficient notice of the witness's condition and needs in order to do so. Therefore, as soon as reasonably practicable after becoming aware that a witness has special needs or is vulnerable, the relevant party should make an application to the PCC for appropriate special measures to be provided.

So that all witnesses are treated fairly and consistently, the applicant must, where possible, provide independent evidence in support of the claim to special needs or vulnerability that justifies the special measures sought. The GOsC's Regulation team will be happy to advise on such applications.

Procedure at PCC Hearings

The PCC, in exercising its specific statutory power enabling it to regulate its own procedures, has decided that:

Evidence-in-Chief and Written Witness Statements

Written witness statements may stand as evidence-in-chief. In such circumstances, the witness should be asked to read their statement into the record and collateral questioning will still be allowed, as appropriate, with permission from the PCC.

The Parties should submit witness statements to the PCC 6 clear days before the day of the hearing.

Witness statements as evidence-in-chief should be addressed solely to the allegation and should not address matters which are not relevant to the allegation. Matters which are not relevant include personal mitigation where it is not relevant to the allegation.

Expert witnesses are not required to read their report into the record.