



Council
1 May 2014

Practice Note – Requirements on expert witnesses in fitness to practise Proceedings.

Classification	Public
Purpose	For decision
Issue	This paper proposes the introduction of a Practice Note setting out clearly the expectations on persons acting as expert witnesses in proceedings before the Investigating, Professional Conduct and Health Committees.
Recommendation	To agree the Practice Note annexed to this paper.
Financial and resourcing implications	No material implications.
Equality and diversity implications	None identified. Equality monitoring in relation to fitness to practise cases is part of the draft Quality Management and Assurance framework.
Communications implications	None identified.
Annex	Draft Practice Note on requirements on expert witnesses in fitness to practise proceedings
Author	David Gomez

Background

1. Expert evidence is a feature of proceedings before the Professional Conduct and Health Committees. Such evidence may take the form of a written expert report and oral testimony from the report author.
2. In some cases, expert reports may be required at an early stage in order to understand the concerns raised about a registrant, and in such cases, the papers before the Investigating Committee may also include an expert report.
3. Members of the fitness to practise committees have expressed concern about the variable quality of expert evidence adduced before them, and at the all members day in November 2013, members of the Professional Conduct and Health Committees suggested that they would find it helpful if the GOSc provided a Practice Note on expert witnesses.

Discussion

4. In recent years, health care regulatory case law has highlighted the duties and responsibilities of health care professionals giving evidence in Court proceedings
5. Fitness to practise proceedings are classified as civil proceedings (*Wickramasinghe v United Kingdom [1998] E.H.R.I. 398*). Currently, the GOSc's fitness to practise committees usually sit in London. Therefore, in drafting the practice note, annexed to this paper, we have taken into account the requirements of Part 35 of the High Court Civil Procedure Rules 1998 (as amended) and associated Practice Direction, as well as the relevant case law.
6. A failure by an expert to comply with the guidance on expert evidence that has been developed by the Courts over the years may have serious consequences. It may hinder a proper assessment of the case by the legal advisers to the parties and by the non professional members of the panel. Misleading expert evidence may also increase costs by requiring competing evidence to be called at a hearing on issues which might, in reality, be non-contentious.
7. It is therefore of critical importance that all those involved in the process of producing expert evidence have a clear understanding of the rules and principles involved.
8. The draft Practice Note sets out a number of principles with which the expert will be expected to comply. These include acknowledgement of his or her primary duty to the Committee (rather than to the party instructing the expert); the requirement to act only within his or her area of expertise; the requirement to give objective opinion and to state the facts on which that opinion is based; and the requirement to ensure that no material facts which might detract from that opinion are omitted.

9. The Practice Note encourages the experts to meet with experts instructed by the opposing party in advance of the hearing, in order to seek to identify the areas of agreement and dispute and to narrow the issues that the Committee would have to decide.
10. The Practice Note also sets out the matters that must be included in the expert report and includes a pro-forma declaration which must be signed by the expert.
11. The Practice Note sets out the existing law and best practice approved by the Courts in relation to expert evidence. As such, the GOsC does not consider that there is any requirement for formal consultation on the draft. However, as a matter of courtesy, the Practice Note was circulated to the Chair and Panel Chairs of the Professional Conduct Committee, the Chair of the Investigating Committee (IC) and to the FTP users forum.
12. 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."
13. A number of drafting comments were made by the Chairs and Panel Chairs which have now been incorporated into the draft before Council.

Consideration by the Osteopathic Practice Committee (OPC)

14. The draft Practice Note was considered by the OPC at its meeting on 27 February 2014.
15. In addition to the drafting comments, the OPC considered the following substantive comments made by the Committee Chairs and Panel Chairs:
 - a. inclusion of a reference to the need for sufficient explanation of the areas of disagreement between experts to assist the Committee's understanding of the reasons for such disagreement
 - b. inclusion of a reference to the importance of using clear language which is addressed to a lay audience
 - c. clarification at paragraph 16.e of the Practice Note, of the tests or examinations referred to
 - d. inclusion of a reference to the expert having to comply with the requirements of his or her professional body
 - e. clarifying that the requirements set out in the Practice Note apply to both oral and written evidence.

The OPC agreed that these changes should be made, and they have been incorporated into the draft before Council.

16. The OPC considered a further comment that, in relation to paragraphs 16.f and 16.g of the Practice Note, information should be limited to that which had relevance to the status of the expert. However, the OPC considered that all matters and findings should be disclosed to assist the parties and the relevant Committee in assessing the credibility of an expert. This suggested change has therefore not been made.
17. The OPC welcomed the encouragement of the use of joint expert statements and stressed that in cases where expert evidence is adduced, the legal assessors should remind the Committee and the parties that the expert's duty is to the Committee, and not to the party instructing that expert.
18. The OPC considered that the Practice Note would be of assistance to the fitness to practise committees and recommended that the Council should approve the note with the agreed changes.

Recommendation: to agree the Practice Note annexed to this paper.

General Osteopathic Council

Investigating Committee, Professional Conduct Committee and Health Committee

Practice Note 2014/03

**Requirements on expert witnesses in fitness to practise proceedings
Effective from: 1 May 2014**

1. This Practice Note applies to the following statutory committees of the General Osteopathic Council—the Investigating Committee, the Professional Conduct Committee and the Health Committee (‘the fitness to practise committees’).
2. The requirements of this Practice Note apply to experts when providing written and oral expert evidence.

Primary duty of experts in fitness to practise proceedings

3. The primary duty of any person giving written or oral evidence in the role of an expert in proceedings before a fitness to practise committee, is to assist that Committee. This duty takes priority over any duty to the party by whom the expert has been engaged or by whom the expert is to be paid.
4. Experts must only provide an opinion about issues that are within their professional competence and about which they have relevant knowledge and expertise. Where a particular issue falls outside an expert’s area of expertise, this must be made clear.
5. Experts are required to give an objective, unbiased opinion on the issues that they have been asked to address. Experts should alert the party instructing them and the Committee to any potential conflict of interest, as soon as possible.
6. Experts are required to state the facts or assumptions on which their opinion is based. Experts should ensure that they do not omit material facts which could detract from their concluded opinion.
7. Where there is a range of opinion on a particular issue, experts are required to summarise the range of opinion and explain the reasons for their opinion on that issue.
8. Where an expert is advancing a hypothesis to explain a given set of facts, he or she owes a very heavy duty to explain to the Committee that what is being advanced is a hypothesis, and to inform the Committee if this hypothesis is controversial.

9. If an expert changes his or her opinion as a result of having heard or read the evidence of other witnesses or the views of other experts in the case, the expert should tell the Committee and the parties of this, without delay.
10. If the opinion of an expert is qualified in any way, the expert must make this clear.
11. Where both parties have instructed experts in proceedings, the experts should endeavour to meet well in advance of any hearing in order to discuss their reports and opinions and to agree a joint statement setting out the areas that are agreed upon and those that remain in dispute.
12. Where the experts are unable to agree on a particular issue, there should be sufficient explanation of the areas of disagreement to assist the Committee's understanding of the reasons for such disagreement.
13. If an expert is asked to comment on the views of other experts, he or she should:
 - a. summarise the areas of agreement and disagreement; and
 - b. indicate the evidence which supports or undermines the views expressed.
14. Experts should comply with any directions, including case management directions issued by the fitness to practise committee.
15. Experts should comply with any relevant requirements and standards set by their professional bodies, provided that such requirements and standards do not conflict with the primary duty of the expert to the Committee.

Format of the expert report

16. All expert reports presented in evidence to a fitness to practise committee must:
 - a. be addressed by the expert to the Committee, not to the party instructing the expert;
 - b. set out the instructions received by the expert (both written and oral);
 - c. set out the questions on which an opinion is sought;
 - d. set out the materials provided and considered, and the materials which are relevant to the opinions expressed or upon which those opinions are based;

- e. (where tests or examinations have been conducted by another person, such as Assessments of Competence or medical tests), provide information about who conducted such tests and their qualifications, the methodology used and whether or not the tests or examinations were conducted under the supervision of the expert;
 - f. set out the expert's academic and professional qualifications and relevant experience;
 - g. confirm whether or not any adverse findings have been made against the expert by a Court or regulatory body;
 - h. set out any information which may adversely affect the professional competence and credibility of the expert, including any convictions or cautions received by the expert, or whether there are any pending proceedings against the expert;
 - i. contain a signed declaration in relation to the duties of an expert witness, in the form set out at Annex A; and
 - j. contain a signed statement of truth in the form set out at Annex A.
17. Expert reports must contain numbered paragraphs and page numbers.
18. Expert reports should be written in clear and simple language, addressed to a lay audience.
19. Expert reports must identify any relevant professional literature and material relied upon by the expert in reaching an opinion. All relevant material must be listed in the report and hard copies must be appended to the report wherever possible.

Annex A to Practice Note: 3/2014

Declaration in relation to duties of an expert and statement of truth

Duty of the Expert Witness

I declare that:

1. I understand that my primary duty in furnishing written reports and giving evidence is to assist the fitness to practise committees of the General Osteopathic Council and that this takes priority over any duties which I may owe to the party by whom I have been engaged or by whom I have been paid or am liable to be paid. I confirm that I have complied and will continue to comply with this duty;
2. I have endeavoured in my reports and in opinions to be accurate and to have covered all relevant issues concerning the matters stated, which I have been asked to address, and the opinions expressed represent my true and complete professional opinion;
3. I have endeavoured to include in my report those matters of which I have knowledge and of which I have been made aware which might adversely affect the validity of my opinion;
4. I have indicated the sources of all information that I have used;
5. I have wherever possible formed an independent view on matters referred to in my report;
6. where I have relied upon information from others, I have disclosed this in my report;
7. where there is a range of opinion on a particular matter, I have summarised the range and provided reasons for my own opinion;
8. where I am not able to give my opinion without qualification, I have stated the qualification;
9. I will notify those instructing me immediately and confirm in writing if, for any reason, my existing report or opinion requires any correction or qualification;
10. I understand that my report, subject to any corrections before swearing as to its correctness, will form the evidence which I will give under oath or affirmation, and that I may be cross-examined on my report by a cross-examiner assisted by an expert;

11. I confirm that I have not entered into any arrangement whereby the amount or payment of my fees, charges or expenses is in any way dependent upon the outcome of this case.

Signed:.....

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.

Signed:.....