Psychologists as witnesses: background and good practice in the delivery of evidence

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Online Publication Date: 01 June 2008

To cite this article: Ireland, Jane L. (2008) 'Psychologists as witnesses: background and good practice in the delivery of evidence', Educational Psychology in Practice

To link to this article: DOI: 10.1080/02667360802019172
URL: http://dx.doi.org/10.1080/02667360802019172

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Psychologists as witnesses: background and good practice in the delivery of evidence

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(Received 30 July 2007; final version received 25 October 2007)

An outline of the background to the provision of psychological evidence within legal settings will be provided, with attention to formal and quasi-court settings (e.g., tribunals). Key points of relevance to psychologists and to educational psychologists in particular will be illustrated, including guidelines for defendable written and oral evidence. The Civil Procedure Rules and their application to expert witnesses will be used to indicate the standards for witness evidence. The paper will conclude by outlining the significance of distinguishing between process and content. The importance of presenting with expertise both in content (e.g., qualification as an educational psychologist) and court process is highlighted.

Keywords: civil procedure; expert witness; oral testimony; written testimony

Introduction

Educational psychologists can provide vital witness evidence in proceedings involving children. Reflecting this, a plethora of independent psychological consultancies which employ educational psychologists have developed and serve the courts. Educational psychologists are particularly favoured within the family court system when assessments of children in need are required, and in special educational needs and disability tribunals (SENDISTs), where they are identified as possible expert witnesses (Henshaw, 2003). The current paper outlines the background to the delivery of psychological expertise within formal settings such as courts and tribunals, with a primary focus on achieving best practice with regards to both written and oral evidence. To achieve this, the paper draws on some of the background to the use of witnesses and associated procedural legislation. The issues raised within this paper are applicable to all psychologists who provide evidence within legal forums. Key learning points, however, are illustrated with examples of practice issues most relevant to applied educational psychologists.

When the term “witness” is applied to psychological practice, it is often used specifically with the term “expert”, which fails to capture the range of witness roles in which applied psychologists may find themselves working. Regardless of whether an applied psychologist is working as an expert or professional (ordinary) witness (or even as a witness of fact), certain principles remain important if psychological evidence is to be delivered in a way that is defensible and in a way which communicates psychological evidence in an effective manner.

Arguably, the provision of evidence has become a more difficult and litigious process for witnesses over recent years, particularly in the light of high profile cases such as that involving

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the evidence of a paediatrician, Professor Roy Meadows, in Regina vs. Angela Cannings (2004). High profile cases such as these have led to an increased drive towards the regulation and improvement of witness evidence, across disciplines. The current imperative to promote good evidence appears restricted to civil courts (primarily family court), with criminal courts only just beginning to regulate this area, and quasi-courts such as SENDISTs not yet producing formal procedures for the delivery of witness evidence. SENDISTs, however, are beginning to see more engagement from educational psychologists due to the challenges of applying the 1996 Education Act to children with learning difficulties, particularly when parents appeal against the placement decisions of LEAs (Henshaw, 2003): the number of independent educational psychologists that will be instructed to provide expert evidence is likely therefore to increase. In 2000–2001, for example, 2728 appeals were lodged by parents compared to 1161 between 1994 and 1995. This has led to the production of guidelines from the LEAs concerning the use of witnesses, what comprises evidence, the nature of pre-hearing reviews, and conduct at hearings (Henshaw, 2003). Thus, the importance of witness work within educational psychology is beginning to increase.

Defining witnesses

Psychologists can find themselves working across three categories of witness: expert, professional, or witness of fact. The expert and professional witness roles are more common for psychologists.

Expert witness

An expert is defined as an individual with experience or knowledge beyond that expected of a typical layperson. They are independently instructed by a court or tribunal to provide evidence. Family courts tend to represent the most common formal court forum, alongside SENDISTs. There is also an increasing role for educational psychologists in personal injury matters, and in the assessment of children of asylum seekers to assist with claims (British Psychological Society, 2006).

The role of the educational psychologist as an expert witness in any proceedings is to assist on technical matters specific to their discipline. For educational psychologists, some of the more common areas of expert witness practice include:

- provision of assessments of the educational, developmental, or ability difficulties or strengths evidenced by children/adolescents
- identification of individual education programmes
- assessment of actual or likely impact of neglect or abuse on a child/family unit
- assessment of the impact of personal injuries on children
- identification of educational provision and/or negligence
- assessment of family interactions and parental ability including attachment relationships
- assessment of risk within family units
- assessment of a child/adolescent’s ability to understand and respond to instruction (e.g., suggestibility and compliance)
- assessment of the existence, and likely impact, of post-traumatic stress responses in children and adolescents

Expert witnesses are expected to provide evidence on both facts and opinion, and to be clear about what type of fact they are basing their opinion on (i.e., is it a fact that they have observed or one they have been told; Bond, Solon, & Harper, 1999). They are not invited to give opinion
based on conjecture (Hagen, 1997). Their overriding duty is to the court and not to those who have instructed them (Bond et al., 1999). To be an expert witness, a professional needs to be qualified both in content and process. This is a point often lost, with some making the mistake of believing that just being a “good” or “excellent” psychologist qualifies one to provide expert evidence. Qualification in content alone (i.e., in educational psychology) is insufficient. A professional also needs to be qualified in court process, such as the correct delivery of witness evidence (Bond et al., 1999).

**Professional witnesses**

This is a recently accepted category of witness, whose main distinction from expert witness appears to be one of employment: professional witnesses (sometimes called ordinary witnesses) are employed by one represented party and are therefore not independently instructed – for example, an educational psychologist working for a local education authority asked to give evidence at an SEN tribunal or in family proceedings. While in theory professional witnesses are there to provide factual evidence (e.g., assessments completed, amount of contact with a child in a case), they are often asked to provide opinion evidence as well. This is where the boundary between expert and professional witness becomes unclear; courts and tribunals will often use professional witnesses in an expert capacity. For this reason, educational psychologists working within this role should, as a matter of good practice, abide by the procedures and recommendations outlined for expert witnesses.

**Witness of fact**

This type of witness solely provides factual evidence. An example may be a teacher providing evidence of what he/she observed during a class.

**Background to the use of psychological expertise in courts and tribunals**

Formal courts have used experts in one guise or another as far back as the 1300s, although at first these were considered “helpers” and courts focused on the use of medical professionals to help courts interpret medical terminology. One of the first references to the potential value of psychological expertise in legal settings is in Professor Hugo Munsterberg’s book *On the Witness Stand*, published in 1908. Professor Munsterberg was among the first to suggest that psychologists had something to offer the legal profession, arguing that findings from experimental psychology on issues such as attention, memory, and perception were of probable benefit. The notion of using psychology at this time was, however, rejected, with the legal profession reporting that it did not need psychological expertise in order to interpret evidence, preferring to rely upon “legal instinct” (Hagen, 1997).

By the 1970s the use of psychological experts had increased, and by the 1980s they were arguably commonplace in some proceedings, particularly within the American court system, and increasingly within tribunal settings. The 1990s saw a further increase in the use of psychological expertise, brought on in part by legislation allowing for claims for psychological injury (Goodman-Delahunty, 1997), and by the increasing availability of practising psychologists. The 1990s also saw some highly significant cases which arguably had an international impact on the provision of psychological evidence in courts. Two such cases took place in the US legal system, as follows.

The first case was that of Eileen Lipsker in 1992. This involved “recovered memory” which occurred, reportedly, when she was looking into the eyes of her newborn child. Eileen Lipsker claimed to have recovered a memory of witnessing her father murdering her nine-year-old friend.
20 years previously. Her father, George Franklin, was subsequently convicted, solely on expert evidence from a psychiatrist (Dr Terr) on the validity of repressed memory. There was no physical evidence. The prosecutor in the case reflected on the value of Dr Terr’s evidence by stating: “[A] number of them said my [Dr Terr’s] testimony had convinced them. Sometimes hypotheticals are just as compelling as specifics.” Interestingly, the oral evidence of a well-known experimental psychologist, Dr Elizabeth Loftus, was rejected by the court in favour of Dr Terr’s evidence on the basis that Dr Loftus was an academic and not a clinician. George Franklin was released six years into his sentence for first degree murder when it was revealed, among other issues, that Eileen Lipsker had been hypnotised prior to providing oral evidence: this is not admissible in the US court where the case was being heard.

The second case was that of Daubert vs. Merrell Dow Pharmaceuticals (1993). The outcome of this case led to the production of the “Daubert criteria”, a set of criteria that determine the admissibility of expert evidence in the US court system. These criteria stipulate that if evidence is to be submitted as scientific, it must be: falsifiable (i.e., a product of a testable theory or technique), reviewed (i.e., subject to peer review and publication in professional journals), accepted (i.e., the theory or technique must have general acceptance in the scientific community) and have a known error rate. These criteria have been used to stipulate the importance of psychological experts being explicit about the scientific foundations of their opinions and the psychological measures that they employ (Goodman-Delahunty, 1997), regardless of the type of setting that they are presenting evidence within.

The Eileen Lipsker case and its outcome were particularly detrimental to the use of psychological and psychiatric evidence in US courts, not helped by the fact that psychiatric and psychological evidence had been confused. Witnesses were vilified, and emotive writings concerning their behaviour were published, the most notorious of which is possibly Hagen’s (1997) book, in which expert witnesses are described as “self-styled soul doctors [who] run amok in our courts, drunk with power, bedazzled by spectacular fees for the no-heavy lifting job of shooting off their mouths about any psychological topic that sneaks a toe into a Courtroom” (p. 4). The question, however, that should perhaps have been asked was how evidence on recovered memory was admissible in a legal setting in the first instance. Criteria such as the Daubert criteria aim to ensure that if evidence is being submitted as scientific then it meets certain standards; otherwise at most it is specialised knowledge, and at least unfounded opinion. The Daubert criteria have been argued to represent one of the means by which relationships between applied psychology and the legal professional have been improved (Goodman-Delahunty, 1997).

Although both these cases were based in the USA, they have had an impact on the use of psychological evidence outside the USA, extending to formal and quasi-legal evidence settings. The Lipsker case demonstrates what can happen when witness evidence is misused by courts; it shares similarities with recent UK cases such as Regina vs. Angela Cannings (2004). The Daubert principles are useful in encouraging all witnesses to distinguish between what they claim is opinion based on scientific fact, and what is opinion based on specialised knowledge or conjecture. For educational psychologists this distinction is particularly important, since many assessments will include, and in some cases rely upon, the inclusion and interpretation of psychological tests. Examples of tests which tend to appear in witness reports include, but are not restricted to:

- Wechsler Preschool and Primary Scale of Intelligence – Revised (WPPSI-III)
- Wechsler Intelligence Scale for Children-IV (WISC-IV)
- Childhood Autism Rating Scale (CARS)
- Asperger Syndrome Diagnostic Scale (ASDS)
- Academic Competence Evaluation Scales (ACES)
- Beck Youth Inventories
Educational psychologists employing such tests need to assure themselves of their validity, reliability, and known error rates. In short, whereas intelligence tests such as the Weschler would certainly meet Daubert standards, other tests would not (e.g., the Parenting Stress Index, the Bar-on Emotional Quotient Inventory, the Beck Youth Inventories, etc.), primarily due to an absence of known error rates. Once a witness submits a psychological test into proceedings they are in effect submitting opinion based on scientific evidence and not just specialised knowledge. Specialised knowledge is psychological opinion that is not based on a psychological test but is informed by experience as a educational psychologist. An illustrative example of how this may appear in a case, including a reference to how conjecture may be presented, is illustrated in Figure 1.

If one intends to provide an opinion based on psychological tests, one must ensure that the tests are scientifically robust. If there are problems with the tests these must be identified, so the court or tribunal can better evaluate the “expert” evidence and determine if its base is truly scientific or closer to specialised knowledge. Legal forums simply need to be assured of the basis of an opinion in case this is later relied upon.

Numerous changes have been taking place in the UK civil legal system since 1996. These were designed to improve the legal system and its use of evidence, driven primarily by a need to reduce waiting times, manage spiralling expense, and improve fairness to all parties involved. The most important of these changes has perhaps been the production of the Civil Procedure Rules (CPR), notably Part 35 and its associated Practice Direction (Department for Constitutional Affairs, 1998). These rules were developed for civil court but are equally relevant to other formal evidence-giving settings such as criminal courts and SEN tribunals. They aimed to produce best practice and thus their principles apply across settings, arguably to both expert and professional witnesses equally.

Within the CPR were rules specific to the use of witnesses, including expert witnesses, with the expectation that witnesses should comply with Part 35 and its Practice Direction, which covers the role of witnesses, how they should be involved in cases, and how their evidence should be presented. Elements of the Practice Direction will be addressed throughout this paper, although it is sufficient to say that Part 35 and the Practice Direction are crucial in determining how witnesses are deployed. There are proposals already underway for Procedure Rules almost identical in scope and content for criminal proceedings.

The CPR rules also represent the first time that legal settings had really focused on the quality of evidence, as opposed simply to whether it was present or not. Courts and/or tribunals expect their experts to be qualified both in content and process, and able therefore to deliver evidence appropriately (“[T]here are a plethora [sic] of experts who look good on paper and do not reveal their shortcomings until they start testifying”; Rocha vs. Great American Insurance Co, 1988; cf. Hagen, 1997). Witnesses are not, however, expected to become quasi-advocates: the legal system is to the legal professionals as psychology is to qualified psychologists (Andrews, 2006).

Psychologists who feel qualified in content but not process should ensure that the latter is addressed prior to engagement in witness work.\(^1\) Being clear on both of these points is crucial

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\(^1\)Qualification in Court process can be obtained via apprentice-style learning where psychologists can observe/shadow the legal profession during the conductance of cases. This is often referred to as mini-pupilllage with such schemes conducted via local Family Justice Councils. Equally, there are a range of training courses that can be attended ranging from one day events to formal university accredited postgraduate programmes.
Child A is a party in proceedings involving the parenting provided to them. A civil hearing has determined that Child A has been subjected to sustained physical and emotional abuse and neglect. An educational psychologist has been instructed to comment on Child A’s current level of functioning and the likely impact of the abuse on Child A. The psychologist has been asked to determine whether Child A’s intelligence levels have been affected negatively by the abuse/neglect which has included enforced absences from school for long periods of time.

In preparing this report the psychologist employed the Wechsler Intelligence Scale for Children-III (WISC-III) and the Beck Youth Inventories to explore depression, anxiety, anger, disruptive behaviour, and self-concept. A structured clinical interview was also conducted with the child and the current foster carers, and interactions were observed between the child and the foster carers.

Opinion: The psychologist concludes that Child A is currently presenting within the low average to average range for intelligence: some verbal comprehension difficulties are noted but these remain within a low average range. The opinion of the psychologist is that the verbal comprehension presentation in this case can be attributed to absences from school. Child A is felt to present with clinically significant levels of depression and anxiety. The psychologist feels that the depression and anxiety is solely attributable to Child A’s experience of abuse, and that there has been positive change in Child A’s emotional management during residence with the foster carers. The psychologist presents the view that the child’s emotional functioning is likely to continue to improve during continued residence with the foster carers.

**Opinion based on scientific evidence:** Intelligence rating, including assessment of verbal comprehension.

**Opinion based on specialised knowledge:** That the verbal comprehension score is influenced by reduced schooling; that there is evidence of clinically significant levels of depression and anxiety; that there has been improvement in emotional functioning which is likely to be maintained.

**Conjecture:** That emotional functioning difficulties (depression and anxiety) are solely linked to abuse in this case.

Figure 1. Distinguishing opinion based on scientific evidence, specialised knowledge, and conjecture: a brief case example.

on two grounds. First, solicitors and barristers are legally appointed advocates and do not expect professional or expert witnesses to do their work for them. In taking on an advocacy role such witnesses serve only to demonstrate their lack of qualification in court/tribunal process. Second, the judge/chairperson (or jury/panel) is the decision-maker and facts in dispute/requiring resolution therefore remain firmly within their remit and not that of witnesses. If witnesses begin to stray outside their remit, they weaken their credibility.
Once witnesses are clear about their role, the focus should be on the quality of the evidence that can be provided, with regard to both written evidence and oral evidence. The following sections aim to provide a summary of what these should include.

Providing good quality written evidence
There are two elements to a well-produced witness report: the presentation and the content. Each will be addressed in turn.

Presentation
The CPR Part 35 Practice Direction has been particularly useful in directing how a report should be presented. One should ensure that the following is included:

- a coversheet, contents page, outline of purpose, and chronology
- the details of all parties involved
- the role of the author in the proceedings
- a statement of methodology, including who conducted the tests
- a summary paragraph at the start outlining the main issue(s) in the case
- a concluding paragraph at the start of the report outlining core opinion
- a glossary as required
- page and paragraph numbering
- good use of appendices, including a professional CV and source of documents considered
- header and footer including date

Content
A number of areas can be attended to so as to ensure the evidence is considered to be good quality. This is not a complete list, but examples include the following.

Stay within your area of expertise and defer to other professionals if needed. Commenting on issues that do not fall within your area of expertise/knowledge will serve only to discredit the witness and the witness’s report. Advocates may try to encourage the witness to stray outside his/her area of knowledge; this is to discredit the witness.

Clarify instructions and alert advocates to areas outside this area of expertise. If the instructions provided at the outset are unclear and/or are not within the witness’s remit of expertise, then it is the duty of the witness to inform the provider of this at the first opportunity. An example of an instruction that an educational psychologist could consider would be: “Please assess the cognitive ability of the child using appropriate psychological testing.” An example of an instruction which would not fall within an educational psychology remit would be: “Please comment on the extent to which Child A has responded to the anti-depressant medication and what you feel would be the most manageable dose for Child A.” Witnesses are not expected to answer questions outside their area of expertise, and thus clarification should be sought prior to work being conducted on a case. If instructions remain unclear, or are not within the professional’s remit, then the instruction may be declined with no prejudice to the witness. It is, however, the duty of the witness to point these difficulties out prior to accepting instructions. If an instructed question has not been answered, or if the witness has decided to modify a question without informing those instructing, then that witness can expect to be asked about the failure to answer, usually by being requested to give oral evidence.
Acknowledge provisional opinion. If opinion is provisional it should be stated as such, and an explanation given as to why this is the case.

Describe the range of opinion available on a core issue. This is an element of report writing often not as explicit as it could be. Legal proceedings will prefer a range of opinion to be acknowledged, as this allows choice in decision-making and ensures that the witness is seen to have carefully considered all possible opinions. It can be valuable, therefore, to indicate what possible explanations there may be on an issue and then to indicate which is your preferred opinion and why. If, for example, you are asked to provide an opinion on the likely cause of a child’s developmental and ability difficulties in a case of neglect, provide a range of reasons (e.g., it could be a consequence of poor parenting, difficulties inherent within the child, such as delay, and/or a combination of both), followed by an indication of your preference and reasons for it.

Acknowledge allegations. The decision-makers in legal settings will decide on the likely proof surrounding allegations, whether this is decided on the balance of probabilities or beyond a reasonable doubt. Witnesses should not comment on allegations as if they were facts: it is up to the appointed decision-maker(s) to conclude whether an allegation is proven or not. Allegations of any nature should therefore be reported as such within reports, and not written as if they were facts in the absence of proven evidence (i.e., “Child A was hit several times by her mother” should be “Child A alleged being hit several times by her mother”). Advocates will notice occasions where witnesses have seemingly strayed into the remit of the decision-maker, and this can be used to discredit evidence.

Do not make unfounded statements. If an opinion is provided it should be clearly linked to a fact or series of facts, including those observed in the witness’s own assessment. Psychological witnesses have been heavily criticised for basing opinion on conjecture and assumption (Hagen, 1997). Making assumptions is one of the most easily criticised areas of practice: an example would be assuming that reduced ability evident in a child is a sole consequence of education providers neglecting the child’s needs, and therefore focusing the whole psychological assessment on the interaction of the education provider with the child, as opposed to looking for other reasons for ability difficulties. In a legal forum it could be argued that the witness in this case was rigid in their initial interpretation of facts and developed their assessment, and thus opinion, by focusing on one likely cause only. It thus becomes crucial for the witness to be clear on what is a scientific fact, what is specialised knowledge, and what is actually conjecture/assumption (again, see Figure 1 for an illustrative example).

Acknowledge weaknesses in the report. Good report writers will pre-empt criticisms of their reports by identifying their weaknesses (Brodsky, 2003). “[A] report which sets out what the weaknesses are and deals with them effectively is more credible than one which ignores them” (Bond et al., 1999, p. 83). An example of a weakness in a report may be an opinion formed on the basis of limited collateral information – for example, incomplete school records. Often there can be sections of records which cannot be analysed for a range of reasons: missing files or illegible handwritten notes in records are two common examples. A witness in this case should identify the problem, illustrate what steps were taken to resolve it, and then indicate the likely impact that this missing/illegible information has had on their opinion (e.g. their absence has led to a provisional view).

Be consistent. It is not unusual for previous reports that have been written by the witness to be acknowledged by advocates during oral evidence, particularly if the case shares similar issues and the same/a similar legal team is involved. Thus, witnesses need to remain mindful of consistency across their reports as regards the scientific facts and specialised knowledge they rely upon.

Avoid prejudicial statements. The use of language in a report is critical, as is acknowledgement of the role as independent of decision-making in the proceedings. A witness’s role is to
assist the court or tribunal to reach a judgement, not to lead them towards one. Thus the use of emotive labels, which imply that an allegation is proven when this is not the case, should be avoided (Goodman-Delahunty, 1997); for example, in a contested child neglect case where there has not been yet been a finding of fact hearing or acknowledgement of guilt from caregivers, a witness stating “This child fits the profile for neglect trauma” will have fallen into the error of making a prejudicial statement. Stating instead “Child B presents with symptoms often found in children subjected to challenging early experiences” would be more appropriate in this instance.

Recognise hypothetical questions. Witnesses may be asked to comment on general issues concerning the extent to which documented events may impact on a child’s development. In such cases, comments need to be speculative and not attributed directly to the child(ren) in question. In legal forums, encouraging a witness to move into the area of answering hypothetical questions is discouraged (e.g., “If we presume that Child B has been abused what is the impact on their development likely to be?”). If witnesses are asked such questions, however, they simply need to recognise their hypothetical nature in the answer. This will avoid any difficulties in terms of being seen as a witness who has inadvertently made a judgement in the absence of confirmation of guilt/finding of fact, since this falls within the remit of the decision-maker. It will, however, allow the psychologist to assist the court with a further opinion, albeit with a caveat outlining its hypothetical nature.

Keep facts and opinion separate. As much as possible, the main body of the report should include the facts as the witness has been informed of them (e.g., chronology) and those that have been observed (e.g., assessment interviews, assessment tests). Opinion should be presented separately in a “conclusion and opinion section” (Department for Constitutional Affairs, 1998).

Producing a written report does not entail the psychologist presenting oral evidence as a consequence. Witnesses tend to be called when new issues have arisen on which expert opinion is required, if evidence is contested, and/or if the instructed questions have not been answered. Attending proceedings, however, is part of the role of a professional or expert witness, and there are some important areas to note. This will be covered in the following section.

Preparing for, and presenting, oral evidence

Preparing for the delivery of evidence is essential (Bond et al., 1999), with arguably three aspects to consider.

First, ensure familiarity with the content of the report and with the facts, issues, and opinions contained therein. The core advice here is to prepare for the issues, facts and opinions contained within the report as opposed to a specific “topic” such as “intelligence” or “empathy” (Brodsky, 2003). The core issues and associated facts and opinions contained within the report should be identified. This is a simple but highly effective technique for preparation. For example:

- Issue before the tribunal: what is the child’s intellectual ability?
- Observed facts: on the WISC-IV the child performed within the low average range overall with no evidenced discrepancies
- Opinion: the child is performing within a low average range

Equally important in preparation is to attempt to identify any questions that may be asked and to prepare an answer, remaining mindful that questions will often focus on the observed facts underlying an opinion.

Second, ensure clarity about with whom the case can and cannot be discussed (e.g., other witnesses, such as the parent of a child one has assessed; the LEA in a SENDIST tribunal where one is an independent witness).
Third, ensure familiarity with legal etiquette: for example, direct all answers to the judge/chairperson, be clear on the distinction between solicitors and barristers, be clear on the role of panel members and lay members, and know how to address the judge/chairperson.

Once prepared for the delivery of evidence, it is important to understand how that evidence will be presented. Witnesses should be clear about the ordering of questioning and what to expect within each section. There are three core areas of questioning: examination-in-chief, cross-examination, and re-examination. Each will be addressed in turn.

**Examination-in-chief**

Examination-in-chief is the opening section of questioning, usually led by the side that has requested the report. This aims to be a free-flowing narrative given by the witness, rarely interrupted by advocates (Ross, 2005), with a focus on the quality of the evidence provided, ascertained by an outline of the witness’s qualification in content and process. During this element of questioning any potential weaknesses in credibility are brought to the attention of the proceedings and then toned down by the questioner; for example, the witness may be asked to outline his/her qualification in content (e.g., qualification as an educational psychologist, years of practice, and any specialism) and process (e.g., number of times that the witness has provided reports in a formal court, and number of times oral evidence has been given in a formal court). If it becomes apparent that the witness has limited or no experience of formal court settings then the questioner, to raise the witness’s profile, may ask for an illustration of the witness’s experience in other formal settings such as SEN tribunals.

Leading questions are not permitted unless allowed by the judge/chairperson. A leading question is a question that suggests the actual answer or contains information the examiner is hoping to find. An example of a leading question would be: “So you assessed the child in the presence of the mother but not the father?” An appropriate non-leading question, which does not suggest a required answer, would be: “Who was present when you assessed the child?”

A few more points to remember during examination-in-chief are as follows (Ross, 2005): advocates are allowed to direct a witness to a specific issue requiring more information; any ill-prepared barrister can easily be identified at this juncture since he/she will be glancing at the witness only occasionally and focusing more on documentation; and the representative of those who asked for the preparation of the report will aim to put the witness at ease during this part of evidence provision.

**Cross-examination**

This is the most intensive part of examination, when questions are put from each side. It should not re-visit what has been covered in examination-in-chief. Questioning is used here simply to advance one side over another, to reduce examination-in-chief, and to set the evidence of one witness against another (Ross, 2005).

To prepare for this examination a few points are worth noting. Leading questions are admissible, with a focus on mixing leading and non-leading questions. Judges/chairpersons will not stop an examination if it appears carefully prepared. At most he/she will ensure questions remain relevant. An ill-prepared examination, however, is likely to be stopped. A sign of poor preparation on the part of advocates includes overlong cross-examination, long pauses, and searching through documents (Ross, 2005). Experienced barristers will “watch the case” — noting any chance remarks and the responses of the panel, the jury, other counsel, etc. Inexperienced advocates will focus on writing down what is said on their notes (Ross, 2005). Questions are asked by experienced advocates only when they can anticipate the answer.
Re-examination
This is not always used. It is considered the most difficult part of examination by advocates on the basis that it cannot be planned for, since it arises solely from cross-examination. Re-examination aims simply to remove ambiguities or uncertainties, to restore facts in issue, and, if needed, to revive witness credibility (Ross, 2005).

Table 1 outlines some of the core issues useful to remember as the witness prepares to deliver evidence; Table 2 presents some examples of specific questioning techniques that may be experienced during examination, along with guidance on how they can be dealt with effectively.

Conclusion
It can be helpful to consider court or quasi-court (e.g., tribunal) proceedings as being very like theatre, with parties taking particular roles and a script already in place. Psychologists acting as witnesses simply need to be familiar with the process (script). Indeed, it is always worth remembering how much more skilled a psychologist is in the specific professional area than those questioning: as stated by Bond et al. (1999, p. 118): “No matter how well prepared the lawyers are, they do not know your field or evidence as well as you do … all the information the lawyer has is, at best, second-hand.”

Being a qualified (educational) psychologist, however, does not qualify a professional to give good witness evidence – nor should it. Legal forums focus on quality and delivery of evidence. If a professional or expert witness is not qualified in process and is unable to present themselves and their evidence as credible, this can be harmful to a case and the profession as a whole. Some psychologists are no doubt excellent in their assessments and in preparing reports, but if they show undue concern or an unwillingness to enter a legal forum to give evidence then

| Preparing your evidence | Identify the issues, facts, and opinions in your report: reduce it to these three areas |
| Know where the proceedings will be held and who will be there |
| Delivering your evidence | Make use of your qualifications and experience: include content and process qualifications |
| Answer all questions asked with courtesy |
| Deliver answers at a suitable pace and clearly (remember judges/chairpersons will be writing down what you say) |
| Focus on the judge/chairperson when giving your answers: this demonstrates respect for due process and allows you to ignore any non-verbal behaviour from counsel that may be unsettling |
| Avoid verbosity |
| Explain succinctly any jargon that you have to use |
| Maintain confident body posture |
| Remain objective |
| Answer all questions asked |
| Address the main issues: don’t digress |
| Make good use of facts to support opinion: do not tell untruths |
| Deal with attacks on evidence and/or report without arrogance or anger |
| Remember to use your report: ask to refer to it a couple of times at least |
| Stay within your area of expertise |
| Remember that you are assisting proceedings: you are not an advocate |
they should seriously consider how they can improve this area of their practice. Having said that, psychologists are perhaps particularly well-placed professionals when it comes to the actual delivery of oral evidence. Psychology as a profession is borne largely on the ability to acquire information through careful questioning, examination, and testing, and on being able to develop case formulations. In theory, therefore, psychologists should be well equipped to manage being the subject of oral examination, and to identify the types of questions being asked with relative ease (i.e., closed, open, socratic, leading, etc.). The core issues for psychologists are the need to remain firmly within the professional remit of knowledge, to ensure that due deference is given to other professionals on issues that are not psychological in nature, and to understand the extent to which the psychologist’s contribution is based on scientific fact and/or specialised knowledge. Educational psychologists acting as witnesses have a responsibility to ensure that they assist formal proceedings by presenting relevant and robust evidence, by acknowledging the flaws in psychological evidence, and by presenting an accurate reflection of the profession of educational psychology.

Table 2. Questioning techniques and possible responses.

<table>
<thead>
<tr>
<th>Questioning technique</th>
<th>Possible response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rapid fire</td>
<td>Take your time; do not feel rushed into answering; try “I need more time to answer these questions from counsel”</td>
</tr>
<tr>
<td>Complex</td>
<td>Ask for an explanation; try “Can this be rephrased, I do not understand it”</td>
</tr>
<tr>
<td>Leading</td>
<td>Ask for it to be rephrased; remain composed and avoid giving a direct answer to a leading question; let the judge/chairperson decide if you should answer it</td>
</tr>
<tr>
<td>Aggressive/hostile</td>
<td>Remain composed and don’t answer; try “I don’t feel I can answer that question”; if pushed, ask for the question to be rephrased; try “I am not clear on the focus of the question, could counsel rephrase?”</td>
</tr>
<tr>
<td>Closed</td>
<td>If giving a closed answer would fail to reflect fully your evidence, qualify your answer before giving it; try “To avoid any misunderstanding I need to qualify my answer …”</td>
</tr>
<tr>
<td>Hypothetical</td>
<td>Never speculate; this question is designed to encourage you to speculate in order to discredit your evidence; if you are pushed to answer it do so with the caveat that you know it is hypothetical</td>
</tr>
<tr>
<td>Multiple</td>
<td>Take your time; ask for the questions to be given in the order in which answers are required; try “Which question would you like me to answer first?”</td>
</tr>
</tbody>
</table>

References


