**<https://www.psychology.org.au/for-members/resource-finder/resources/Business-admin-legal/Giving-evidence-in-Court>**

**Giving evidence in Court**

**Giving evidence in court is a frequently misunderstood process for those with little experience, in large part due to misconceptions arising from popular television programs.**

There are essentially two types of evidence that can be given by a professional witness in court - factual evidence and expert (or opinion) evidence.

An understanding of the difference between factual evidence and expert evidence, as well as an awareness and understanding of the relevant court rules of procedure, is important for any psychologist who is going to be a witness in court. There are also additional court rules of procedure for witnesses providing expert evidence.

The following questions and answers have been prepared to assist psychologists who may be required to give evidence in court. Understanding in these areas will ensure that a psychologist is able to provide evidence that assists the court, reflects well on him or her personally, and upholds the professional reputation of psychologists.

**What are the different circumstances under which a psychologist may give evidence in a court?**

There are a variety of ways in which a psychologist can become a witness in court. A psychologist may be invited to act as a witness on behalf of a client, be instructed to appear as a witness by an employer, be compelled to be a witness by warrant or subpoena, or be appointed to act as expert witness in a case.

**What is factual evidence?**

A psychologist may be asked to give evidence about consultations with an existing or former client. As a factual witness the psychologist is able to give evidence only about what has actually happened. So, details of the frequency and length of consultations, what was discussed in those consultations, and the opinions formed and actions recommended as a result of those consultations will be evidence that the psychologist is able to properly give to the court.

As a factual witness it is not appropriate to voice opinions about events that the psychologist was not a party to, or in response to hypothetical questions from legal counsel. A well prepared psychologist can respond to a hypothetical question appropriately by stating that he or she is unable to accurately speculate on what could happen, but rather is only in a position to tell the court what did happen.

**What is expert evidence?**

A psychologist may be appointed by a party to act as an expert witness in a court matter. Expert witnesses are asked to form an opinion based upon their qualifications and experience, and to advise the court of that opinion. There are special rules dealing with the requirement of an expert witness to be a witness for the court, which relate to the conduct of that person as an expert. Experts are required to be completely impartial in their assessment and may be asked hypothetical questions in order to expand upon their opinion.

Any psychologist who is asked to act as an expert witness should request a copy of the appropriate court rules and should be required to provide a resume that identifies the expertise relevant to the opinions that he or she is being asked to express. If a psychologist does not possess the appropriate expertise, the appointing party should be advised to consult someone who does have this expertise.

Psychologists should only undertake this type of highly specialised work if they have adequate training in forensic work (i.e., investigating matters of legal relevance, and collecting and reporting admissible and testable evidence).

**What are the court rules about giving evidence?**

Psychologists who are giving evidence in court should be familiar with three different sets of requirements before doing so - firstly, the rules of procedure for the court or tribunal where the psychologist will give evidence; secondly, the rules around what qualifies as evidence and what is hearsay or otherwise able to be excluded; and thirdly, any requirements of legislation affecting the matter, like the Family Law. Court rules generally relate to procedural requirements for the conduct of court proceedings.

Most legislation and court and tribunal rules for Australia are accessible via the [Australian Legal Information Institute](http://www.austlii.edu.au/) website and most courts and tribunals have their own websites which include copies of their rules of procedure and other relevant legislation. There are different Evidence Acts in the different States and Territories.

**Do the rules of giving evidence differ across different courts?**

The rules of evidence are less strict in tribunals than they are in courts and differ slightly between the different court jurisdictions. There is a State-based court hierarchy and a separate federal court hierarchy each with different rules of procedure. The Family Courts are part of the federal hierarchy.

**How should a psychologist prepare to give evidence to a court?**

It is important to know how to address the different people in the court room, for something as simple as proper court etiquette can affect the perception of a psychologist's credibility as a witness. In preparing to give evidence, seek as much information as possible about the court rules and procedures (when a psychologist is allowed in the courtroom, what will happen when he or she is sworn in as a witness, the different people who will put questions to the psychologist and what happens when evidence is finished) and try to visit the court beforehand.

It is recommended that the following matters be attended to in preparation for giving evidence.

* Be clear about whether you are giving evidence as an expert witness or factual witness
* Know the nature of the evidence that you are required to present
* Be sure that you have the necessary qualifications and experience to give the evidence that you are required to give
* Understand the court rules and procedures
* Review your file and all of the information that you have regarding the matter (don't search out additional information as it may colour your evidence)
* Have a written agreement regarding your costs in place before the day of court, even if subpoenaed.

**What is involved in appearing in court to give evidence as a psychologist?**

Psychologists should be aware that time is unpredictable in courts and they could be waiting hours or days prior to giving evidence, but must remain available.

Evidence is given in court in a two- or three-part process. The steps are called examination, cross examination and re-examination. The lawyer who calls the psychologist to give evidence is examining the witness and is limited to asking open questions that do not suggest the answer that is being sought. A witness who is well prepared helps in conveying all of the information required in this process.

At the conclusion of the examination the lawyer is limited to referring to what has been said by the psychologist and cannot go beyond what has already been put to the court. Sometimes this evidence is given by way of written statement rather than questions, particularly in tribunal matters.

The lawyers for other parties are then able to cross examine the psychologist to test his or her evidence. If evidence was given by written statement, the lawyers ask questions regarding that statement. This is the process regularly shown in television programs. Lawyers can ask questions which only require a yes or no answer and can attempt to ‘put words into the mouth' of the psychologist.

Re-examination is a process whereby the first lawyer can provide the opportunity for the psychologist to more properly explain some of the answers given during the cross examination process.

**Do the privacy laws influence what is allowed to be disclosed when giving evidence in a court?**

In a court or tribunal setting a psychologist swears to tell the whole truth. This is an absolute and overrides the maintenance of confidentiality requirements of privacy laws. There are very limited provisions for refusing to give evidence due to privacy or confidentiality reasons, but those limited provisions are unlikely to apply to the psychologist-client relationship.

**Can a psychologist talk about the evidence that has been given in court?**

Giving evidence can be quick or can take days. A psychologist who is in the process of giving evidence is not permitted to speak to anyone about the evidence, especially not anyone involved in the case. This means no conversations about how the psychologist is performing while in the witness box.

After a psychologist's evidence is complete and prior to the end of the hearing, a psychologist should not discuss the evidence given specifically, but may speak with others about the evidence in very general terms. The psychologist should not speak with other witnesses who have yet to give evidence. Strictly speaking, any person giving evidence should not discuss the evidence until a decision is handed down because there is always a chance that they will be recalled to give further evidence.

The court will usually give a direction about the extent to which evidence can be discussed when the psychologist has concluded giving evidence.

**When does a report need to be written as part of giving evidence?**

A psychologist is not required to prepare a report as part of giving evidence unless specifically requested to do so. If asked to prepare a report, obtain a written agreement and or payment of costs prior to delivering the report.

**Where can advice be sought if a psychologist is called to give evidence?**

The lawyer for the party who has invited or subpoenaed a psychologist to be a witness should be able to answer questions and may interview the psychologist beforehand. Many courts and tribunals also have officers who are responsible for assisting people involved in the court system. Information can also be sought from professional colleagues who have been witnesses in court, and most courts have a website that can be searched.

The Australian Legal Information Institute website (www.austlii.edu.au) is also a great source of information and includes the decisions of a substantial number of Australian court and tribunal decisions as well as legislation for each different jurisdiction within Australia.

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