

A summary of the Crown Prosecution Service Pre-trial therapy guidance



The consequences of pre-trial therapy

The key issue with regard to pre-trial discussions is the potential effect on the reliability, actual or perceived, of the evidence of the witness and the weight which will be given to in court. Pre-trial discussions may lead to allegations of coaching and, ultimately, the failure of the criminal case. Professionals concerned may themselves be called to court as witnesses in relation to any therapy undertaken prior to the criminal trial.

Records of therapy and confidentiality

To ensure a fair trial, any information and evidence that could have an impact on the decision to prosecute, the conduct of the case, or the outcome of proceedings is to be made available to the police and prosecution.

Disclosure rules mean that the investigator, prosecutor and third parties including therapists are responsible for preserving all material that may be relevant to the case in order to ensure that it is available to the parties and the court.

At some stage during the trial process the prosecution must provide the defence with information and evidence that may undermine the prosecution case or assist the defence case. In this way, all of the material that is relevant to the outcome of the trial is put before the jury or magistrates.

The police, the prosecutor, the defence and the court may make requests for information from third parties at various stages in a criminal case. These requests should explain the issues in the case and be reasonably precise. The purpose should be to elicit a genuine and focused search for relevant documents or information. Careful maintenance of records of therapy will facilitate this focused approach.

An application may be made to the court for a witness summons to obtain material if there are real grounds to believe that material which could affect the outcome of the prosecution is being withheld. If, as will usually be the case, a therapist, having taken appropriate legal advice, believes that the material should not be disclosed, he or she may oppose the witness summons application. In that case the court may hold a hearing at which the therapist's employer may be legally represented. The court, having heard representations from the advocate

representing the applicant for the witness summons and the advocate for the therapist's employer, will decide whether or not to issue a summons requiring the disclosure of the material.

Those aspects of the therapy that have no material relevance to criminal proceedings should not have to be disclosed. However, the issue of relevance may need to be reviewed at different stages of the criminal case, as more becomes known about the prosecution and defence cases.

Confidentiality cannot, therefore, be guaranteed in advance. Bearing this in mind, it is important that an understanding is reached with the client at the outset of any therapy undertaken of the circumstances under which material obtained during treatment may be required to be disclosed.

Guidelines on the use of therapy

The witness should not discuss the evidence s/he is to give in the criminal proceedings but may receive general support to help them through the process of appearing in court. Preparation for court and carefully planned preventive work which does not focus upon past abuse presents less of a problem than interpretive psychodynamic psychotherapy. The least problematic aspect of therapy will focus on improving self-esteem and self-confidence, often using cognitive/behavioural techniques.

The need for therapy should be clearly stated before it begins and both therapist and witness should be aware of the related criminal case, which may or may not have already been commenced. Careful recording is essential.

Decision making

The decision as to whether a witness should receive therapy before a criminal trial remains with the witness, in conjunction with the professionals from the agency providing the service. The best interests of the witness are the key consideration in decisions about the provision of therapy before a criminal trial.

Communication

Clear lines of communication between the police and the relevant agency's lead contact are required to ensure that everyone involved in the process is fully and reliably informed.

Summary

The therapist should be made aware of any pending criminal proceedings before commencing the therapy and should also be aware of the implications of using techniques which may result in the evidence of the witness being discredited.

Therapists should avoid using leading questions or discussing the evidence which the individual or any other witness will give, including exploring in detail the substance of specific allegations made.

The police and The Crown Prosecution Service must be made aware that therapy is proposed, is being undertaken, or has been undertaken.

Records of therapy (includes videos, tapes and notes) and other contacts with the witness must be maintained so that they can be produced if required by the court. They should include, in the case of therapy, details of those persons present and the content and length of the therapy sessions. It is not expected, for practical reasons, that verbatim written records will be kept.

At the outset of therapy an understanding should be reached with the witness and, where appropriate, those who are emotionally significant to the witness of the circumstances under which material obtained during therapy might be required to be disclosed. Maintaining trust will remain important and it can be confirmed that those aspects of the therapy that have no material relevance to criminal proceedings will not have to be disclosed. However, what is "relevant" may change as the case progresses and so confidentiality cannot be guaranteed.

Witnesses may derive therapeutic benefits from talking about their experiences, but any detailed recounting or reenactment of the offending behaviour may be perceived as coaching. The criminal case is almost certain to fail as a consequence of this type of therapeutic work.

Although witnesses should never be encouraged to extend their account of the offending behaviour they have suffered, it is acceptable to offer general reassurance and support to a witness during this difficult process.

In newly arising allegations, therapy should not usually take place before a witness has provided a statement. In existing cases where therapy is already under way, a decision about how to proceed may be best made after discussion at a multi-disciplinary meeting which includes the therapist. When therapeutic work is in progress, disruption of therapy should be avoided even if new investigations must be conducted.

Group therapy should not be offered to the witness prior to the trial if there is a risk that it may cause the witness to adopt the experiences of others in the group.

Professionals should avoid using jargon and language that will may be perceived, if repeated by a witness, as evidence of the witness being instructed.

Any disclosures of materially new allegations by the witness undergoing therapy, including possible disclosures of their own abusive behaviour, or any material departure from or inconsistency with the original allegations should be reported to the Police and other relevant statutory agencies.

If the prosecutor advises that the proposed therapy may prejudice the criminal case, this should be taken into account however it may still be in the best interests of the witness to proceed with the therapy.

Prosecutors must be informed that the witness has received therapy. They must then obtain an assurance that the witness did not, in the therapy session(s), say anything inconsistent with the statements made by the witness to the police. Prosecutors may need to be made aware of the contents of the therapy sessions as well as other details specified in the paragraph above, when considering whether or not to prosecute and their duties of disclosure.