

The Counsellor & The Legal System





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Workshop Objectives

- 1. Overview** -Irish legal system & **understanding** Legal Concepts.
- 2. Formation** of Client/Therapist Contracts
- 3. Confidential** Record Keeping and Data Protection - Breaching Confidentiality – When, How, Why.

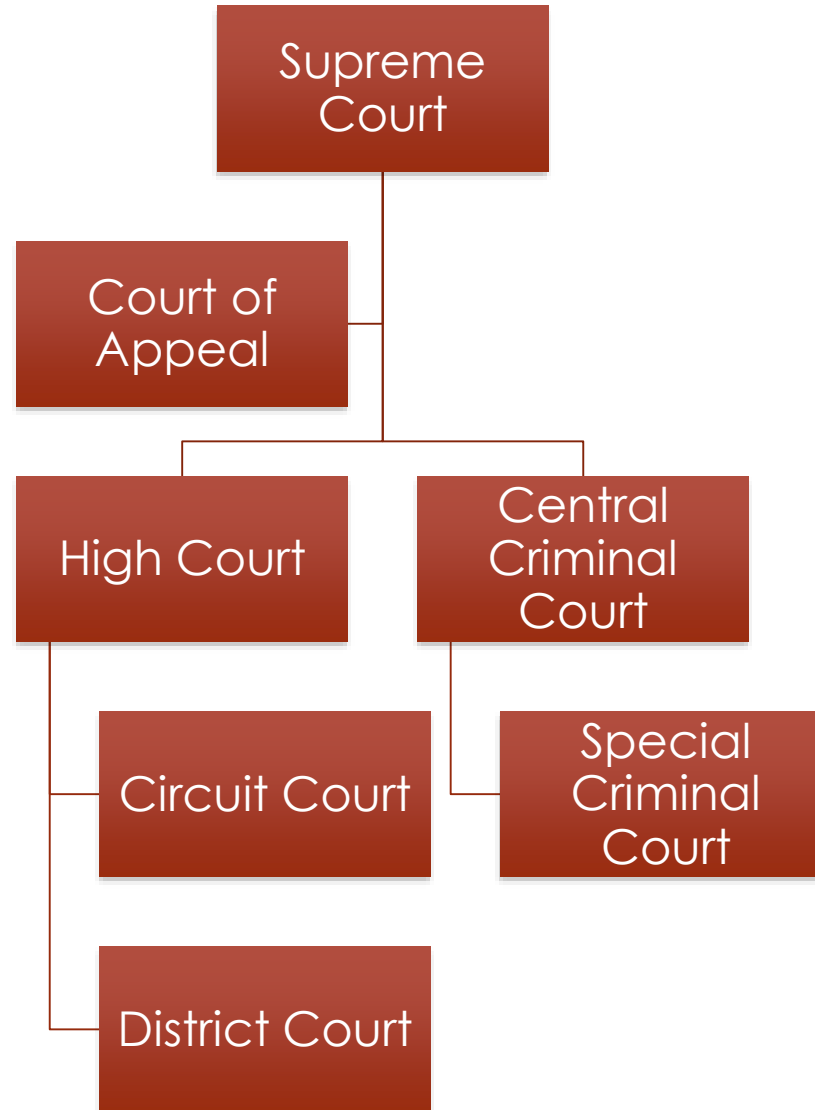
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4. Counselling Child and Vulnerable **Witnesses**
 5. Court **Reports**
 6. Giving **Evidence**
 7. Pointers for the **Future**



Criminal Law v Civil Law

- ➔ What is the **difference**?
- ➔ Common Law

The Irish Court System





Criminal Law

1. Burden of Proof

- **The State** must prove their case

2. Standard Of Proof

- The Defendants guilt must be proven '**beyond a reasonable doubt**' i.e. there can be no other possible explanation



Civil Law

1. Burden of Proof

- The **plaintiff** (person bringing the action) must prove their case

2. Standard Of Proof

- The plaintiff must prove their case on a '**balance of probabilities**' i.e. more likely than not



Jurisdiction of the courts

1. Civil Cases

1. **District Court** claims up to €15,000
2. **Circuit Court** claims between €15,000
and €75,000
3. **High Court** claims above €75,000

Jurisdiction of the courts

➔ Criminal cases:

1. **District court** cases heard by **judge alone**, sentence **limited 1 year imprisonment**
2. **Circuit court-** **judge and jury** e.g. non fatal assault
3. **Central criminal court-** more **serious** cases e.g. murder, rape. (Judge and Jury)
4. **Special criminal court-** **organised crime, terrorism** (Judge only)



Officials of the court

- **Judge**
- **Jury**
- **Registrar**
- **Usher**
- **Counsel**
- **Solicitor**

Circuit Court

- https://www.youtube.com/watch?v=tZYvv_s5R-s



Contracting as a therapist, Contracting with Clients

- ➔ It is: a **Civil Contract**
- ➔ **Breach of which:** can allow for compensation (**damages**)
- ➔ **Obligations –**
- ➔ **E.g Insurance Contracts –** duty to act in **Utmost Good Faith**

Contracting as a therapist, Contracting with Clients

- ➔ **What should my contract include?**
- 1. **Nature of the Therapy** – What to Expect.
- 2. **Confidentiality** and its Limitations.
- 3. **Data protection**
- 4. **Fees** and Notice of **Missed Sessions**.
- 5. **Supervision**, Ethical and Contractual **Obligations**
- 6. **Termination**, Closure and Ending Therapy

Confidentiality and Record keeping

What constitutes data ?

- Appointment Diaries
- Notes of any Kind
- Session Notes
- Telephone Numbers and Texts
- Emails
- Doctor Referral Letters and Replies
- Drawings of other Writings made in Therapy
- Supervision Notes

Are you a data controller?

Duties:

- **Obtain** and process the information fairly
- Keep it only for one or more **specified and lawful purpose**
- Process it only in ways **compatible with the outcome** for which it was given to you initially
- Keep it **safe and secure**
- Keep it **accurate** and up to date
- Ensure it is **relevant** and **not excessive**
- **Retain** it no longer than is necessary for the **specified purpose** or purposes
- **Give a copy** of his/her personal data to any individual **on request**

Breaching confidentiality: how, when and why?

Ethical and legal considerations

- **Client waives** confidentiality (**legal**)
- You are served with a **sub poena** (**legal**)
- **Risk** to the **client or another** (**ethical and legal**)
- **Risk** to a **child or vulnerable adult** (**ethical and legal**)

Should therapist have legal privilege?

Making good ethical decisions to breach confidentiality

- Keep **calm**
- Look to your **contract**
- Seek **consent** if possible
- Seek to **limit that disclosed** by contacting the requesting party
- Seek **supervision**
- Consider **ethical and legal** obligations
- Seek **legal advice** as necessary
- Remember if you have good grounds legal impunity and a civil suit will likely fail if there are **public policy considerations**.



Negligence and the counsellor- the duty of care

- Legal Avenue?
- Either: **BREACH OF DUTY OF CARE** AND **BREACH OF CONTRACT**
- **REMEDY = Compensation** – For which I have insurance!!

Possible Claims

1. Inappropriate **Breach of Confidentiality**
2. Inappropriate **Treatment of the Client**, treating out of your area of competence or whilst unfit to practice.
3. Inappropriate **Recording of Client Sessions**
4. Breach of **Boundaries** i.e. Having a Sexual Relationship with a Client as in the US case of **Nicholson v Hahn [1968]**
5. Having a sexual relationship with a **clients partner or spouse** as in the US case of **Massa v Huffaker a [1983]**
6. **Conduct** - Assault, Inappropriate touching, financial exploitation, bullying.
7. **Failure to warn a third party** of potential danger from your client as in the case of **Tarasoff v University of California, [1976]**

Counselling child and vulnerable witnesses .

► Legislation

1. **Criminal Evidence Act 1992** (as amended)

- Implemented a series of measures for children U18 & vulnerable witnesses e.g. intellectual disabilities.
- Give evidence through intermediary, video-link, pre-trial recording examination in chief
- Unless – **Good Reason to the contrary**



2. Victims of Crime Act 2017

- **Extended special measures for vulnerable witnesses e.g. Screens, no gowns or wigs.**
- **Need to promote use of intermediaries in Ireland!!**



➔ **O'R V DPP [2011]** on Coaching Witnesses Pre-Trial

➔ **The UK Crown Prosecution Service suggest that therapy in such cases should be largely supportive with in depth work being delayed until after the trial. You can access these guidance statements**

<https://www.cps.gov.uk/legal-guidance/therapy-provision-therapy-child-witnesses-prior-criminal-trial>

Court Reports – The Procedure

Receiving a Letter from a Solicitor – what to do?

1. **Discuss with Client** and make them aware of the contents of the notes
2. **Discuss the Consent** given with the client.
3. Discuss with the client who will likely **see the notes** if handed over.
4. **Clarify with the Solicitor** what records exactly they require, possibly writing a letter confirming that you have been counselling their client and giving the duration of the therapy.

Writing a Report

Be Aware:

1. Of the **purpose** of the report - civil or criminal proceedings.
 - Clarify if the report relates to a criminal or civil claim
2. **Onus of Proof** in the case to which the report relates.
3. **Your Purpose-** Are you being asked to prepare a report as an Expert or a merely to prepare a statement of what you know.
4. **Need for adequate expertise** – are the issues within your expertise?
5. **If asked to report as an expert – you are required to speak to only the facts known to you and to give an opinion on them**

Composing a Report

- 1. Introduce Yourself-** State your **Credentials** and **Experience** grounding your ability to report
- 2. Outline the facts** - your involvement with the client, were they referred by a GP? or other professional? or self-referred?
- 3. Be aware of the purpose** - the Report must assist the court in arriving at the right decision. Do not **speculate, remain impartial and credible.**
- 4. Set out how they presented and what they reported.** State the nature of the therapy being offered. Try to explain this in simple language which can be easily understood.
- 5. Basis of Report** - State the basis upon which you are preparing the report – usually contemporaneous notes.

6. **Ground your report** - Relate the facts and the therapy to a hypothesis, which you can stand over both theoretically and clinically.
7. **Be transparent** by being clear about any amelioration in symptoms relative to therapy. – **give the good and bad facts!**
8. **Be Aware - EGGSHELL SKULL RULE** in a Civil Case as it might apply to your client and their current symptoms
9. **Pre-Existing Factors** - in civil proceedings refer to any **pre-existing psychological or physical issues which might aggravate symptoms or influence recovery.**
10. Refer to how the **therapy is progressing**, any changes and give an opinion on prognosis if you can.
11. **Involve your client** - Go over the Report with your Client before delivering it.

COMPOSING A PRE-SENTENCING REPORT

- **Concise report** setting out your credentials
- the fact that defendant has been **attending therapy**
- the **dates**
- the **nature** of the work
- **presenting issues, previous and/or current life experience** if it relates to the offense committed
- their **commitment to the therapy** if applicable
- **changes and reflections in therapy** if applicable and **propensity to re-offend**.

STATEMENTS IN CRIMINAL CASES

➤ Not Reports

- but may be a statement taken by the Gardai relative to a crime, reported in therapy.

➤ THIS IS NOT A REPORT

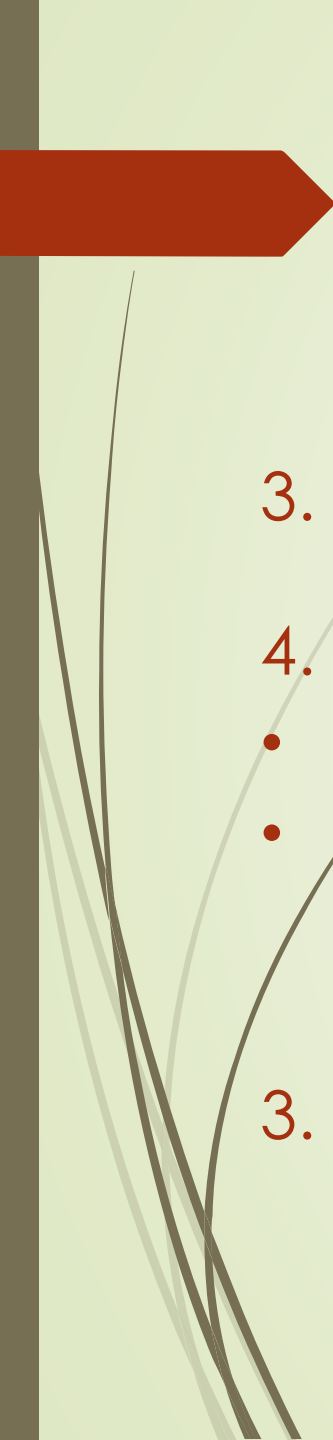
- **Only reciting facts – No expert hypothesis or prognosis**

GIVING EVIDENCE IN COURT

- **Giving evidence as a witness of fact**
 - you are asked to **recall**
 - Not to give **opinion or expert evidence.**
 - Used to verify a statement already given
 - Need to distinguish between a witness of fact and expert witness.
- You will receive a **sub poena or summons** to attend at least **three days before the hearing** together with a **viaticum** (small payment towards travel etc).
- Giving **expert evidence** on foot of an expert report also requires a **sub poena or summons** and you should prepare a comprehensive **file of your notes** and **report** for the hearing which you can refer to whilst giving evidence

PREPARING TO GIVE EVIDENCE AS AN EXPERT WITNESS

1. **CREATE A WORKING RELATIONSHIP** WITH THE SOLICITOR OR BARRISTER
2. BE **PROACTIVE WITH YOUR INVOLVEMENT** IN THE CASE BEARING IN MIND YOU MAY KNOW MORE ABOUT IT THAN ANYONE ELSE
3. IN ANY PRE- HEARING MEETING BE **PREPARED TO ASSIST THE SOLICITOR OR BARRISTER** TO ASK THE RIGHT QUESTIONS.
 - THIS MIGHT INVOLVE EXPLAINING CERTAIN THINGS ABOUT PSYCHOTHERAPY, YOUR CLIENT OR OTHER UNDERLYING ISSUES.

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3. IN THIS WAY YOU CAN **TRAIN THE SOLICITOR OR BARRISTER** TO ASK THE RIGHT QUESTIONS IN THE RIGHT WAY.
 4. IDENTIFY **THE STRENGTHS OF YOUR EVIDENCE**
 - THIS WILL HELP GREATLY IN **CROSS EXAMINATION**
 - IT WILL GROUND YOU ESPECIALLY IF YOU COME UNDER PRESSURE AND YOU WILL BE ABLE TO USE YOUR ANSWERS TO COME BACK TO THSE POINTS WHISLT REMAINING **PROFESSIONAL, INTEGRAL AND CREDIBLE.**
 3. SIMILARLY IDENTIFY THE **WEAKNESSES** IN YOUR EVIDENCE AND CONSIDER YOUR RESPONSES WHILST MAINTAINING TRUTH ANS INTEGRITY.

TAKING THE STAND

- **Administration of the Oath or Affirmation**
- **Examination –in –Chief** by the solicitor/ party on whose behalf you attend.
- You need to appear
- **CALM ,CLEAR CONFIDENT AND COMPETENT,WELL PREPARED**
- **KNOWLEAGBLE**
- **RELIABLE**
- **FOCUSED,**
- **PROFESSIONAL**
- **INTEGRAL AND HONEST**
- **DO NOT SPEAK OUT OF YOUR AREA OF COMPETENCE**
- **VISUALISE YOURSELF AS ALL THESE THINGS.**


THINGS TO REMEMBER DURING THE EXAMINATION – IN - CHIEF

- **Your Role:** Provide Information to the Court – Allow them to make an informed decision.
- **Communicate** clearly and in a concise non-specialist language
- You **must appear** – objective, independent, impartial, impartial and truth
- You will remain more focused and professional if you **direct all your evidence to the judge** looking at him/her and addressing him/her



CROSS- EXAMINATION BY THE OPPOSING PARTY

1. What does the **judge expect** from the therapist?
2. **Precision and Accuracy** in Answering Questions – keep answers short, take your time, be prepared.
3. **It's okay to buy some time!** Ask for the question to be repeated or reframed if you do not understand.
4. **The Finder of Fact** – decides your credibility – after cross-examination
5. You will be judged on the extent to which you face up and accept the proposition put to you in **cross-examination**

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6. Must be prepared to **defend your argument** and concede a change of view.
 7. **You are much more credible** – if you are able to engage with the process whilst simultaneously maintaining your overall opinion
 8. **Remember!!** Your role is to assist the Court in their decision
 9. Your testimony must be **reliable and credible**.

➔ SEE https://www.youtube.com/watch?v=-Kha_fmWlg

POINTERS FOR THE FUTURE ROLE OF COUNSELLORS IN THE LEGAL SYSTEM

- ➔ **ROLE OF DEPARTMENT OF JUSTICE INTERMEDIARIES FOR VULNERABLE WITNESSES IS EVOLVING.** SEE <https://www.justice-ni.gov.uk/sites/default/files/publications/doj/intermediaries-leaflet.pdf>
- ➔ **THE ROLE OF COUNSELLORS**
- ➔ **In Assisting the Court** – Understand trauma – evolving clinical area
- ➔ **Need to understand:** trauma, psychological impact, recovery in trauma & potential for traumatisation of all parties to Court proceedings.