

## Guidelines for Doctors Acting as Expert Medical Witnesses

1997

### Introduction

1. When giving evidence, recognise your responsibility to assist the court in arriving at a just decision. (*AMA Code of Ethics 1996*).
2. When providing expert evidence, medical practitioners should remain impartial and should confine their opinions to that which is within the limits of their expertise.

One of the duties of every citizen is to assist the administration of justice. In addition, doctors have a professional duty to their patients, which includes an obligation to provide reports reasonably required by those patients to be used in legal proceedings related to the injury or condition treated.

**Treating** doctors are obliged to assist by providing **factual information**, concerning the patient's condition or injury, on the patient's request, to the patient's legal advisers, or, again with the patient's express consent, to other nominated third parties.

**Non-treating** doctors can assist the court in two ways:

- by giving their expert **opinions** based on expert knowledge and experience and facts, and
- by informing the court on matters within their specific area of expertise.

In these Guidelines the term "court" refers to a court (which may be a judge sitting alone or a judge and jury), a tribunal or any other forum where formal rules of evidence apply.

It is a legal rule that a person's opinion is not admissible as evidence. However, there are exceptions.

One is when the subject matter before a court relates to a special area of knowledge, outside ordinary/lay knowledge. The opinion of an expert in the particular special area is relevant and admissible as it assists the court in drawing inferences from the facts arising from the special area. Without an expert's opinion, the court is left to speculate.

Doctors are routinely considered to be experts because of their knowledge and experience of medicine. All doctors, treating and "independent" (non treating), are considered to be "experts", but treating and non-treating doctors have different roles. The significance of their opinion is linked to their role in the proceedings.

In most states and territories, there is a protocol between the AMA and the state or territory law society concerning relations between doctors and lawyers. If you intend to undertake medico-legal work, it would be prudent to obtain a copy of that protocol from the law society or local branch of the AMA.

These Guidelines have been formulated to assist both doctors engaged in medico-legal work as independent experts and treating doctors called to provide evidence concerning a patient's condition, injury, or prognosis.

### **Role of the Expert - Treating Doctor.**

1. As the patient's **treating doctor**, you have special knowledge of the patient, the patient's condition, injury, diagnosis and prognosis. Your role is to provide this factual information, with the patient's consent, initially to the patient's legal advisers. You may also be asked to give an opinion relating to the condition or injury. Whilst there is an ethical obligation to assist the patient by providing a factual report, you are under no obligation to provide an opinion, in fact you should specifically refuse to provide an opinion if you believe this is outside your area of expertise. You may be called later to give evidence in court.
2. Any party to the proceedings may serve a subpoena compelling you to produce your medical records **to the court**. You are obliged to comply with the terms of the subpoena, whether or not the patient consents to production of the records. Noting that your obligation is to provide the records to the court, and not the party which has served the subpoena, it is open to the other party to argue in court against disclosure. Some doctors may wish to oppose disclosure of clinically sensitive or potentially harmful information. The records should still be supplied but under seal, asking that the court not release the records to the parties until it has heard argument against disclosure.

### **Role of the Expert - Independent Non - Treating Doctor.**

1. You have been asked to act as an "independent" expert witness. You are not the treating doctor. You will be asked to give an opinion on the facts of the case, either as provided to you in written form, or based on your own examination of the patient. Your opinion will be based on your special expertise and will assist the court in deciding the matter before it.
2. Your opinion will not carry great weight in court if you do not have sufficient expertise in the specific area. You may be examined and cross-examined to demonstrate that you have specific expertise relevant to the particular case.
3. The relevance of your evidence may be diminished if it is proved you do not have expertise in a particular area.
4. If you do have the relevant expertise, you are still regarded as an expert, even if your opinions differ from those of your colleagues.
5. As the independent expert witness, you play an important and integral part in the litigation. You are involved in the case because of your expertise, your knowledge of a special area.

You are entitled to be fully informed about the case, your role in it and who else has been asked to give medical evidence. If the lawyer requesting your opinion does not tell you, you are entitled to have your questions answered.

6. Because you are the expert, you should expect to have to explain your area of expertise to the lawyers, so that they understand your evidence.
7. It is important for you to remain independent and remote from the litigation. Your role is **not** to plead the merits of the case for the side paying your fee. You are **not** an advocate. You should be seen to have no interest in the outcome of the case.

- 8 The weight of your opinion may be diminished if it is shown to be biased. Your role is to **assist the court** by providing independent opinion, even though your opinion may be used to diminish the other side's case.

### Costs

1. Assess realistically what your time and skill are worth. In some cases, such as workers' compensation, the fees payable for an expert's report have been determined by a statutory body. In other cases, you should discuss the matter with the lawyer, and reach agreement on the probable fee, before the service is provided.
2. Discuss all fees, including attendance to give evidence at court and compliance with subpoenas to produce documents, with the lawyer as soon as possible. Remember that although the lawyer may contact you, as a matter of law it is the lawyer's client who is responsible for paying your fees. You may wish to ask the lawyer for a written undertaking that the firm will pay your fees.
3. It is both unethical and improper conduct for a **treating doctor** to withhold a specially commissioned medico-legal report until the patient pays any outstanding treatment fees.

### Reports

- 1 Although you may have worked with the lawyer before, you are the expert, not the lawyer, so assume the reader knows nothing about your area of expertise. Your report will be read not only by the lawyer who requested it but also by lawyers on the other side and the judge.
2. Use simple terms where ever possible and explain technical terms or jargon.
3. Explain how you reached your opinion: what facts it is based on; what methodology was used; why one methodology was used over another; the range of possible outcomes; reference reports from other experts who may have been given opinions and comment on these.
4. Append an abbreviated curriculum vitae, summarised to highlight your qualifications, training and experience relevant to the particular case. Give the requesting lawyer a copy of your full c.v., but only append a summarised c.v. to your report. This will aid the reader in determining your expertise. For example, your most recent and relevant publications and experience should be appended to the report.
5. You should request a conference with the lawyer once the report is completed so that you can explain it, highlight its strengths and weaknesses, areas of disagreement with other experts as well as areas of agreement. It will assist the lawyer, and ultimately the court, if the lawyer understands your report and is familiar with the subject matter.

### Attendance at Court

1. In most jurisdictions a date for hearing of a matter will be fixed by the court, but these dates can and do change depending on the circumstances of the court and

of the case. You have a right to be kept informed by the lawyer when the case is likely to be heard.

2. It is a source of irritation to doctors to be unnecessarily absent from their practices. When the date of the hearing grows close, contact the lawyer and advise them what are the best and worst times for you to attend court. Most courts will accommodate reasonable requests on the hearing of witnesses. Ask the lawyer, if it is possible to take your evidence by telephone or other means, if you are interstate or overseas.
3. When giving evidence, as far as possible, use simple terms and avoid technical or jargon terms. The court is not expert in your special field of knowledge.
4. Resist any attempts to make you testify on matters outside or beyond your area of expertise. If you are asked questions outside your area, make it clear to the court the question does not fall into your area of expertise. If you are asked to speculate or hypothesise, you should either refuse or again emphasise that your answer is given in an area outside your specific area of expertise.
5. Use a moderate and objective manner when giving evidence. Resist attempts designed to provoke you and do not argue with the questioner. Be cautious of the use of humour and satire and never be sarcastic. Your demeanour is as important as your special knowledge.
6. Listen carefully to each question and answer honestly. If your counsel objects to the question, do not answer until the court or tribunal has ruled on the objection.
7. State your opinion plainly and make sure you distinguish these from statements of fact.
8. If you believe that you are being asked questions in such a way as to prevent the disclosure of relevant matters, or to prevent you completing the answer to a question, then you should ask the judge for assistance.
9. Subject to any objections, you are required to answer all questions honestly even if that leads to disclosure of issues not covered in your report. Your counsel will give you the opportunity to explain why things were left out of your report.

Reproduction and distribution of AMA position statements is permitted provided the AMA is acknowledged and that the position statement is faithfully reproduced noting the year at the top of the document.