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## Ethical Guidelines for Doctors Acting as Medical Witnesses 2011. Revised 2016

### 1. Introduction

1.1 A doctor (medical practitioner) may be called as a medical witness to give evidence in court, at a tribunal, or as part of an alternative dispute resolution process.

1.2 These guidelines have been developed to advise doctors of their ethical obligations when providing medical evidence whether as a treating doctor or an independent expert. These guidelines are not meant to apply where a doctor is a party to the proceedings; for example, in a case where a patient alleges that the doctor has been negligent.

1.3 All doctors are encouraged to seek advice from their medical defence organisation before acting as a medical witness.

### 2. Types of medical witnesses

2.1 A doctor may be called upon to be a medical witness as a treating doctor or as an independent expert. It is important for a doctor to distinguish the context under which their evidence is being sought.

2.1.1 Treating doctor - A doctor may be asked to present factual information about their treatment of a particular patient.

2.1.2 Independent expert - A doctor may be asked to give evidence of their opinion as an independent expert witness. The opinion of a particular expert is sought based on their experience and expertise as relevant to the particular case. Expert medical evidence is often critical to the administration of justice in legal proceedings involving health and medical matters. Expert evidence provided by doctors can assist the courts or alternative dispute resolution process in making informed, fair decisions.

2.2 Medical witnesses may also be called to provide evidence in different contexts (which could vary from state to state); for example, independent experts may be called to provide evidence as single experts (assessors, court-appointed experts, referees and single joint experts) or may be called upon to participate with other experts in joint expert conclaves and to give concurrent expert evidence).

### 3. The role of the medical witness

3.1 When acting as a medical witness, the doctor's role is to provide impartial evidence to assist the court in reaching a decision. It is not the role of the doctor to advocate for a party.

3.2 When providing medical evidence, either as a treating doctor or an independent expert, the doctor's overriding duty is to assist the court impartially. This means that a doctor should be honest and objective when providing evidence or an opinion. The doctor should not allow their evidence or opinion to be influenced by:

- the party paying their fee;
- the potential outcome of the case; or
- reasons based on discrimination.

3.3 A doctor providing evidence should have no pecuniary or non-pecuniary interest in the outcome of the case.

3.4 The doctor has an obligation to protect the privacy and confidentiality of all evidentiary materials in their possession.

#### **4. Your role as the treating doctor**

4.1 As the treating doctor, you have an ethical and professional obligation to assist by providing factual information concerning the patient's condition or injury as ordered by a court or, with express patient consent, to the patient's legal advisers or other nominated third parties.

4.2 The treating doctor has special knowledge of the patient, the patient's condition, injury, diagnosis and prognosis and may 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 on a particular issue if you do not wish to do so.

4.3 Any party to the proceedings may serve a subpoena compelling you to produce their medical records to the court and/or to give evidence. You are obliged to comply with the terms of the subpoena, whether or not the patient consents to production of the records subject to limited exceptions. If you wish to oppose disclosure of clinically sensitive or potentially harmful information, you should supply the records under seal, asking that the court not release the records to the parties until it has heard argument against disclosure.

4.4 You have an ethical duty to provide a report reasonably required by the patient to be used in legal proceedings related to the injury or condition treated.

4.5 You should not withhold a medico-legal report on the basis of any outstanding treatment fees.

#### **5. Your role as an independent expert**

5.1 As an independent expert, you can assist the court in two ways:

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

5.2 If asked to provide expert evidence and faced with a competing interest, you should declare the competing interest or decline to offer an opinion. Doctors providing evidence should have no pecuniary or non-pecuniary interest in the outcome of the case.

5.3 Because you are an independent expert, you should expect to have to explain your area of expertise to the lawyers, so that they understand your evidence. You should give an honest representation of yourself to the court and not hold yourself out as an expert in an area outside of your area of expertise. You should confine your opinions within the limits of your expertise.

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

5.5 You are entitled to be fully informed about the case, your role in it and who else has been asked to provide an opinion. You should be provided with a full brief of relevant paperwork and clinical information by your instructing lawyer. If the lawyer requesting your opinion does not provide sufficient information, you are entitled to have your requests for further information answered. If you do not have enough information on which to reach a conclusion on a particular point, or your opinion is otherwise qualified, you must make this clear in your report and your evidence.

5.6 There may be a range of medical opinions in the area that you are asked to comment. Your opinion may differ from those of your colleagues on a particular issue.

5.7 You may be cross-examined and re-examined to demonstrate you have the specific expertise relevant to the particular case. Your opinion will not carry great weight in court if you do not have sufficient expertise in the specific area.

5.8 All States and Territories have an expert witness code of conduct, to which you must adhere in order for your evidence to be admissible. You should familiarise yourself with the relevant code of conduct to ensure that you adhere to its requirements. Be aware that there might be particular legal rules relating to expert evidence that apply in some jurisdictions but not in others so you should familiarise yourself with the legal rules in the jurisdiction in which you are providing evidence.

5.9 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.

## **6. Report preparation**

6.1 You should adhere to the requirements of the relevant expert's code of conduct in relation to the preparation of expert reports. These are usually provided with the letter of instruction and are also available from the relevant court.

6.2 Assume the reader of your report knows nothing about your area of expertise and has no medical background. Your report will be read by the lawyer and party who requested it and may also be read by lawyers for the other parties, the other parties and the judge.

6.3 Use simple terms wherever possible and explain technical terms or jargon. Your advice and evidence will be used to assist the determination of the medical and legal position by people who are not medically qualified. Remember that the parties to the action will rely on your advice and evidence to make decisions about case progression and/or possible settlement. Your report should be clear and explained in lay terminology, with explanations provided for any medical abbreviations, technical terms or processes referred to.

6.4 You should advise whether a particular issue falls outside your field of expertise.

6.5 If providing expert opinion, explain how you reached your opinion; for example:

- what facts it is based on;
- the research or literature relied upon;
- what methodology was used and why one methodology was used over another;
- the range of possible outcomes;
- list all available documents which you considered in preparing the report including reference reports from other experts who may have been given opinions and comment on these;
- list any examinations, tests or other investigations on which you have relied, identifying the person who carried them out and that person's qualifications.

6.6 Include any qualification of an opinion, if necessary to ensure your report is accurate and complete. State whether the opinion is not a concluded opinion because of insufficient data or for any other reason.

6.7 Append a curriculum vitae (c.v.), summarised to highlight your qualifications, training and experience relevant to the particular case. 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.

6.8 You should liaise with the instructing lawyer to agree on a reasonable timeframe in which to produce the report. You should advise of any delay or other issues preventing you from meeting the agreed deadline at your earliest opportunity.

6.9 Where required to confer with other independent experts or prepare a joint expert report, you should use your independent judgment. You should identify those matters on which you agree and those matters on which you disagree and say why. You should not be given an instruction or request to withhold or avoid agreement (except in the sense just discussed, namely where it is not possible for you to agree), nor should you act on any instruction or request to withhold or avoid agreement with the other expert. If you change your opinion at any stage before you are required to give evidence, you should inform the instructing lawyer. If you change your opinion whilst giving evidence at trial, you should advise the judge and parties accordingly.

6.10 If the report refers to a particular document or documents (e.g. a journal article) then you should annex a legible copy or copies of those documents to your report. You should be aware that a copy of the lawyer's letter of instruction, together with any other documents containing instructions and/or further information relied upon by you to prepare your report, will be disclosed to the other party (if the report is to be relied upon).

6.11 The instructing lawyer may request a conference once the report is completed so that you can explain it. Alternatively, you may wish to 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 and any further evidence which may assist. It will assist the lawyer, and ultimately the court, if the lawyer understands your report and is familiar with the subject matter. The instructing lawyer may seek a supplementary report from you after this meeting.

6.12 Once a report has been issued in final form, the independent medical report by a doctor should not be amended. A supplementary report may be prepared if additional information is subsequently provided and/or if the additional material causes you to change your opinion. Explain the reason for the provision of the supplementary report and if applicable the reasons for the change in your opinion.

6.13 An agreement to provide an expert report implies an agreement to attend court and conferences if necessary.

## **7. Court attendance**

7.1 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. You should also be asked for your availability so that it can be accounted for when scheduling hearings.

7.2 As the date of the hearing approaches, contact the lawyer and advise them of the best and worst times for you to attend court. Most courts will try to accommodate reasonable requests on the hearing of witnesses. Ask the lawyer, if it is possible, to take your evidence by telephone or videolink; however, you should expect to attend in person. Any application to give evidence by video link will be made by the instructing solicitor and should be made well before the proposed hearing date.

7.3 When giving evidence, as far as possible, use simple terms and avoid technical terms or jargon. The court is not expert in your special field of knowledge.

7.4 Do not comment 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 again emphasise that your answer is given in an area outside your specific area of expertise and seek guidance from the judge. Give your answer based on the facts as you know them.

7.5 Use a moderate and objective manner when giving evidence. Resist attempts which appear designed to provoke you and do not argue with the questioner. Be cautious of the use of humour and satire and never be sarcastic or defensive. Your demeanour is as important as your special knowledge.

7.6 Listen carefully to each question and answer honestly. Do not try to pre-empt the line of questioning. If counsel objects to the question, do not answer until the court or tribunal has ruled on the objection. If you do not understand the question, ask for the question to be restated or rephrased. Answer the specific question and do not provide information beyond the question. Wait for the next question.

7.7 State your opinion plainly and make sure you distinguish statements of opinion from statements of fact. If you need to refer to your notes or your report, ask to have access to it.

7.8 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.

7.9 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.

## **8. Costs**

8.1 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.

8.2 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, 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.