

## **EXPERT WITNESS**

1. Expert witnesses may be sought by the parties in legal proceedings, or a disciplinary inquiry of the Malaysian Medical Council (“MMC”) or other organization(s) hereinafter termed as “adjudicating bodies”, unless otherwise stated.
2. The Evidence Act provides for the opinion of experts in legal proceedings.
3. The MMC, when considering the evidence in a disciplinary inquiry, bears in mind the provisions of the Evidence Act.
4. This guidance is provided for those who instruct experts and the experts themselves on their role in legal proceedings or disciplinary inquiries.
5. The MMC’s guidance “Good Medical Practice” sets out the principles which underpin good care. When registered medical practitioners (“RMP”) act as expert witnesses, they take on a different role from that of a RMP providing treatment or advice to patients. However, the principles set out in “Good Medical Practice” also apply to RMPs who are expert witness.
6. This guideline does not apply to witnesses of facts.

### **Who is an expert witness?**

7. A RMP is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.
8. An expert witness’ special knowledge, skill, experience, training, or education may be shown by any admissible evidence, including his own testimony.
9. An expert witness may be appointed by any party in legal proceedings or a disciplinary inquiry.

### **Qualifications of an expert witness**

10. Prior to admitting an expert witness and/or an expert’s report to an adjudicating body, the adjudicating body shall have to be satisfied that:
  - a. he has the appropriate expertise and experience;
  - b. he is familiar with the duties of an expert;
  - c. there is no actual or potential conflict of interest;
  - d. he has been fully and properly instructed by the party requesting his evidence.

### **Responsibilities of an expert witness**

11. The duty of the expert witness is to assist the adjudicating body on matters that are within his expertise and he must maintain neutrality at all times. This duty is paramount and overrides any obligation of the expert to the party who has instructed him or by whom he is compensated.

12. The expert's opinion should be independent, providing objective and unbiased opinion(s) on matters within his expertise. A useful test of independence is that the expert would provide the same opinion(s) if instructed by an opposing party.
13. If an expert changes his opinion at any time, such change(s) should be communicated immediately to the adjudicating body and the other parties in the proceedings.

#### **Power to admit expert evidence**

14. The adjudicating body has the right to decide on the admissibility of the testimony of an expert witness or an expert's report.
15. When any party applies to the adjudicating body for the admission of the testimony of an expert witness or an expert's report, he shall identify:
  - a. the area in which expert evidence is to be relied upon; and
  - b. the expert in that area on whose evidence he wishes to rely on.
16. The adjudicating body may, at or before the trial of any action, or disciplinary inquiry, by order, limit the number of expert witnesses who may be called at the trial or disciplinary inquiry to such number as it may specify.
17. The adjudicating body may, at any stage, direct a discussion between experts for the purpose of requiring them to:
  - a. identify the issues in the proceedings; and
  - b. where possible, reach agreement on an issue.
18. Where the experts reach agreement on an issue during their discussions, the agreement shall not bind the parties, unless the parties expressly agree to be bound by the agreement.
19. The adjudicating body shall decide on the weightage to be given to the testimony of an expert witness or an expert's report.

#### **Expert evidence**

20. Expert evidence is to be submitted in the manner and time as directed by an adjudicating body.
21. Expert evidence is to be in writing unless directed otherwise by the adjudicating body.
22. An expert report is to be submitted to the MMC and the other parties in the inquiry at least ten working days before the date of the inquiry.
23. An expert's report shall:
  - a. give the expert's qualifications;
  - b. give details of any literature or other material which the expert witness has relied on in making the report;
  - c. contain a statement setting out the issues which he has been asked to consider and the basis upon which the evidence was given;
  - d. if applicable, state the name and qualifications of the person who carried out any test(s) which the expert has used for the report and whether or not such test(s) has been carried out under the expert's supervision;

- e. where there is a range of opinion on the matters dealt with in the report:
    - i. summarise the range of opinion; and
    - ii. give reasons for his opinion;
  - f. contain a summary of the conclusions reached
  - g. contain a statement of belief of correctness of the expert's opinion; and
  - h. contain a statement that the expert understands that in giving his report, his overriding duty is to the adjudicating body and that he complies with that duty.
24. If, after the exchange of reports, an expert witness changes his view on a material matter after having read the other parties' expert reports; or for any other reason, such change of view shall be communicated, through legal representative(s), to the other parties and the adjudicating body without delay.
25. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey or audit reports or other similar documents, they must be provided to the other parties at the same time as the exchange of reports.

### **Conflict of interest**

26. A RMP involved in the management of the same patient, as the RMP in the legal proceedings or disciplinary inquiry, shall not appear as an expert witness in such legal proceedings or disciplinary inquiry.
27. If there is any matter that gives rise to a potential conflict of interest, such as any prior involvement with one of the parties, or a personal interest, this shall be disclosed to the instructing party, the opposing parties and the adjudicating body without any delay.
28. An expert is not disqualified from giving evidence by reason only of a pre-existing relationship with the party that proffers the expert as a witness, but the nature of the pre-existing relationship shall be disclosed. The expert should make it clear whether, and to what extent, the opinion is based on the personal knowledge of the expert (the factual basis for which might be required to be established by admissible evidence of the expert or another witness).
29. The RMP may continue to act as an expert only if the adjudicating body decides that the conflict is not material to the case.

### **Joint expert**

30. In any cause or matter in which any question for an expert witness arises, an adjudicating body may at any time, on its own motion or on the application of any party, appoint an independent expert or, if more than one such question arises, two or more such experts, to inquire and report upon any question of fact or opinion not involving questions of law or of construction.
31. An expert appointed by an adjudicating body shall be referred to as such. He shall, if possible, be a person agreed between the parties and, failing agreement, shall be nominated by the adjudicating body.

*The singular shall be treated as the plural and the male gender as the female gender in this document.*

## References

1. California Evidence Code. Expert Witnesses & Evidence, 2010
2. Evidence Act 1950
3. General Medical Council. Acting as an expert witness, 2008
4. Malaysian Medical Council. Expert Witness, 2007
5. MEJ Black CJ. Practice Direction: Guidelines for expert witnesses in proceedings in the Federal Court of Australia, 2008
6. Rules of Court 2012

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3. Federation of Private Medical Practitioners Associations of Malaysia
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