

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 expert witnesses 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 expert witnesses and the expert witnesses 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 witnesses.
6. All expert witnesses are encouraged to seek advice from their medical defence organisation before acting as an expert witness.
7. This guideline does not apply to witnesses of facts.

Who is an expert witness?

8. A RMP is qualified to testify as an expert witness 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.
9. An expert witness’ special knowledge, skill, experience, training, or education may be shown by any admissible evidence, including his own testimony.
10. An expert witness may be appointed by any party in legal proceedings or a disciplinary inquiry.

Qualifications of an expert witness

11. 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

Responsibilities of an expert witness

12. 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 means the expert witness has a duty to act independently and to be honest, trustworthy, objective and impartial.
13. The expert witness must make sure that any report written, or evidence given, is accurate and not misleading. This means the expert witness must take reasonable steps to check the accuracy of any information given, and to make sure that all relevant information is included.
14. If an expert witness 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

15. The adjudicating body has the right to decide on the admissibility of the testimony of an expert witness or an expert's report.
16. 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.
17. 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 any legal proceedings or disciplinary inquiry.
18. The adjudicating body may, at any stage, direct a discussion between expert witnesses for the purpose of requiring them to:
 - a. identify the issues in the proceedings; and
 - b. where possible, reach agreement on an issue.
19. Where the expert witnesses 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.
20. 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

21. Expert evidence is to be submitted in the manner and time as directed by an adjudicating body.

22. Expert evidence is to be in writing unless directed otherwise by the adjudicating body.
23. An expert witness' report shall:
 - a. give the expert witnesses 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 witness 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 witness' opinion; and
 - h. contain a statement that the expert witness 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. The RMP may continue to act as an expert witness only if the adjudicating body decides that the conflict is not material to the case.

Joint expert

29. 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 another expert witness or, if more than one such question arises, two or more such expert witnesses, to inquire and report upon any question of fact or opinion.
30. An expert witness 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, 2013 and 2016.
5. MEJ Black CJ. Practice Direction: Guidelines for expert witnesses in proceedings in the Federal Court of Australia, 2008.
6. Rules of Court 2012.
7. Australian Medical Association. Ethical Guidelines for Doctors Acting as a Medical Witness, 2016.

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