

## Position statement

### Guidelines for Expert Witnesses, Qualification and Testimony

#### Preamble

The Australian legal system in its Federal and State jurisdictions often requires expert medical testimony. Proper functioning of this system requires that when such testimony is needed, it is truly expert, impartial, and available to all litigants. These guidelines are applicable to ASA members providing expert opinions to the courts, litigants or lawyers in civil or criminal matters, and apply to written expert opinion as well as sworn testimony.

An expert witness is appointed to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their field of expertise<sup>1</sup>.

#### Expert Witnesses

This document relates to the role of the anaesthetist as an expert witness engaged to provide an expert opinion. It does not relate to an anaesthetist called upon as a witness of fact.

#### Code of Conduct

A legislated Code of Conduct exists in each State to guide an expert witness<sup>2</sup>. It is the responsibility of the retaining solicitor to provide the expert witness with the relevant Code of Conduct as it applies in that State.

The Codes have been created to avoid misunderstandings that may cause delays in a hearing or impact on the fairness to the parties involved.

Anaesthetists who are called upon to act as expert witnesses are expected to adhere to the Code of Conduct relevant to them. Breaches of the Code of Conduct may be subject to sanction by the court.

Anaesthetists who are approached or subpoenaed to attend court as an expert witness are encouraged to consult with their medical defence organisation for advice, particularly if inexperienced as an expert witness and / or unfamiliar with the applicable Code of Conduct.

#### Role of expert testimony as part of normal practice

The provision by an anaesthetist of expert opinion and testimony as an expert witness is viewed by the ASA to be a normal component of specialist anaesthetic practice and as such is to be governed by the rules, ethics and standards of specialist anaesthetic practice.

An anaesthetist engaged as an expert witness should be mindful that their duty is to the court and not the party that has engaged their services.

#### Requirements and responsibilities of expert witnesses

Expert witnesses are expected to be truthful, thorough and impartial. They must not adopt a position of advocacy except as spokesperson for the field of specialised knowledge that they represent. They should not exclude any relevant information to create a view favouring either the plaintiff or the defendant. The ultimate test for accuracy and impartiality is the ability to prepare testimony that could be presented unchanged for use by either party. The expert witness must testify as to the practice behaviour of a prudent specialist anaesthetist, and where applicable, give different viewpoints<sup>3</sup>.

In offering expert testimony or opinion, the expert witness:

- Should review and become familiar with all the pertinent data of the particular matter at hand. The anaesthetist, as an expert witness, should diligently and thoroughly prepare themselves with relevant facts relating to the particular patient or case being discussed. This allows the expert witness to provide the court with accurate and documentable opinion on the appropriateness of the anaesthetic management in question.
- Should be provided with a full brief of relevant paperwork and clinical information by the instructing lawyer. The expert witness' medical defence organisation may assist if this is not forthcoming.
- Should review prior and current concepts related to standard anaesthetic practice on the matter at hand before providing written opinion or giving testimony about such practice standards. The expert's testimony should be in the context of generally accepted standards, reflected in the anaesthetic literature and current anaesthetic practice. Australian publications, position statements and guidelines would normally take precedence over non-Australian documents. Further, publications, position statements and guidelines promulgated by anaesthesia organisations would normally take precedence over non-anaesthesia documents. The testimony should not condemn performance that falls within generally accepted practice and neither should it endorse performance that clearly falls outside the accepted standard of anaesthetic practice.
- The expert witness should be mindful of hindsight bias and should recognise and correctly represent the standard of anaesthetic care as it applies at the time in question.
- The expert should not present their views as the only correct ones, as these views may differ from what might be done by other anaesthetists with a similar level of knowledge and experience.
- Should honestly champion what they believe to be the truth and not advocate for one or other party. The expert witness should use a moderate and objective manner avoiding humour, satire, sarcasm or an argumentative demeanour. In addition, the expert witness should not be evasive for the purpose of favouring one party over another. Answers to properly framed questions should reflect the expert witness' informed and unbiased opinion.
- Should not concern themselves with the legal issues of the matter in question.
- Should decline the invitation to act as an expert witness if they have financial or other conflicts of interest in the outcome of a case in which opinion or testimony is sought.

### **Qualification as an expert witness**

An anaesthetist providing opinion or testimony shall only be designated as an expert witness if:

- They have sufficient knowledge and experience of the specific subject(s) or area(s) of their written expert opinion or sworn testimony, related to current anaesthetic practice, which is considered to be beyond the comprehension of the average layperson;
- They are currently active in anaesthetic practice with relevant experience and specialised knowledge in the area of anaesthetic practice forming the basis of their opinion or testimony;
- They are accepted as an expert by their peers in the area of anaesthetic practice forming the basis of the opinion or testimony being proffered.

## Compensation of expert witnesses

The anaesthetist acting as an expert witness may be entitled to be paid reasonable fees and to receive reimbursement for expenses. This matter should be addressed before reports are prepared or the trial commences. It is reasonable to ask for a written undertaking that the agreed fees will be paid.

## References

1. AMA (2011, revised 2016), 'Ethical guidelines for doctors acting as medical witnesses, accessed September 13th, 2019, <https://ama.com.au/system/tdf/documents/AMA%20Ethical%20Guidelines%20for%20Doctors%20Acting%20as%20Medical%20Witnesses%202011.%20Revised%202016.pdf?file=1&type=node&id=46100>
2. Charret D (2015), "The rules for expert evidence in Australia", *Melbourne TEC Chambers*, accessed September 13th, 2019, [www.mtecc.com.au/the-rules-for-expert-evidence-in-Australia](http://www.mtecc.com.au/the-rules-for-expert-evidence-in-Australia)
3. Allsop JLB (2016), 'Expert Evidence Practice Note', *Federal Court of Australia*, accessed September 13th, 2019, <http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-expt>

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