

### SPECIAL SUPPLEMENTS

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Optimising patient-ventilator synchronisation

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# Multiple organ support

Introduction to multiple organ support, *D. Abrams et al.*

From multiple organ support therapy (MOST) to extracorporeal organ support (ECOS) in critically ill patients, *C. Ronco et al.*

Chronic respiratory dialysis, *D. Abrams et al.*

Understanding LVAD & artificial hearts, *N. Aissaoui et al.*

## PLUS

CO<sub>2</sub> in the critically ill, *L. Morales-Quinteros et al.*

Immune dysfunction in sepsis, *V. Herwanto et al.*

Hypothermia in neurocritical care patients other than cardiac arrest, *R. Helbok & R. Beer*

Intracranial pressure monitoring devices, *S. Patil & F. Fadhilillah*

Complications of decompressive craniectomy in neurological

emergencies, *J. Gonzalez*

A novel communication device for tracheostomy ICU patients, *F. Howroyd*

The Critical Care Resuscitation Unit, *L.I. Losonczy et al.*

Variation in end-of-life care, *A. Michalsen*

Simulate or not to simulate? *M. Poggioli et al.*

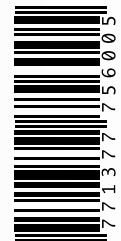
Being an expert witness, *J. Dale-Skinner*

Role of the chaplain in the ICU, *K. Jones*

Developing new approaches to patient safety, *J. Welch et al.*

How to provide better intensive care? *J. Takala*

Caring for critically ill immunocompromised patients, *E. Azoulay*



5



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# Being an expert witness

Describes the practicalities of being an expert witness and explains what qualities are necessary to succeed in this important role.

**O**ur legal system couldn't function without medical expert witnesses. From personal injury claims to criminal prosecutions, there is a constant demand for experienced doctors with the necessary skills and authority to take on this role. But while expert witness work can be intensely rewarding it also requires long-term commitment, integrity and a willingness to stand up in court.

## The importance of expert evidence

A widespread misconception about expert witnesses is that they give evidence on behalf of one of the parties in a court case. However, the actual purpose of an expert is to assist a court or tribunal by giving an *impartial opinion* on the facts, in the form of a written report or in oral evidence which can be understood by the court and parties involved.

An expert's report can also influence case management at an earlier stage in proceedings. In clinical negligence cases, for example, expert reports are exchanged between the claimant and the defendant(s). Experts also meet to prepare a joint statement which helps narrow down the issues, saving time and costs. This is why the majority of clinical negligence claims discontinue or settle before reaching the trial stage.

## The role of an expert

Unlike a witness of fact (also known as a professional witness) who is called to testify about their own contact with a patient, an expert witness will not have had any involvement in the case until they are instructed. They are also free to decide whether or not

to act in a case and can charge a fee.

After accepting instructions in a case, an expert is required to formulate an opinion based on their clinical examination of the patient (in some cases), a review of the records and other documentation and (usually) a search of the relevant literature including guidelines, peer-reviewed journals or textbooks.

■ **while expert witness work can be intensely rewarding it also requires long-term commitment, integrity and a willingness to stand up in court** ■

Instructed experts must then produce an expert report which responds to the questions raised in their instructions. Expert reports should reference all the information that has been used to form an opinion and if appropriate any literature that would support a different opinion, explaining why the expert's interpretation leads them to a particular conclusion. If there is not enough information to reach a conclusion on a particular point, this must be made clear. Equally, the expert can also include comments that go beyond the scope of their original instructions, provided it is within their area of expertise. At the end of the report, the expert must sign a declaration

confirming that they understand their duty to the court and that they have complied with that duty.

However, submitting their report is only the first stage in an expert's involvement in a case. They may need to take part in case conferences with lawyers and other interested parties, and ultimately they must be available to attend court and give evidence. A court appearance requires experts to be familiar with all the evidence relied upon by the judge. This includes their own report and also reports from the other expert witnesses. They must be able to answer, competently and credibly, the other party's questions during cross-examination—the best experts on the stand are those who are able to provide a well-reasoned opinion, having already considered alternative views.

## Ethical and legal duties

The General Medical Council (GMC) publication *Acting as a witness in legal proceedings* (GMC 2013) sets out guidance for witnesses, expanding on the core principles set out in *Good medical practice* (GMC 2013) These can be summarised as:

- Be impartial—your duty is to the court not the person who instructs or pays you
- Confine statements to areas of relevant knowledge or direct experience
- Declare conflicts of interest without delay
- Do not disclose confidential information without consent (other than to parties in the proceedings, or where obliged by law or ordered by the court)

- Inform the appropriate people if you change your view on a material matter
- Ensure that instructions you are given are clear and unambiguous

As well as the GMC's guidance, expert witnesses must also comply with their legal obligations. For example, an expert witness acting in a claim must be familiar with Part 35 of the Civil Procedure Rules, which governs expert evidence and the Civil Justice Protocol for the instruction of experts.

### Risks and liability

Working as an expert witness does carry some medico-legal risks and it is therefore essential that experts are adequately indemnified for their medico-legal work. The Medical Defence Union (MDU) advises its members to keep us updated of their working circumstances.

Experts can face GMC investigations and in extreme cases could be sued for negligence or breach of contract. This followed a landmark Supreme Court ruling in 2011, which ended the right to immunity for expert witnesses.

Courts also take a rigorous approach to ensuring that their timetables are met. They may exclude any party from calling expert evidence if the expert reports have not been served on time. If the expert is considered to be at fault, they can be sued or reported to the GMC. Similarly, if a judge criticises an expert for failing to comply with the timetable, there is a risk that they may be found personally liable for all costs.

### Avoiding the pitfalls

Here are some useful points to consider, based on the MDU experience of instructing experts and advising doctors in expert witness matters:

- Before accepting instructions, check the names of all those involved in a case, including the solicitor, to ensure there is no conflict of interest. If you have accepted instructions from the other party or have a professional relationship with a clinician who is involved in the case for instance, you may have to decline the case.

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- Stick to your own area of expertise. Let the instructing solicitor know if you believe an alternative opinion is necessary.
- Tell the instructing solicitor if you change your opinion as the case progresses and more evidence becomes available. Date any supplementary opinion that you provide.
- Be realistic about the amount of medico-legal work that you can take on, bearing in mind other commitments.
- Inform the instructing solicitor at the outset if there is a chance you won't be able to commit to the entire process e.g. you are planning to retire or travel.
- Ask the instructing solicitor to provide details of the court timetable at the first opportunity and note relevant

dates so there is less chance they will be overlooked.

- Ensure you are appropriately indemnified for expert witness work by your medical defence organisation.

### Becoming an expert witness

If you have at least 10-15 years' experience in ICU or another area of medicine and think you have what it takes to be an expert witness, you may find it helpful to attend a specialist training course. These often cover important aspects of the role including report writing, the legal process generally and court appearances. It's also a good idea to compile a CV detailing relevant general and specific medical experience, including any teaching posts, publications and lectureships.

To find work as an expert witness, consider registering with an agency or a body like the Expert Witness Institute, which produce directories of experts in the UK. These provide details of the expert and how they can be contacted and may list any high-profile cases in which they have been involved. ■

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