



## The Code of Practice on Expert Evidence

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The medico-legal guidelines and recommendations published by the Faculty are for general information only. Appropriate specific advice should be sought from your medical defence organisation or professional association. The Faculty has one or more senior representatives of the MDOs on its Board, but for the avoidance of doubt, endorsement of the medico-legal guidelines or recommendations published by the Faculty has not been sought from any of the medical defence organisations.

Forensic physicians, forensic nurses and forensic paramedics ('forensic clinicians') may be called upon to provide evidence for the purposes of the administration of justice. This role is distinct from, and not to be confused with, their roles as doctors, nurses and paramedics in providing clinical care to people involved in the criminal justice process, such as suspects, witnesses, complainants and police personnel. This Code of Practice has been prepared primarily for the assistance of members who are 'required to give or prepare expert evidence for the purpose of criminal proceedings' in England and Wales in accordance with the Criminal Procedure Rules<sup>i</sup> Part 19 r.19.1(2) and therefore have to comply with r.19.4(1)(j) and Criminal Practice Direction V Evidence 19A: Expert Evidence. The Practice Direction states that an expert report should include the following declaration (or one in substantially the same terms):

*'I confirm that I have acted in accordance with the code of practice or conduct for experts of my discipline, namely [identify the code].'*

This Code should be cited as 'The Code of Practice on Expert Evidence of the Faculty of Forensic & Legal Medicine of the Royal College of Physicians'.

It sets out the Faculty's expectations of members who provide evidence for the criminal courts in England and Wales, but it may also be applicable in other jurisdictions. Some members may also provide evidence in other jurisdictions such as the family courts, in jurisdictions outside England and Wales or to various tribunals. The Code of Practice is also applicable, but not required, in these circumstances. Failure to comply with this Code of Practice could give rise to an allegation of 'unprofessional conduct' in violation of [Standing Order 2.15](#).

This Code of Practice complements, and should be read in conjunction with, the General Medical Council's *Good Medical Practice*<sup>ii</sup> and *Acting as a witness in legal proceedings* (2013).<sup>iii</sup>

This Code of Practice has its basis in the law of evidence and in ethics. Its content reflects some of the standards set out in the Criminal Procedure Rules. Members should be familiar with the Criminal Procedure Rules Part 19 Expert Evidence and the accompanying Practice Directions and, if instructed by the prosecution in England and Wales, they should also comply with *CPS Guidance for Experts on Disclosure, Unused Material and Case Management* (Crown Prosecution Service, 2019).<sup>iv</sup> In cases outside the criminal jurisdiction or in cases outside the jurisdiction of England and Wales they should consult and have regard to any similar rules or directions such as the Family Procedure Rules or, in Scotland, the Crown Office and Procurator Fiscal's *Guidance booklet for expert witnesses – The role of the expert and disclosure*.<sup>v</sup>

A body of case law has established the duties of expert witnesses and this Code of Practice sets out the main duties of expert witnesses as derived from that case law and as reinforced by ethics.

### The law of evidence

In *Expert Evidence: Law & Practice* Hodgkinson and James distinguish five categories of evidence that may be given by experts:<sup>vi</sup>

- i. expert evidence of opinion, on facts adduced before the court;
- ii. expert evidence to explain technical subjects or the meaning of technical words;
- iii. evidence of fact, given by an expert, the observation, comprehension and description of which require expertise;
- iv. evidence of fact, given by an expert, which does not require expertise for its observation, comprehension and description, but which is a necessary preliminary to the giving of evidence in the other four categories; and
- v. admissible hearsay of a specialist nature.

Category (iv) is not expert evidence as such. Category (iii) is sometimes referred to as professional evidence, for example by the General Medical Council, the Academy of Medical Royal Colleges and Her Majesty's Courts and Tribunal Service.

### Ethics

It has been long established that doctors are required 'as citizens qualified by professional knowledge, to aid the execution of public justice'<sup>vii</sup> and that they must assist with the provision of 'an opinion consistent with truth and with justice'.<sup>viii</sup>

In doing so doctors are expected to act in accordance with established ethical principles. The four basic principles of medical ethics are: respect for autonomy, beneficence, non-maleficence and justice. Whereas beneficence and non-maleficence are of particular relevance to the doctor-patient relationship, it is important to recognise that for forensic clinicians providing expert evidence, and where there may be no doctor-patient relationship as such, justice takes precedence. This is consistent with r.1.1(1) of the Criminal Procedure Rules:

*'The overriding objective of this procedural code is that criminal cases be dealt with justly.'*

Where there is a risk that discharging this responsibility may not be in the interests of, for example, an accused person, thus violating the principle of non-maleficence, ethical difficulties may be reconciled by adherence to the principle of autonomy. This gives rise to a requirement that the forensic clinician should either, where the accused person has capacity, obtain informed and explicit consent to obtain and disclose evidence or, where the accused person lacks such capacity to consent, do so only if the best interests test is satisfied.



## The expert's duties

Whether instructed by the prosecution, the defence or the court, forensic clinicians must provide independent, objective and impartial evidence and perform their duties effectively, fairly and justly. This should include, where appropriate, providing a range of opinion and including reference to, and a balanced consideration of, matters that might adversely affect the validity of their opinion.

Forensic clinicians must limit their evidence to that area or areas of expertise in which they are qualified by experience and/or training and, if appropriate, distinguish between matters within their core area of expertise and matters of which they have only a working knowledge and about which they will defer to other experts.

Forensic clinicians must define their area or areas of expertise in sufficient detail and with sufficient clarity for the court to decide whether their evidence is admissible.

Forensic clinicians must make it clear if or when a matter or issue falls outside their area or areas of expertise.

Forensic clinicians should ensure that they clearly distinguish expert evidence of fact and expert evidence of opinion (see the above classification of evidence that may be given by experts) and, in accordance with the FFLM recommendations<sup>ix</sup>, offer expert evidence of opinion only if they are 'properly qualified and experienced to do so'.

The forensic clinician must have regard to any potential or actual conflict of interest and promptly inform the instructing party of such. Where the forensic clinician has, or has had, a therapeutic relationship with a person about whom they are instructed to provide evidence, they should consider recommending that such evidence is provided by another forensic clinician.

When forensic clinicians rely on a particular examination, technique, method or process, they should ensure that they are familiar with, and are able to explain, its validity and reliability and provide such other information as enables the court to assess the reliability of the evidence.

Forensic clinicians must create and retain detailed records of their examination or investigation and do so in compliance with the General Data Protection Regulation and the Data Protection Act 2018. They should be sufficiently detailed and expressed in such a manner that another expert can fully understand how, and with what results, the examination or investigation was carried out and, if appropriate, replicate it. Records should reveal the extent and quality of any data on which the forensic clinician's opinion is based.

When drawing conclusions from their findings the forensic clinician should draw attention to anything which affects the safety of their conclusion.

When relying on, or referring to, medical, scientific or other published authorities the forensic clinician must provide a balanced interpretation. The forensic clinician must not select findings or results to support their opinions or otherwise misrepresent, or mislead as to, individual findings or overall conclusions.

The forensic clinician should comply with all reasonable requirements as to the timing or delivery of any report, attendance at meetings or conferences with solicitor and/or counsel, and attendance at court. Any difficulties in so complying should be communicated promptly and with adequate explanation.

The forensic clinician who discusses the content of a proposed report in detail with another expert under a peer review arrangement should disclose the fact and nature of the discussion and identify the expert.<sup>x</sup>

The forensic clinician should have received, and should periodically update, training as an expert witness.

The forensic clinician should be engaged in a process of continuing professional development which addresses both the area or areas of expertise in which they are qualified and trained, so that they can demonstrate continued competence in that area or areas, and expert witness practice.

The forensic clinician should ensure that their practice as an expert witness is addressed at their annual appraisal.

## References

- i. *Criminal Procedure Rules* (SI 2005/384)
- ii. General Medical Council (2019) *Good Medical Practice*
- iii. General Medical Council (2013) *Acting as a witness in legal proceedings*
- iv. Crown Prosecution Service (2019) *CPS Guidance for Experts on Disclosure, Unused Material and Case Management*
- v. Procurator Fiscal and Crown Office *Guidance booklet for expert witnesses – The role of the expert and disclosure*
- vi. Hodgkinson, T. and James, M. (2015) *Expert Evidence: Law & Practice* (4th edition) Sweet & Maxwell, p.10
- vii. Percival, T. (1803) *Medical Ethics*. S. Russell
- viii. Duncan, A. (1795) *Heads of Lectures on Medical Jurisprudence* Edinburgh.
- ix. Faculty of Forensic & Legal Medicine (2020) *Forensic clinicians (physicians, nurses and paramedics) as witnesses in criminal proceedings*
- x. *Pinkus v Direct Line Group* (EWHC QB, unreported, January 2018).