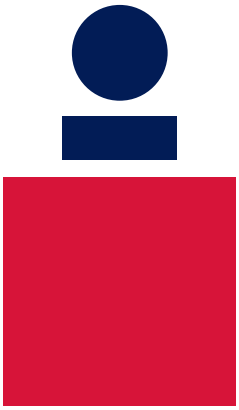
Giving evidence as a professional witness

Being a recognised expert



Doctors can expect to be called to give evidence in court several times during the course of their professional career. They can be called to testify in many different types of courts, including criminal and civil courts, coroners' courts and industrial tribunals.

Background

A doctor can be a professional witness or an expert witness, or both. These are two distinct roles and more information on the role and duties of an expert witness can be found in our factsheet, 'Acting as a medical expert witness.' Being called as a 'witness to fact' in a professional capacity is far more common than being asked to provide an expert opinion and here we examine the role of the professional witness.

Witness to fact

A professional witness is a doctor who is a 'witness to fact'. They are called to testify to the facts, usually of a consultation or contact with a patient in which they were acting in their normal professional capacity. They may also, on occasion, be required by the court to give a professional interpretation of the facts. Many of these facts are noted in the patient's records, which are confidential, but can be vital in helping the court to establish the facts.

The doctor will be asked to provide first-hand oral evidence. This will be cross-examined either to clarify or expand on any written evidence submitted, or to help the court establish the truth and determine the weight of the evidence.

Voluntary and summoned attendance

A professional witness can be compelled to give evidence in court and is usually paid a standard, non-negotiable fee for such an attendance. Typically, the patient will have given consent for information to be disclosed to the court. If the doctor agrees to attend voluntarily then there is no need for him or her to be summoned.

When you are asked to appear by a third party, or where evidence is being sought against the patient's wishes, or where your evidence will be against the patient's best interests, there will be issues of confidentiality and consent to disclosure, and you may prefer to be summoned. In such cases, you should inform the requesting solicitor accordingly. For a summons to be valid, it needs to be properly issued and to be accompanied by 'conduct money' (in effect, your travel costs). It can be sent through the post. Sometimes, solicitors will send you a copy of their application to the court for a summons. This is not the same thing and does not mean that a summons has been granted. Distinguishing between the two can be difficult and, if in any doubt, members should contact us for advice.

Referring to records and reports

While you are giving oral evidence to fact as a professional witness, the court will probably allow you to refer to the original contemporaneous paper records, or a print-out of the electronic record, in your possession while you are in the witness stand.

The court will probably not allow you to look at any non-contemporaneous records or reports. This applies to any you may have written at the request of the patient's own solicitors to submit to the court and on which you may be cross-examined. As it may have been some time since writing the report, it is advisable to read your report again carefully before the hearing.

Maintaining patient confidentiality

Even when giving evidence under oath in court, a doctor still has an ethical duty to seek to maintain patient confidentiality. If a question is asked which you fear may have to breach confidentiality, you should turn to the coroner, presiding magistrate, judge or chairman of the tribunal and explain your difficulty.

If the presiding officer of the court directs you to breach confidentiality, then, and only then, must you do so, even though you do not have fully informed consent from the patient. The solicitor or barrister acting for either side in a case does not have authority to compel you to breach confidentiality – either before or during the hearing.

Giving evidence

The court is most interested in what is called 'first-hand evidence'. This means that it wants you to concentrate on your observations and understanding of the case, rather than hear you quote word for word what the patient told you happened.

However, your understanding of a case, and the interpretation you place on your examination, will be influenced significantly by the history given to you by the patient, so you will need to give the court the relevant information.

A description of the presenting symptoms is important, but this information is to put the interpretation of your examination into context. It is less likely to be part of the evidence on which the court will rely. This contrasts with good clinical descriptions, where the history is central to any consultation.

Being challenged

If your evidence is challenged, it may be on the basis that you failed to put yourself in a position to make an adequate assessment of the patient. You must be prepared to explain not only what you found, but also what you asked, and what you looked for but failed to find.

Your contemporaneous notes are unlikely to contain this kind of 'negative' information. No one expects you to make copious clinical notes of every last detail, nor will you be expected to remember every detail of a consultation that at the time appeared to be routine, and which may have been one of several thousand similar cases that you have dealt with in the intervening time.

It is quite acceptable to quote from memory. However, if you cannot recall the details of a particular case, then it is acceptable to state what your 'usual' or 'normal' practice would have been in the circumstances.

The other relatively common area where doctors are challenged is on the level of expertise they claim for themselves. You should not be afraid to say 'I don't know' or to admit that something is beyond your level of experience or outside your area of expertise.

Answering the questions

You should address your answers primarily to the judge or tribunal (and the jury, if one is present), and then look directly back at the barrister when they are asking the next question. The courts want an answer that is concise and to the point. On the whole, the more succinct the answer, the better it will be.

Often a simple 'yes' or 'no' will suffice. It is the job of the barristers or advocates to ask further questions and to gain all the information the court wants from you. Sometimes, questioning may seem to be repetitive, but you are expected to respond to each question and to retain a professional composure. The courts expect witnesses to answer only the questions that are put to them. While barristers will often prefer a clear, black-or-white response, very often the truth is a shade of grey.

We have a podcast about doctors as professional witnesses. Please visit **themdu.com** to listen to this and all our other podcasts.

Questions and answers

Q I have been called to give evidence in the criminal courts after treating a patient who had allegedly been assaulted and sustained significant head and abdominal injuries. I provided the police with a report, so why am I also required to give evidence and what can I expect to happen in court?

A It would appear in this instance that you are being called to assist the court as a witness to fact or professional witness. As the patient has given his consent for information to be disclosed to the court, you are advised to co-operate with the court's request and attend voluntarily. The court has the power to summon you if you do not attend and the GMC also expects doctors to co-operate fully with any formal inquiry into the treatment of a patient. If you treated this patient in the NHS, you are expected to inform your trust's legal department. You will need to review your report again before appearing and take the contemporaneous medical records with you to court. Dress smartly and arrive promptly, but be prepared to have to wait for some time before you are called into the courtroom.

Bear in mind your duty of confidentiality while giving evidence and, if asked a question which you believe may breach confidentiality, seek direction from the judge.

Paragraph 72 of the GMC's guidance *Good Medical Practice* (2013) states 'You must be honest and trustworthy when giving evidence to courts or tribunals[1].

You must make sure that any evidence you give or documents you write or sign are not false or misleading.

a) You must take reasonable steps to check the information.

b) You must not deliberately leave out relevant information.'

Ensure your responses are concise and factually accurate and do not be drawn into making statements about matters that you may not be certain of or that are outside your area of expertise.

The example above is fictional but based on cases in the MDU's files.

For medico-legal queries

24-hour advisory helpline

Call **freephone 0800 716 646**

Email **advisory@themdu.com**

Visit **themdu.com**

This information is intended as a guide. For the latest medico-legal advice relating to your own individual circumstances, please contact us directly.

Our medico-legal team are available between 9am-5pm Monday to Friday and provide an on-call service for medico-legal emergencies or urgent queries 24 hours a day, 365 days a year.

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