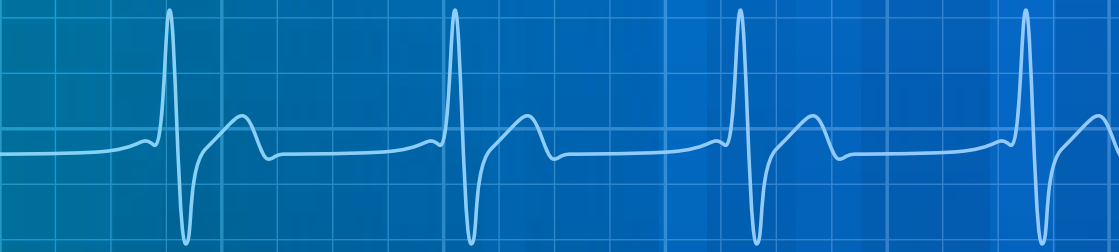
GUIDELINES
for co-operation between DOCTORS AND LAWYERS



AMA VICTORIA

Law Institute Victoria

GUIDELINES
for co-operation between DOCTORS AND LAWYERS

The Medico-Legal Joint Standing Committee, consisting of representatives of the Australian Medical Association (Victoria) Ltd, the Victorian Bar and the Law Institute of Victoria, has considered ways to improve co-operation between the medical and legal professions in relation to litigation and pre-litigation procedures.

Co-operation and communication between the two professions can alleviate much anguish and frustration in relation to the arrangement of medical examinations of litigants, furnishing of medical reports, payment of fees for medical reports, payment of witness fees and the calling of medical witnesses in litigation.

The following notes, published by the Australian Medical Association (Victoria) Ltd and the Law Institute of Victoria, are suggestions for both lawyers and doctors. It is hoped they will help both professions in relation to this area of practice.

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1. MEDICAL REPORTS

1.1 The doctor's role

Medical reports by both treating and non-treating doctors play a crucial role in helping courts to determine injury claims.

Treating doctors have a professional obligation to provide medical reports when requested by the patient or by a third party with the permission of their patient or, in some exceptional circumstances, when requested by a third party acting under legislative authority.

In providing a report, doctors should remember that their overriding duty is to assist the court or tribunal by giving a truthful and accurate medical opinion rather than to act as an advocate for the patient or as an advocate of another party.

A timely, detailed and well supported medical report will assist the pre-trial process and contribute to the resolution of a matter, meaning it is less likely that a doctor will be called to give evidence.

Before providing a medical report, doctors are obliged to acknowledge that they are bound by the expert witness code of conduct (see Appendix B).

1.2 The lawyer's role

The best approach is for lawyers to request a medical report rather than resort to a subpoena in the first instance. This enables lawyers to obtain the relevant medical details and may avert the need to subpoena the doctor.

It is suggested a lawyer's letter of request for a medical legal report includes details of the reason for the examination and questions requesting advice as to:

- the patient's physical condition with particular reference to the injuries alleged;
- whether, in the doctor's opinion, the incident could have caused the particular injuries;
- whether the patient's condition is stabilised or whether there is any prospect of further improvement or deterioration;

- whether there is any residual disability and, if so, the extent of such disability;
- whether any further medical treatment is indicated and, if so, the nature, frequency and period of such treatment, an estimate of the costs of and/or probable outcome of such treatment;
- whether the patient is fit for any work and, if so, what type; and
- if the patient is unfit for work, the probable cause of his or her loss of capacity for work and the extent to which he or she is incapacitated.

Where appropriate, the following questions should also be asked in the letter:

- do you recommend that the injured person be examined by any other specialists?
- what is the injured person's prognosis?; and
- are there any other matters which you consider relevant?

Details should also be given of any other arrangements for the injured person to be examined, including names of specialists and their areas of specialisation.

1.3 Reports by non-treating doctors

Medical reports by a non-treating doctor should include:

- the solicitor's complete reference on the report and copies of all accounts/receipts relating to the report;
- the patient's full name, age, occupation and address;
- the history of the patient relative to the injuries alleged to have arisen out of the accident;
- present complaints from which the patient is suffering;
- the results of the examination of the patient;
- any special diagnostic reports, including x-ray, pathology, ECG, EEG and CT scans;
- the probable diagnosis of the patient's condition;
- the probable prognosis of the patient's condition. (Where it is alleged that a pre-existing disease or condition has been aggravated or that future disease or degeneration may occur, specific reference to this should be made);
- the answers to the solicitor's specific questions where possible;

- an acknowledgment that the doctor has read and is bound by the expert witness code of conduct (see Appendix B);
- an analysis of medical records, operations notes and all other relevant data;
- full details of all verbal instructions that may have been provided by the lawyers or insurers; and
- a description and analysis of the evidence based clinical findings.

It is the responsibility of an injured person's legal representative to ensure that the independent examiner is provided with all relevant documentation in their possession to provide a clinically based recommendation(s).

It is the responsibility of the examiner to ensure that they have all clinical information when completing the report. If they do not have this information, they should make a qualifying statement in the report stating that they do not have all the information needed and the report has been completed on this basis. Alternatively, if it is not possible to form any opinion the examiner can refuse to complete the report until all the information is provided.

All details of any verbal instructions received from, or discussions held with, the requesting party either prior to or following an examination form part of the report and must be clearly detailed in the report.

The independent examiner should also note that, in all circumstances, his or her report will be released to either the injured person, their legal representative or treating medical practitioner(s).

1.3.1 Diagnostic investigations

In the interests of patients and to avoid duplication, certain specialised examinations such as X-rays, pathology, ECG, EEG and other special diagnostic investigations should only be undergone by patients if it is necessary for their treatment. Subject to the consent of the patient, the relevant reports should be made available to the defendant's medical advisors.

The injured person's solicitors should ensure that the injured person takes X-rays and relevant reports to the examination or, if

this is not possible, that the injured person authorises in writing the defendant's examiner to inspect such X-rays.

1.3.2 Merits of the case

The role of the independent examiner is to provide a recommendation based upon a comprehensive examination of the injured person, their current medical state, a review of all medical reports, test results and clinical records, details of any surgery and/or treatment and the need for same. Doctors should only be concerned with the medical and bio-medical reasons that are contributing to an injured person's current medical condition and not with what may flow from their reports. The injured person's legal representative will concern themselves with legal proceedings, settlements and awards. Under no circumstances should the examiner make any comment to the injured person regarding any legal proceedings, the likelihood of a settlement or as to the quantum for damages. Similarly, the independent examiner should also refrain from making written comments in his or her reports regarding these topics. The examiner should also refrain from expressing an opinion on whether there has been negligence by any party as that is for the court to decide.

Counsel and solicitors, on the other hand, must make an assessment of the risks involved in establishing that the defendant is liable. Many personal injury claims are settled at substantially less than the amount at which the injured person's injuries would have been otherwise assessed because there is substantial risk that the injured person might lose the action, or because both counsel and solicitor are satisfied that the damages will be substantially reduced because of the injured person's own contributory negligence.

Further, in some cases where there is a lack of uniformity of opinion between doctors (e.g, as to causation of the injuries, prognosis, etc.), it may become necessary for the injured person's legal advisors to discount the amount of the injured person's claim.

1.3.3 Delivery of reports

It is essential that doctors report to solicitors promptly after the medical examination. Rules operating in the courts put additional pressure on solicitors to prepare cases for trial. However, it is recognised that doctors have the right to withhold a report until they have received their fee for preparing the report or a written acknowledgment that their fee will be met either immediately or within a specified period.

It should be noted that the Transport Accident Commission (TAC) and the Victorian WorkCover Authority (VWA) do not pre-pay for medical reports requested from either a treating doctor or an independent examiner. However, the organisations do have a statutory obligation to pay these fees in part or in whole in many circumstances. In most circumstances, a payment will be made within 14-30 days of the organisation receiving the report.

1.3.4 Surveillance

The doctor must disclose any surveillance material, which is provided to doctors on engagement to prepare a medico-legal report or by way of supplementary request in the report.

1.4 Treating doctors

There is a difference in the position of the treating doctor whose primary function is to identify and treat conditions and a doctor whose assistance is sought solely for the purpose of independent assessment.

Treating doctors have a moral and ethical obligation to furnish a report for independent purposes on request by the patient or their solicitor and any follow up report reasonably necessary to present the patient's claim.

A treating doctor's report is a record of the medical history of a patient, which consists of consultations, examinations, tests, x-rays, prognosis and treatment plans. It should deal only with the patient's condition and treatment and not with issues of liability relating to the claim. A doctor is not obliged to provide expert opinions when they prepare a treating doctor's report.

A treating doctor must only disclose that information to which the patient has consented to being disclosed. In some cases, a doctor may feel uncomfortable about the information for which the patient has consented to disclosure in the report (for example, cases involving sexual abuse and family matters). In such cases, the treating doctor is entitled to discuss with the patient concerns regarding releasing such information.

1.4.1 Payment

Subject to the provisions of the *Workers Compensation Act* 1958, *Accident Compensation Act* 1985 and the *Transport Accident Act* 1986, accounts for treatment are the responsibility of the patient, many of whom believe erroneously that their actions for personal injuries will be prejudiced if payment of medical and hospital bills is made before their claims are litigated or settled. Solicitors should do their best to correct this perception.

From February 1996, Medicare benefits became payable for professional services that are wholly covered by workers compensation or damages under a Commonwealth or State or Territory law. A doctor treating patients seeking compensation has the option to either bulk-bill Medicare or give the patient a private account as would normally occur with any other consultation.

It is noted that Medicare benefits are not payable where medical expenses for the services are in relation to a compensable injury or illness for which patient's insurer or compensation payer has accepted liability. However, if medical expenses relate to a compensable injury or illness and the insurer or compensation payer is disputing liability, Medicare benefits are payable until liability is accepted.

1.4.2 Authorities from patients

A treating doctor must not provide medical reports without the patient's consent. Ideally, an authority signed by the patient should be an original document dated contemporaneously with the request for the report and addressed specifically to the doctor on the information sought.

This applies also to cases where the patient is a Victorian WorkCover Authority (VWA) or Transport Accident Commission (TAC) claimant and has previously signed a general authority.

It should be noted that patients may withdraw the authority granted, in which case medical information may not be imparted until another authority is given.

1.5 Issues for both treating and non-treating doctors

1.5.1 Privilege

Documents created for the dominant purpose of prosecuting or defending an action are legally privileged and such privilege can be waived only by the party who has the benefit of such privilege (usually the client).

Medical reports are medically privileged documents and the contents may only be disclosed with the consent of the patient / client. Therefore, the mere issue of proceedings by a patient or medical records being the subject of a subpoena does not mean that patients have waived certain rights to confidentiality or that medically privileged information will automatically be disclosed. Medical privilege requires that patients still must give their consent for their medical information or records to be viewed in these circumstances. Accordingly, it would also normally be improper for the injured person's and defendant's medical advisors to discuss the injured person's medical condition with each other without the consent of both parties through their respective solicitors.

The Rules of Court require the parties to exchange reports in most cases. Often, medical reports are revealed or exchanged during settlement negotiations, mediation or conciliation and, in all circumstances, will be released to either the injured person, their legal representative or treating medical practitioners(s). Doctors should keep this in mind when preparing their reports.

It is recognised that a solicitor may be required to disclose and discuss the contents of any medical report received in the

course of advising a client. The solicitor should exercise care so as not to interfere with the medical treatment of the client. When in doubt, the solicitor should discuss the question of the information to be disclosed with the treating doctor and vice versa. Doctors should be careful not to make derogatory remarks about the patient or their colleagues either orally in examination or in written reports but should confine themselves to medical fact and their professional opinion.

In the interests of their patients, doctors sometimes indicate that their reports are "confidential" or "not to be sighted by the patient", etc. Notwithstanding such endorsement, the report may nevertheless have to be disclosed pursuant to the Rules of Court. See Section 1.5.4 – "Exchange of Medical Reports" below.

Where a litigant is incapable by reason of injury, disease, senility, illness, physical or mental infirmity of managing his or her affairs relevant to the proceedings or is a minor, the Rules of Court make provision for the appointment of a litigation guardian. In such a situation, it is the litigation guardian who makes the decisions which would otherwise be made by the litigant. Thus, it is for the litigation guardian to make any decisions as to the waiving of privilege.

Doctors should keep in mind that they may be required to make available to the court their original notes, particularly if they refer to them during evidence.

1.5.2 Setting fees

Doctors may charge a reasonable fee for the preparation of a report for a patient or for a third party. Fees and arrangements for payment, such as payment before the release of the report, should be agreed before the assessment is undertaken.

Co-operation and undertakings by both solicitors and doctors in relation to payment for medical reports can help avoid disputes and unnecessary delays.

The amount of work involved in writing a medico-legal report

varies between cases. For treating doctors, it could range from a one-page history of a patient's condition to a more time-consuming report. Communication between lawyers and doctors in relation to such matters will help alleviate any tension in relation to fees.

Co-operation can be encouraged by:

- Lawyers agreeing to promptly pay fees for medical reports;
- Prior discussion about the level of work involved for the doctor in preparing the report;
- An appropriate hourly rate being agreed to between the doctor and the lawyer;
- A doctor providing a breakdown of their bill, detailing what was involved and the time taken; and
- A solicitor making it clear at the time of requesting a report that they do not intend to pay for the report until after an award of damages.

The fee is generally a matter for negotiation between the doctor and the solicitor, insurer or authority seeking the report. However, some jurisdictions have limits on the amount paid for a report. Also, some organisations - such as Victoria Legal Aid, Community Legal Centres, the VWA and the TAC impose limits on the amount paid for medical reports. Such limits should be made clear to the doctor by the solicitor before or when requesting a report.

Subject to this, doctors should satisfy themselves in each individual case as to a fair and reasonable fee to charge having regard to the particular circumstances of the case.

As far as practicable, the fee should reflect the effort, skills and resources associated with the provision of that report, and consider:

- What income is foregone by the doctor in completing the report?
- Are other employees involved in the preparation and at what cost are their services to be provided?
- Are there any other costs directly associated with the service (e.g. photocopying, telephone calls, etc)?

The doctor's fee for the report should not include a pre-estimate of preparation time for the giving of evidence or stand-by costs.

It is not justifiable for a doctor to require a solicitor guarantee payment of stipulated fees for a possible subsequent court attendance – as opposed to payment for the report - before forwarding a report.

A doctor can reasonably expect that solicitors who call upon them as witnesses will give an assurance for the payment of those fees fixed by the court or allowed by the scale. Some doctors demand the payment of fees prior to their appearance in court substantially in excess of the scale for professional witnesses. This is not justifiable and may be unlawful. The doctor, like any other witness, is bound to appear to a subpoena.

1.5.3 Payment of fees

A doctor may request prepayment of the fee for the preparation of a report, and may decline to provide a report if there is no security of payment. This does not apply to some authorities, such as the VWA and the TAC, which have policies of not prepaying for medico-legal reports. This policy extends to the insurers and solicitors acting on behalf of these authorities.

However, both the TAC and VWA have a statutory obligation to reimburse the reasonable cost of these reports. In most circumstances, a payment will be made within 14-30 days of the organisations receiving the report.

When a solicitor, insurer or authority requests a medico-legal report, the payment for this service is the responsibility of the party making the request.

If the doctor does not request pre-payment, the solicitor should ensure that they either have funds in their trust account to pay the fee or be prepared to bear the costs from their general account.

If a solicitor requests a report but it is no longer required, the report fee is payable if the report has been prepared. If the report has not been prepared but the examination conducted, a

reasonable fee is payable for the work done.

Both VWA and TAC do consider circumstances where a fee in excess of its current fee schedule will be paid. Full details regarding this topic can be found on the respective websites – TAC, www.tac.vic.gov.au and for VWA, www.workcover.vic.gov.au.

1.5.4 Exchange of medical reports

Rules of Court require parties to exchange medical reports prior to trial in personal injury actions. It should be noted that, in all circumstances, the independent examiner's medical report will be released to either the injured person, their legal representative or treating medical practitioners(s).

Generally speaking, a defendant's solicitor is obliged to obtain and supply, within a fixed time, a copy of any medical report given by a medical advisor whether it is held by or on behalf of the defendant. The injured person's solicitor is also obliged, within a fixed time, to give the defendant's solicitor copies of any reports, including any hospital report, on which the injured person intends to rely.

This removes the privilege attached to such medical reports in injury claims and doctors and hospitals should be aware that their reports would be exchanged in this type of case. It is appropriate for solicitors to inform doctors at the time of arranging examinations so that they are clearly put on notice that their medical reports may be made available to the opposing parties and their advisors or indeed, tendered as evidence in non jury actions.

It is reasonable to anticipate that, in most cases, the defendant's solicitor will be obliged to deliver medical reports to the injured person.

A doctor providing a report for one party in the litigation may be called to give evidence for the other party as a consequence of the exchange of reports. Again, the doctor should be given as much warning as possible of their likely requirement to attend court. The

reason they are being called by that party should be explained so as to avoid confusion. Doctors unsure of their ethical position should contact the solicitors at AMA Victoria, or the doctor's indemnity insurer or the Medical Practitioners Board.

1.5.5 Medical reports for injured persons with no legal representation

A doctor will occasionally be required to provide a report or an opinion for an injured person who is without any legal assistance. The doctor should ensure that the injured person understands the cost of preparing a report where a direct request has been received from an injured person. Where conducting an independent examination for an insurer, the doctor should explain to the injured person the purpose of the examination.

Doctors should refrain from being drawn into any legal or entitlement issues by the injured person and, if appropriate, suggest that the injured person seek legal advice.

2. THE EXAMINATION

2.1 Arranging the examination

It should be possible to arrange an appointment for the medical examination of an injured person far enough in advance to avoid disrupting a doctor's schedule.

The reported practice of asking clients to arrange their own consultation with a non-treating doctor, ostensibly for treatment, followed immediately by a request for a report, may constitute professional misconduct on the solicitor's part.

It should be noted that examinations required by either the TAC or VWA, in most cases, will be arranged by the organisations, agents or their legal representatives. In some circumstances, the injured person may be self-represented and the injured client will contact a doctor's rooms directly to arrange an examination.

Generally, a non-treating doctor should consider providing a report only

in response to a letter from solicitors, insurance companies, authorities and the like. A non-treating doctor who is unwilling to appear in court should not accept a request to undertake a medico-legal assessment. Patients can request provision of a report from their treating doctor.

2.2 Letter

Appointments are usually made by telephone and should always be confirmed by letter. It is suggested the letter be accompanied by a brief description of the circumstances in which the patient was injured, particulars of the injuries alleged, copies of relevant medical certificates and other medical reports, X-ray and pathology reports and the like, together with details of the disabilities which the patient claims arise out of the injuries caused by the accident. The letter to the examiner should also note details of relevant verbal information or instructions received at the time from either the lawyer or the TAC or VWA.

2.3 Examination at short notice

Sometimes an appointment and examination may be needed at short notice. This could be because the injured person's condition becomes manifest or relevant late in the course of legal proceedings, or the particulars of injuries are amended shortly before the hearing of the action.

In such cases, mutual understanding and co-operation between the professions is essential to ensure the assessment of an injured person's entitlement to compensation is not unduly delayed by an adjournment.

2.4 Further queries

There may be times when a lawyer needs to ring the doctor to clarify something in a report. All verbal advice or clarification should be followed up by a letter detailing the nature of the telephone call.

In general, doctors are advised not to provide reports or clarification of reports only by telephone. Reports should be written and substantive clarifications should be in writing, in response to a written request. This ensures that their opinion deals with the issues in dispute and accurately reflects their views. A fee may be charged for the time required in

responding to a telephone enquiry and in providing written clarification.

In the case of any clarifications, it is important for the doctor to take steps to identify the caller as the lawyer involved in the case, perhaps calling them back at their office. Lawyers should also give a doctor prior notice of the anticipated telephone call so they can organise time to receive the call and be prepared. When asked follow-up questions, a doctor should simply clarify points made in the initial report and not produce new information over the telephone. It is also important for the doctor to keep notes of the conversation.

2.5 Cost

Medicare does not cover the cost of an examination for legal purposes and no government benefit is available. It is essential that the doctor knows the nature of the consultation beforehand so they do not inadvertently defraud the Medicare system by asking the patient to sign an assignment form. Therefore, lawyers should ensure clients are not left to arrange their own appointments with a non-treating doctor, and should make clear to the doctor the applicable arrangement for payment of the doctor's fee.

2.6 Information to the injured person

When a medico-legal examination is organised, it is recommended that the injured person be given a copy of the statement set out in Appendix A to this booklet. The statement explains what the examination involves and the role of the doctor.

Non-treating doctors are advised not to divulge the likely content of a report to a patient at the time of examination.

2.7 Examination for the defendant

When a defendant's solicitor arranges the examination, they must advise the injured person's solicitor of the appointment and obtain written confirmation of the injured person's ability to attend. The injured person should be asked to take copies of reports and x-rays, CT scans, ECG, EEG and other diagnostic investigations to the appointment.

2.8 Interpreters

In appropriate cases, a solicitor should arrange for an independent, qualified and experienced interpreter to attend the examination with the injured person. Ideally, the interpreter should be the same gender as the injured person. The doctor should be informed of these arrangements. Use of family members as interpreters should be avoided if possible.

2.9 Surveillance

It is inappropriate to seek a doctor's assistance in any surveillance of a litigant at, before or after a medical examination. As a standard practice when involved in treatment or independent examination, doctors should undertake their own clinical observations of an injured person within the confines of their premises.

3. CALLING MEDICAL WITNESSES

3.1 Introduction

Some doctors may be reluctant to attend court, believing that their evidence is not going to assist the patient's case and may even hinder it. The decision as to whose evidence will be required is one for the solicitors to make; however, it is generally helpful for a doctor to discuss their concerns with the solicitor first.

A doctor who is asked to attend a court or tribunal to give evidence should write to the solicitor concerned, indicating their professional commitments on the appearance date and for several days afterwards. This will allow agreement on a mutually convenient time for the doctor to give evidence and to be "placed on call". Making arrangements convenient to all doctors who are potential witnesses assists all parties.

Doctors should seek written acknowledgment from the solicitors to pay expenses as appropriate or agreed within a reasonable time of receiving their account.

3.2 Fixture of cases

Court and tribunal cases to determine liability and damages in relation to personal injuries arising from accidents are fixed for hearing in the monthly court lists. Such cases are fixed to be heard on specific dates

and are heard in the order in which they appear in the court lists. However, it is not possible for a solicitor to determine precisely when a witness will be required. Contested cases frequently run for several days or more, and sometimes cases are settled shortly before they are due to be heard.

The uncertainty surrounding the precise hearing date of a case is a constant source of inconvenience to those involved. It is undesirable for a doctor to be required to attend court from the beginning of the case as this could result in them being absent from their practice for a considerable period. It is also undesirable to require doctors to leave their practices on short notice, without prior warning.

More work could be done in this area particularly by lawyers and the courts to make this less burdensome. There should be greater emphasis on mutual respect, courtesy and a better understanding of the circumstances.

3.3 Obligations of the solicitor

Prior to the pre-trial conference, summons for directions or callover, the solicitor should inquire as to the availability of the doctor to give evidence during the relevant fixture period. The solicitor should try to make such arrangements to suit the doctor's other commitments as far as is practicable.

When the case is fixed for hearing, the solicitor should immediately notify the doctor of that date in writing and advise that the case might not necessarily be heard on that precise date but on some date shortly afterwards.

The doctor should be asked to give some indication of their professional commitments on that date and for several days thereafter so a mutually convenient time for the doctor to give evidence can be agreed upon. The time must fit in with the court schedule. It should also be possible to arrange for the solicitor to telephone the doctor about one hour (or such time as mutually agreed) before the agreed time to advise whether they will be required at court to give evidence. A solicitor should be able to arrange the order of appearance of medical witnesses during the course of the hearing to avoid calling any of them at an inconvenient time.

However, during the course of litigation, the progress of even the most thoroughly prepared case can be altered or delayed, which sometimes results in the re-arrangement of witnesses. Doctors are asked to be understanding in such situations.

A solicitor should inform a doctor as soon as possible if they are no longer required at the arranged time due to a matter being resolved or adjourned.

3.4 Subpoenas/summonses

There are two main subpoenas a doctor can be served with:

- Subpoena to produce documents; and
- Subpoena to give evidence.

3.4.1 Subpoena to produce documents

Doctors should read the schedule to the subpoena carefully. They are only obliged to produce those documents specified in the schedule and are not required to attend court in person. Generally, a subpoena to produce will request a patient's entire medical file and not specify separate documents. The schedule to the subpoena will also state whether the doctor is to provide original or copies of documents. (The courts are moving slowly towards acceptance of copies and doctors who are in doubt as to what may be submitted as a copy should check with AMA Victoria legal staff.) If required to produce original documents to the court, it is good practice to maintain a copy of the sent documents. The documents should be sent by registered post (or couriered) to the court in a sealed envelope and it is essential to enclose a copy of the subpoena. The documents should NOT be sent directly to the solicitor requesting the documents or the relevant statutory authority. The original or copied documents will be returned by the court at the end of the hearing or after the parties have inspected the documents.

3.4.2 Photocopying charges for medical records

At times, treating doctors are merely requested to provide the original medical records to a court or tribunal pursuant to a subpoena or summons. It is advisable for the doctor to keep

photocopies of the medical records for the purpose of the ongoing treatment of the patient or should the original records get lost.

Doctors may, in the circumstances, charge a reasonable fee for photocopying. In deciding what constitutes a reasonable fee, the doctor should have regard to the actual expense involved in the photocopying and any associated administrative costs.

Doctors should note that copying of records under the *Health Records Act 2001* is subject to fees set by regulation. Copies of the fee schedule may be obtained from AMA Victoria or the Health Services Commission.

3.4.3 Subpoena to give evidence

Doctors may be called formally to attend a court to give evidence by means of a subpoena or summons. Courts have extensive powers regarding the failure to answer subpoenas or summonses and a failure to obey may cause a witness to be held in contempt of court and penalties may apply.

3.4.4 What doctors should do

Doctors should telephone the solicitors who issued the subpoena and organise the most convenient time for them to give evidence.

Courts are mindful of the pressures on doctors who have to leave their practices to give evidence and will accommodate them as far as is practicable. At times, a court will give priority to doctors giving evidence to minimise the impact of keeping a doctor away from his/her practice.

Doctors should always communicate with the solicitor requesting their attendance and the court about individual circumstances. However, doctors need to be aware that although it may be argued that a doctor should be heard before others, due to other commitments, the court may not allow their evidence out of order. Further, practical difficulties can arise and in some situations the calling of a doctor's evidence may be delayed for reasons beyond the control of the solicitor and the court.

In exceptional circumstances, doctors may apply to the court to be excused from appearing in response to a subpoena or summons. This application should be brought as soon as the subpoena or summons has been served and it becomes apparent the doctor will be unable to attend on the date specified.

Information which is sensitive or potentially deleterious to the patient's health may be enclosed in a separate envelope by a doctor with a covering letter to the trial judge alerting them to the concerns and requesting a ruling on the production of the sensitive documents. In doing this, the doctor has complied with their obligation to the court but has taken all measures to protect the confidential information.

3.4.5 What solicitors should do

A letter from the solicitor should accompany the subpoena or summons directing the doctor not to cancel appointments during the hearing unless further directed.

Solicitors should take care to name the patient when they are subpoenaing records. Sometimes, solicitors may send a document that just names the parties in the case when the patient may not be a party.

Ideally, the barrister or instructing solicitor or self-represented injured person briefed in the case should organise the time for calling the doctor and give an estimate of the time that the doctor will be required at court.

Solicitors should only serve subpoenas and summonses if they are absolutely necessary and serve them within a reasonable time.

Solicitors have a duty to the court in respect of the conduct of a case and must ensure witnesses are available. It is helpful if they provide an after-hours telephone number for the doctor to enable them to check on information about a trial.

A solicitor should check with the doctor that they are still available as a witness if a new date is set.

3.4.6 Video evidence

In some circumstances, it may be possible for a witness to give evidence by video link.

Doctors may inquire about this from the solicitor seeking their appearance in court or a tribunal.

3.5 Witness fees

A doctor is entitled to a fee for attending a court or tribunal. The amount should reflect the time the practitioner is away from their practice but will not always compensate the doctor for all cancelled appointments.

The Supreme and County Courts fix scales of fees for professional witnesses. These scales are not binding. It is ultimately for the doctor and solicitor to negotiate the fees, although the scales serve as a useful point of reference.

A request to give evidence or the service of a subpoena or summons should be accompanied by a letter from the solicitor agreeing to pay the doctor's expenses in accordance with the appropriate scale or as negotiated between the parties.

If this is not done, the doctor can, with complete propriety, before giving evidence ask the judge or magistrate whether arrangements can be made to secure payment of scale fees for attendance in court.

A solicitor should make every reasonable endeavour to obtain payment of a doctor's fee for a court or tribunal appearance within a reasonable time of receiving an account.

APPENDIX A

MEDICO-LEGAL EXAMINATION – INFORMATION FOR CLAIMANTS

You have been asked to attend a "medico-legal" examination conducted by

.....

on your/the defendant's behalf.

The purpose of the consultation

Medico-legal examinations are an important part of the process of investigating and assessing your claim. They may be organised by either your solicitors or the insurer or solicitors of the other party. Regardless of who has organised the examination, it is designed to be an independent, professional assessment of your condition, its cause and its likely outcome. The examination will provide the doctor with information on which to base a report.

What will I be asked?

Because the purpose of this interview is not to provide medical advice or treatment, it will be different in character to your usual consultations with treating doctors.

The examining doctor will need to take a history of your medical and health problems. For example, he or she will ask you about when your problems began, what has happened to you since that time, what treatment you have received, and so on. You will also be asked about the details of the accident and about your present and past medical and health problems in detail.

If it is relevant you may then be asked about your work history, both past and present, so that the effect of your problems on your working capacity may be assessed. You may also be asked questions about your social and recreational activities, past and present.

The doctor will not be able to rely on other people's notes or letters but must obtain these details from you personally. Some doctors prefer that only you and the doctor are in the room while you are giving your history unless a professionally qualified interpreter is required.

What will the examination involve?

The physical examination will differ depending upon the type of specialist who is examining you. If the examination requires you to undress, you may ask for a gown. You may also ask for a chaperone to be present if you prefer.

The examination will be thorough and may involve areas which do not appear to have been injured. For example, back injuries may require examination of the legs or arms because the nerve supply to these limbs comes from the spine.

The medico-legal examination should not injure you. In some cases the doctor may need to test joint movements, if this causes pain tell the doctor and do not continue to move beyond the point of pain.

Psychiatric assessments

If you have been asked to attend a psychiatric or psychological assessment your examination will involve more in-depth discussion on a range of subjects. The doctor will not provide you with counselling or advice but will ask you to describe your own feelings and reactions. No physical examination will be required.

Additional material

If your solicitor has requested the medico-legal examination, she or he will usually have supplied the doctor with copies of any records, X-rays and tests results in their possession.

If the examination has been organised by the other party's solicitors or insurers you should bring copies of any relevant X-rays and X-ray reports.

Discussions with the medico-legal expert

You will probably cover a great deal of information during the consultation. If you have any questions other than an opinion about your medical status during the interview or the examination you should feel free to ask the doctor.

Because the assessment is not related to the medical care and treatment of your condition he or she cannot offer any comment to you on the appropriateness of your treatment. The doctor is not at liberty to discuss the diagnosis and treatment with you but these matters will be covered in the report.

You are, of course, entitled to be treated with respect and consideration during the examination. If you are concerned about the way in which the examination has been performed you should discuss this with your solicitor.

Non-Attendance

If you are unable to attend the appointment, please ensure that you contact your solicitor or the insurer or party who arranged the examination as soon as possible. If you fail to attend an appointment you may be charged a non-attendance fee and your claim may also be delayed by several months due to the waiting list for appointments.

APPENDIX B

SUPREME COURT EXPERT WITNESS CODE OF CONDUCT

FORM 44A – SUPREME COURT (GENERAL CIVIL PROCEDURE) RULES 2005

1. A person engaged as an expert witness has an overriding duty to assist the Court impartially on matters relevant to the area of expertise of the witness.

2. An expert witness is not an advocate for a party.

3. Every report prepared by an expert witness for the use of the Court shall state the opinion or opinions of the expert and shall state, specify or provide:

   (a) the name and address of the expert;

   (b) an acknowledgement that the expert has read this code and agrees to be bound by it;

   (c) the qualifications of the expert to prepare the report;

   (d) the facts, matters and assumptions on which each opinion expressed in the report is based (a letter of instructions may be annexed);

   (e) (i) the reasons for,

   (ii) any literature or other materials utilised in support of,

   (iii) a summary of–

   each such opinion;

   (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;

   (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;

   (h) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate, and that no matters

of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the Court;

(i) any qualification of an opinion expressed in the report without which the report is or may be incomplete or inaccurate; and

(j) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason.

4. Where an expert witness has provided to a party (or that party's legal representative) a report for the use of the Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i) and (j) of clause 3 of this code and, if applicable, paragraph (f) of that clause.

5. If directed to do so by the Court, an expert witness shall–

(a) confer with any other expert witness; and

(b) provide the Court with a joint report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing.

6. Each expert witness shall exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement.

APPENDIX C

VCAT PRACTICE NOTE – EXPERT WITNESS

Practice Note PNVCAT 2 – Expert Evidence

The Rules Committee issues the following Practice Note under s158 of the *Victorian Civil and Administrative Tribunal Act 1998*:

1. Operation

1.1 This practice note will apply from 1 September 1999 in respect of:

(a) any evidence given to the Tribunal by an expert witness;

(b) the retainer by parties to a proceeding, of any expert witness to provide a report for use in evidence before the Tribunal.

2. Expert's duty to the Tribunal

2.1 An expert witness has a paramount duty to the Tribunal and not to the party retaining the expert.

2.2 An expert witness has an overriding duty to assist the Tribunal on matters relevant to the expert's expertise.

2.3 An expert witness is not an advocate for a party to a proceeding.

3. Content and form of expert's report

3.1 The report of an expert must include the following matters-

1) the name and address of the expert;

2) the expert's qualifications and experience;

3) a statement identifying the expert's area of expertise;

4) a statement setting out the expert's expertise to make the report;

5) all instructions that define the scope of the report (original and supplementary and whether in writing or oral);

6) the facts, matters and all assumptions upon which the report proceeds;

7) reference to those documents and other materials the expert has been instructed to consider or take into account in preparing his or her report and the literature or other material used in making the report;

8) the identity of the person who carried out any tests or experiments upon which the expert relied in making the report and the qualifications of that person;

9) a summary of the opinion or opinions of the expert;

10) a statement identifying any provisional opinions that are not fully researched for any reason (identifying the reason why such opinions have not been or cannot be fully researched);

11) a statement setting out any questions falling outside the expert's expertise and also a statement indicating whether the report is incomplete or inaccurate in any respect; and in Domestic Building List cases only

12) i) if rectification or demolition or other alteration of premises is recommended, the reason(s) for such recommendation and the likely cost(s) involved;

ii) whether any alternative remedy or remedies are a reasonable alternative.

3.2 The expert must declare at the end of the report, "I have made all the inquiries that I believe are desirable and appropriate and that no matters of significance which I regard as relevant have to my knowledge been withheld from the Tribunal."

3.3 This paragraph does not apply to reports obtained from treating doctors and hospitals.

4. Where the expert changes his or her opinion on a material matter

4.1 An expert witness who changes an opinion on a material matter on the basis of another expert's report or for any other reason must, after the exchange of reports or at any other stage, communicate that change of opinion in writing to the party retaining the expert and such party shall forthwith file with the Tribunal, notice of such change of opinion.

4.2 Such a document must specify reasons why his or her opinion has changed.

5. Where the Tribunal directs expert witnesses to meet

5.1 If expert witnesses retained by the parties meet at the direction of the Tribunal to narrow any points of difference between them and to identify any remaining points of difference they must each set out in writing by a document filed with the Tribunal any agreed points and all remaining points of difference.

5.2 If any expert witness directed by the Tribunal to meet with any other expert is instructed by a party not to reach agreement in respect of points of difference, the fact of such instructions must be reported in writing to the Tribunal by the expert witness concerned.

6. Generally

6.1 Parties to a proceeding must ensure that any expert retained by them to provide a report for use in the proceeding is aware of the contents of this practice note, at the time of such retainer.

DISCLAIMER

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