# "The Health Professional in Court": 10 Principles for Practice

**For this month's feature article, we interviewed someone who is acknowledged as one of the world's top surgical coaches and an international authority in medico-legal issues.**

**Mr Rodney Peyton, OBE MD is a Trauma Surgeon who has the unique distinction of holding Fellowships in all four Royal Colleges of Surgeons in the UK and Ireland as well as being a Fellow of the Royal College of Physicians in London. He holds a master's degree in medical education from Cardiff University and also graduated in law from the College of Law in London.**

**In his career spanning 40 years, he has been engaged in over 70,000 personal injury cases as well as being asked to advise on more than 3000 cases involving medical malpractice.**

**He therefore has a wealth of experience in preparing cases for and giving expert testimony in Court and has been involved in the training of doctors and lawyers in dealing with medicolegal cases, individually on a face-to-face basis, and also as a trainer and keynote speaker.**

**In this article he will cover his 10 top strategies to help health professionals deal with the Court process.**

**He is also a well-known author and international keynote speaker. For his availability to speak at your corporate events, contact him at rpeyton@rpeyton.com.**

Increasingly, senior professionals from all branches of the healthcare industry are finding themselves involved in the Court system, either on an involuntary basis, as a witness to fact or defendant, or on a voluntary basis as an expert witness.

Gone is the paternalism of "the professional knows best" and there has been more and more scrutiny by the public of professional actions and attitudes.

Leaving aside the criminal law, which is an entirely different situation, civil legal cases are predicated on the fact that within every profession, or branch of profession, there exists a range of opinions as to what constitutes good practice. Defendants and expert witnesses are expected to provide opinions, witnesses to fact are not.

It is important to understand that, while judges are highly trained and experienced in the interpretation of the law, they and the barristers or trial lawyers who argue cases are nevertheless lay people when it comes to the health care professions. They are not medical experts and therefore require help in understanding the medical evidence before them. For the health professional, whether as defendant or expert witness, the duty is to assist the Court in their decision-making whilst at the same time maintaining and promoting their own professional integrity and reputation.

Most healthcare professionals rarely appear in Court. From personal experience as a teacher and trainer to those who do become involved, there are recurrent themes which arise and so the following 10 principles have been developed to help guide professionals through the Court process.

#### Record Keeping

Keep detailed contemporaneous records.

Any major findings or decisions, whether it be from working with a patient, a client or undertaking a project, should be on record as one never knows when such events may become the object of scrutiny. There is an old saying, "if it is not written down, it did not happen" and oral evidence is likely to be regarded as weak and suspect unless there is written evidence to back it up. A little extra time spent in ensuring accurate, contemporaneous recording may save considerable time, effort and indeed stress at a later stage when trying to convince a Court that decision making was sound. Remember, all written communications are discoverable and may be used in Court proceedings. Therefore, it is important not to make any gratuitous comments within the written record.

When acting as an expert witness, always look for original, contemporaneous documentation to back up later oral recall of events. Stick to the facts as presented and derive opinions from them.

#### Producing a report

Reports should be timely, factually based and the opinions well-reasoned, taking full account of appropriate legal tests.

When producing a report, clarify whether you are acting as a professional or as an expert and keep the distinction between the two. As a defendant you will be required to explain your position. It is important you outline any reasonable range of opinion which informed your decision-making and actions, stating why your own should be preferred, "defence being the best form of attack".

Being a witness to fact is a requirement rather than a choice. If you have been directly involved, provide evidence under clinical findings, observations and actions. Limit evidence to that which has been recorded and remember not to venture opinions or speculate on events.

An expert witness's function is to help the Court by virtue of their knowledge, training and experience within their professional field of expertise. Reports must not intentionally mislead and any omission of relevant information reveals prejudice ,whether acting as a professional or an expert witness. All opinions proffered must be logical, based on recognised clinical evidence and guidelines to include the appropriate standard of care, being clear what was relevant at the time of the incident. Always anticipate counter arguments, addressing them within the body of the report wherever possible and be alert to the potential for your own professional bias. Expert witness reports must be and must be seen to be independent.

Do not revise your report unless you have been subsequently provided with new facts which need to be taken into account, at which time you must explain why these have made a material difference to the previous conclusions.

### Attendance at Court

Always present as professional and credible.

First impressions count. This includes dressing appropriately for the Court and ensuring you have all your papers with you, particularly when actually giving evidence.

Make sure you take time to prepare thoroughly, highlighting any relevant areas in your report and those of others for ease of reference. Make sure you have taken time to think out potential questions or possible arguments which may be raised and know your reasoning behind everything you are going to present.

### Court procedure

Be aware of the Court procedure in whichever jurisdiction you attend While you may be senior in your branch of the health care profession, unless you are highly experienced in Court practice, you are relatively junior in relation to the Court process. This is particularly pertinent for witnesses to fact who may be unfamiliar with legal proceedings.

An expert is engaged because of expertise in a particular subject and must, not only keep up to date in their own field, but also be cognisant of the requirements of the Court process. They are there to represent their point of view and assist the legal process.

It is important they do not come across as overbearing as they are, in fact, servant/leaders, tasked with educating the Court and therefore must understand what is required from the Court's point of view.

Constantly strive to improve your presentation skills, for example by giving talks on medicolegal issues, so that you are used to standing up and delivering legal points in relation to medical cases.

### Duty to the Court

Your professional duty as an expert or a witness to fact is always to the Court, no matter who engages you or why you have been called to attend.

This responsibility must be taken seriously. The role is to help litigants, their lawyers and the Court better understand the nature of medical evidence in individual cases so they can come to reasonable decisions. In this context it is important they are helped to understand what acceptable practice was at the relevant time.

Health professionals do not have immunity when giving evidence. Not having this protection has unfortunately meant that some have been at the receiving end of severe public criticism, up to and including the award of costs against them and even a custodial sentence when the Judge considered that, by acts of omission or commission, the Court had been misled. This can have severe implications on personal, professional and financial standing.

### Range of Opinion

Always acknowledge there may be a range of reasonably held opinions.

In this context also consider possibility Vs probability "more likely than not". If a matter comes to Court, there is going to be an opposing view from another professional expert who does not fully, if at all, agree with your opinion. Therefore, it is important to cover counter arguments in your considered opinion which adds to the credibility of the report. The report must contain logical reasoning for accepting or rejecting other opinions and include any references which are to be relied upon.

Guard against emotional statements and hyperbole and never denigrate others. Very rarely is "in my experience" relevant in Court unless it is thoroughly backed up by objective evidence.

### Credibility

Experts must stay within their field of expertise when giving opinions. They should have a bespoke CV for each case, indicating why they are a reliable expert for the matters at hand. It is in the nature of the Court process that opposing lawyers will try to diminish your credibility and it is wise to have answers for the three questions which almost every barrister/trial lawyer will utilise at the beginning of an examination. These are:- • Do you know your duty to the Court, including your knowledge of relevant legal tests? • Are you an expert on all points on which you are giving an opinion? • Is there a range of opinion which reasonable and respectable doctors may hold? Ensure you are clear on your answers before getting into the witness box. This is all about credibility and as far as possible stay away from arguing about legal, technical and ethical issues.

### Giving evidence

There are three types of oral examination for all types of witnesses, the evidence-in-chief, cross examination and re-examination.
For Evidence-in-chief, your barrister or trial lawyer will lead you through your report and highlight any specific points relevant to the case. Cross examination by opposing counsel looks at those points in detail, helping the Court assess credibility and ascertain whether there are in fact other opinions which are equally valid. Do not get into an argument with the barrister or trial lawyer who is questioning you. Expect to be put under pressure during cross examination but resist being provoked. Keep calm and answer to the bench. If you feel that your answers are being cut short unreasonably ask the Judge if you may expand and follow their direction, always coming across as reasonable and professional. After answering the Judge or presiding officer then look back to the barrister or trial lawyer for the next question.

If you are given new information which you did not have before then say so and, unless the answer is obvious, do not give a knee jerk reaction but ask for time to think it out. If it is not in your field say so and be careful of your own personal bias, again clearly separating fact and opinion. All your reasoning must stand up to logical scrutiny. Re-examination is led by the instructing party to clarify issues which have been raised during cross examination. This phase is usually fairly short and rarely are any new matters raised.

### Keep it Simple

Keep all your evidence as simple as possible.

Remember, although the Court consists of lay people, they have considerable expertise and experience in handling different kinds of evidence. Take time to explain the issues at hand in jargon free,

transparent terms, the more so if it happens to be a jury trial. Speak slowly, follow the Judge and his/her speed of writing or typing as they will be keeping a record of the proceedings.

**Reflection**

Reflect on the outcome.

After the verdict, as an expert do not take anything personally and learn what you need to learn. Similarly, as a witness to fact.

Think over what transpired and take time to reflect on what went well and what could you have possibly done better, or at least differently. As Stuart Emery states, "The path to mastery in any subject is to correct, not protect"

Be open and honest with yourself and always seek to improve your practice as well as in the reporting and delivery of your evidence.

Once you have done so, move on. Civil Courts are not saying you are right or wrong in general terms, they are saying they prefer one set of evidence over another and it is only in the balance of probabilities.

**Conclusion**

Whether as defendant, witness to fact or expert witness, the process in civil litigation is the same.

By gaining an understanding and some familiarity with the process, practitioners can develop both confidence and competence in their role of presenting evidence. As an expert, the more often you appear in Court the more competence you gain and therefore the more confident you become.

Health care professionals are required ethically and by their professional bodies to continually update their practice, knowing why they do what they do in the way they do it, ensuring practice is evidence-based. However expert you are, you must not become complacent in either your practice or in Court.

Finally, all witnesses must remain neutral, explain the range of opinions, and be aware of their own potential for selective bias in any evidence presented. Courts are reliant on credible, impartial and articulate health care professionals and presenting as such impacts greatly on personal, professional and financial standing.