

Position Summary

The ADA provides guidelines to assist its members to understand their obligations in providing assessments, expert opinions and reports to third parties.

1. Background

- 1.1. The Australian Dental Association (ADA) recognises that dentists may be requested by third parties to provide expert opinion as to a person's dental health from time to time.
- 1.2. The ADA assists its members to understand their obligations in providing assessments, expert opinions and reports to third parties.

Definition

- 1.3. BOARD is the Dental Board of Australia.

3. Position

- 3.1. Dentists undertaking assessments and providing expert opinions and reports for third parties should stay within their area of expertise, be unbiased and honest.
- 3.2. Dentists in providing assessments, expert opinions and reports to third parties must comply with the Board's Code of Conduct.
- 3.3. Dentists should also be guided by the attached ADA Guidelines on undertaking assessments and providing expert opinions and reports to third parties as well as other documents that may be relevant as notified to them.

Policy Statement 5.19

Adopted by ADA Federal Council, November 15/16, 2012.

Amended by ADA Federal Council, August 25/26, 2016.

Amended by ADA Federal Council, November 22, 2019.

Appendix to Policy Statement 5.19 – ADA Guidelines on undertaking assessments and providing expert opinions and reports to third parties

1. Introduction

- 1.1. Dentists may be requested by third parties to provide expert opinion as to a person's dental health on the basis of their qualification, study and experience as a dentist.
- 1.2. Third parties seeking an assessment or a report may include a government department, an insurance company, the patient's employer, a statutory authority, the police, a solicitor or a court.
- 1.3. Providing reports at the request of third parties is an important part of contemporary dental practice.
- 1.4. If preparing a report for a court or tribunal, dentists have an overriding duty to assist the court rather than to act as an advocate for the party requesting the report. If the dentist provides an expert's report they should be prepared to be cross-examined on their report during court proceedings.
- 1.5. Prior to preparing or providing a report, the dentist should clearly understand the purpose of the report.
- 1.6. Generally, reports should not be provided without the consent of the patient (or authorised substitute decision maker for the patient), unless provision of the report is authorised by law or legal proceedings to which the patient is a party. The collection, use and disclosure of personal information (including health information) is subject to relevant privacy laws.
- 1.7. The third party requesting the report may provide information to the dentist. The third party may also intend to provide the dentist's report to other persons. It is important that dentists respect the privacy and confidentiality of information they obtain, use and/or include in the report.
- 1.8. Reports for third parties should be factually accurate, balanced and represent the accepted opinion of the body of the profession at the relevant time.
- 1.9. Preparation of, and provision of the report to the third party, is generally subject to a range of common law and statutory provisions, including the Dental Board of Australia Code of Conduct, privacy law compliance and defamation law.
- 1.10. Reports for third parties are usually paid for by the third party requesting the report.

2. General Principles

- 2.1. When consulting with patients and providing reports for third parties, dentists must comply with the Code of Conduct for registered health practitioners issued by the Dental Board of Australia. Dentists should familiarise themselves with the Code's requirements, including the duty to act in an ethical and professional manner.
- 2.2. Where a dentist is contracted by a third party to provide a report on a person who is not their patient, the usual therapeutic dentist-patient relationship does not exist. In this situation, the Code of Conduct is still applicable.
- 2.3. Dentists should ensure they have the qualifications and expertise to perform the assessment and/or to provide an opinion, and should decline a request for a report if:
 - (i) they are not adequately qualified or experienced;
 - (ii) there is a conflict of interest (personal, work-related or financial); or
 - (iii) if they are unable to complete the task within the timeframe requested by the third party.
- 2.4. Copies of requests for reports and the report(s) provided should be retained by the dentist as part of their practice records.

- 2.5. Dentists should assess whether a consultation and examination of the patient is required prior to providing the report and be aware of the risks inherent in utilising their previous reports as the basis of a subsequent report without further review of the patient.

Nature of report

- 2.6. The content of the report should be restricted to the scope of the request and the purpose for which the report has been requested.
- 2.7. Where a professional opinion is requested, the dentist's opinion should be based on information known to the dentist or able to be properly inferred from the information and the dentist's own expert knowledge. If a dentist relies on a standard to provide the opinion, the nature of the standard should be clearly outlined in the report.
- 2.8. Any opinion offered in the report must be wholly or substantially based on the dentist's specialised knowledge or the dentist's training, study or experience.
- 2.9. Where the report content is based on information provided by others, this should be made clear in the report, especially where the patient is not a patient of the dentist or has not been seen or examined by the dentist.
- 2.10. If a dentist makes assumptions, these should also be stated in the report.
- 2.11. Dentists must write reports in an impartial and neutral way and only offer professional and objective opinions.

3. Medico-Legal Expert Reports

3.1. Expert evidence

- (a) Dentists may be specifically retained by a patient's or other party's solicitor to review aspects of the patient's treatment or other issues associated with potential or current medico-legal proceedings. The request may seek opinions on specified questions asked by the solicitor.
- (b) The dentist may, or may not have treated or advised the patient therapeutically.
- (c) In this role, the dentist is acting as a "medico-legal expert".

3.2. Principles for providing medico-legal reports

- (a) *Evidence Acts* in all jurisdictions provide the statutory rules for the nature and admissibility of medical reports or other "business documents". Dentists are required to comply with either the *Evidence Act 1995 (Cth)* or the relevant Act in the state or territory in which the dentist practices.¹
- ~~(b)~~ There are also numerous practice notes and rules of courts in each jurisdiction in each state and territory which govern the admissibility of expert evidence and the responsibilities of expert witnesses.²
- (c) When retained to provide an expert medico-legal opinion, the solicitor making the request should provide the dentist with a copy of the relevant court or tribunal's Expert Witness Code of Conduct or Guidelines.
- (d) Evidence provided in a medico-legal report may only be given in the dentist's field of expertise.
- (e) When preparing a report for a court or tribunal, dentists have an overriding duty to assist the court impartially on matters relevant to the dentist's area of expertise, rather than to act as advocates for the patient or party requesting the report. Such a report may result in dentists

¹ *Evidence Act 1995 (NSW); Evidence Act 2011 (ACT); Evidence Act 1939 (NT); Evidence Act 1977 (Qld); Evidence Act 1929 (SA); Evidence Act 2001 (Tas); Evidence Act 2008 (Vic); Evidence Act 1906 (WA).*

² See Schedule 1 Expert witness code of conduct (ACT); Schedule 7 - Uniform Civil Procedure Rules 2005 [UCPR] (NSW); Order 44.03 of the Victorian Supreme Court (General Civil Procedure) Rules 2005 and Form 44A (Vic); Annexure C to Consolidated Civil Practice Direction (District Court WA); Uniform Civil Procedure Rules 1999 - Sect 428 [Queensland Consolidated Regulations]; South Australia Supreme Court Civil Rules 2006 160 & 161; Supreme Court Practice Directions 2006 Direction 5.4 (incl Guidelines for Expert Witnesses in Proceedings in the Supreme Court of South Australia) & 5.5; Rule 23 of the Federal Court Rules 2011 and Practice Note CM7; Part 15.5 of the Family Law Rules 2004; Guidelines for Persons Giving Expert and Opinion Evidence (AAT).

being cross-examined about their report in a court.

3.3. Patient consultation and examinations for preparation of a report

- (a) The dentist must act professionally and, if required, undertake the consultation with the assistance of a professional interpreter
- (b) The dentist should introduce themselves and explain their qualifications in dentistry.
- (c) The dentist should explain that their role is that of an independent reviewer who is providing an impartial opinion for use in a court or before another decision-making body and that there are limitations on the confidentiality of the assessment.
- (d) The dentist should explain that the purpose and nature of the consultation and examination is not to treat the patient.
- (e) Prior to the consultation, the patient should be advised that the patient has the option of having an accompanying person present during the examination.
- (f) The accompanying person must not contribute to the assessment, unless it is appropriate for the accompanying person to assist in the communication between the dentist and the patient.
- (g) In some cases, it may be appropriate to advise the patient of an incidental clinical finding which has been identified by the examining practitioner. In other circumstances, it might be preferable to notify the patient's treating practitioner.
- (h) The dentist should not undertake any form of treatment in relation to the patient during the consultation.
- (i) The dentist should limit questions to those that are relevant to the purpose of the assessment, prefacing personal questions with an explanation as to why they are necessary.
- (j) The patient should be given an opportunity to provide information that they believe may be relevant to the assessment.

3.4. Standard of care

- (a) The standard of care for health professionals is set out in state and territory civil liability legislation.

For example, under section 50 of the Civil Liability Act 2002 (NSW):

1. *A person practising a profession (a professional) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.*
2. *However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.*
3. *The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.*
4. *Peer professional opinion does not have to be universally accepted to be considered widely accepted."*
5. Therefore, in giving expert evidence, it is useful to reference what would be widely accepted to be peer professional opinion as competent professional practice.

3.5. Report format

The report should:

- (i) state the name and address of the dentist;

- (ii) provide an acknowledgement that the dentist has read the expert witness code of conduct and agrees to be bound by it;
- (iii) state the qualifications of the dentist to prepare the report;
- (iv) state the information, facts, matters and assumptions on which the opinion is based (a letter of instructions may be annexed);
- (v) outline the opinion of the dentist, including:
 - (a) the reasons for it;
 - (b) any literature or other materials utilised in support of the opinion; and
 - (c) a summary of the opinion;
- (vi) state any qualification of an opinion expressed in the report without which the report is, or may be, incomplete or inaccurate;
- (vii) specify whether an opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason.
- (viii) include the signature of the dentist;
- (ix) provide clear copies of any photographs, reports (clinical or otherwise) or other extrinsic matter to which the report refers;
- (x) explain medical terminology;
- (xi) indicate if additional investigations are required;
- (xii) provide a clear separation of patient's statements from the dentist's findings;
- (xiii) give an objective and unbiased opinion, avoiding emotive and offensive language and value-laden comments;
- (xiv) reflect the practitioner's consideration of the available opinions of other practitioners and health professionals who have assessed, treated or provided reports on the patient in the past;
- (xv) provide reasons for all opinions expressed;
- (xvi) respond to questions and only address issues within the dentist's expertise;
- (xvii) omit highly personal material that is sensitive unless pertinent to the issue at hand;
- (xviii) make all statements in good faith and without malice to attract the defence of qualified privilege in relation to a claim of defamation; and
- (xix) clearly state any limitations to the scope of the assessment.