



THE MEDICO-LEGAL JOINT STATEMENT



THE LAW SOCIETY OF
SOUTH AUSTRALIA

Published jointly by the South Australian branch of the Australian Medical Association and The Law Society of South Australia

1. INTRODUCTION

- (1) The Medico-Legal Advisory Group, formerly the Joint Advisory Committee, has been established by the South Australia Branch of the Australian Medical Association and The Law Society of South Australia to:
 - (a) promote harmonious relations between the members of both professions;
 - (b) provide one source of clear guidelines and information on medico-legal matters;
 - (c) ensure that the efforts of both doctors and solicitors are co-ordinated and directed towards the rapid and efficient settlement of the patients' claims for their injuries; and
 - (d) deal with complaints.
- (2) The Medico-Legal Advisory Group will also keep this Joint Statement under continuous review.

2. PROCEDURE FOR ARRANGEMENT OF MEDICAL EXAMINATION

Arrangements by a patient's solicitor

- (1) Generally a solicitor should not refer his or her client to a doctor for a report without first requesting a report from the client's treating doctor who should supply it promptly.
- (2) This report should be made available to the examining doctor as soon as possible.
- (3) The solicitor should consider speaking to the treating doctor before arranging a referral to the examining doctor.

Arrangements generally

- (4) The solicitor making the appointment should make the purpose of the examination quite clear to the doctor at the time it is made.
- (5) When arranging a medical examination, the solicitor should at all times give primary consideration to the welfare of the patient and abide by all reasonable recommendations of a treating doctor as to when the patient is fit to undergo the examination.
- (6) If the appointment for the examination prior to the preparation of the medical report is arranged by telephone, the appointment must be confirmed by letter from the solicitor. The letter should, where appropriate, contain a brief description of the circumstances in which the patient was injured, particulars of the injuries alleged, copies of any medical report already in the possession of the solicitor and which might assist the doctor to assess the case, and details of the disabilities claimed by the patient to have resulted from the injuries. Where the patient is in possession of radiological or other relevant test results or films, the solicitor should tell the patient to bring them to the examination.
- (7) The specific matters which the solicitor desires the doctor to include in the report should then be set out, such as:
 - (a) a description of the injuries;
 - (b) whether, in the opinion of the doctor, the injuries were caused by the accident in question;
 - (c) an outline of the course of treatment;
 - (d) whether or not the patient's condition is stable;

- (e) whether there is any residual disability and, if so, the extent of such disability;
- (f) whether any further medical treatment is indicated;
- (g) whether the patient is fit for any and, if so, what, type of work;
- (h) if the patient is unfit for work, the extent to which this incapacity has resulted from the injuries;
- (i) if the patient's condition is not stable, when should a further report be requested?

3. FURNISHING OF MEDICAL REPORTS

- (1) There is a difference in the position of the treating doctor, and a doctor whose assistance is sought solely for the purpose of a medico-legal assessment. In the case of the treating doctor, whether the treatment has been given in hospital or in any other place, there is a moral and ethical obligation to furnish a report on request by the patient or his or her solicitor and such follow up reports as may be reasonably necessary to enable the patient's claim to be properly presented. This is so, even if the doctor does not in the ordinary course accept instructions to examine and report on patients the doctor has not treated.
- (2) In addition to any other information specifically sought by the solicitor, medical reports should normally include:
 - (a) the history obtained from the patient;
 - (b) the patient's present complaints;
 - (c) the observations and findings on examination of the patient;
 - (d) details of any special diagnostic reports, including copies of X-rays, pathology, ECG and EEG reports;
 - (e) the diagnosis of the patient's condition;
 - (f) the 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).
- (3) Unless the solicitor clearly indicates at the time of request that he accepts no personal responsibility to pay for the report, a doctor is entitled to assume that the solicitor accepts both legal and ethical responsibility for payment. The attention of solicitors is drawn to the provisions of Rule 26 of the Rules of Professional Conduct & Practice in respect to third party payments.
- (4) A report should be comprehensible without particular reference to the letter of request and should not simply state "yes" or "no" in answer to numbered questions.
- (5) A doctor making a report should confine his or her comments to matters relevant to the condition of the person examined.
- (6) It is inappropriate for doctors to express opinions to patients as to the amount of damages likely to be received as a result of the injuries.
- (7) Similarly, solicitors should not make any comments to their clients about the medical management of cases.
- (8) Doctors should bear in mind that medical reports obtained by patients or their solicitors for the purposes of litigation are legally privileged in the sense that their availability to the opposing party to the litigation is governed by Rules of Court. Generally, but not in all circumstances, Rules of Court require a party to disclose reports to the opposing party prior to the hearing. Such disclosure often assists the parties to resolve matters.
- (9) The examining doctor should supply the report only to the solicitor requesting it, but where that solicitor is the patient's solicitor, a copy may be sent to the patient's treating doctor.
- (10) No medical report should be provided to any solicitor (or indeed any other person) without the signed authority of the patient unless required by law.
- (11) When requested by a solicitor, the doctor should provide the report within one month of the examination or, if there is no examination, within one month of the request.
- (12) Similarly the solicitor should make payment for the report within one month of receiving it in the absence of prior agreement.

4. COURT ATTENDANCES OF A MEDICAL WITNESS

- (1) Frequently there is uncertainty about the precise date upon which the trial of an action will commence. Before the listing of cases, solicitors should ascertain whether doctors will be available.
- (2) Generally the case is listed for trial on a particular day, but unless it is high on the list for that day, it may not be allocated a Judge and be only a reserve, in which case it may not be heard that day or the next or not be reached at all. Similarly there may be delays in the calling of evidence, which requires some flexibility on the part of medical witnesses.
- (3) The uncertainty of the listing of cases is one of considerable concern to solicitors, parties to the action and other witnesses, but at the present time and notwithstanding the updating of listing procedures, no scheme has been devised whereby all cases can be guaranteed to commence on specific dates.
- (4) The following booking procedure is set out:
 - (a) A doctor should be booked to give evidence, if required, as soon as a solicitor becomes aware of the date of the hearing of the case. Such a booking should be done by telephone and confirmed in writing.
 - (b) The solicitor should try to make such arrangements to suit the doctor's other commitments so far as practicable. Equally doctors should endeavour to make themselves available to fit in with the reasonable requirements of the solicitor and the court.
 - (c) Should a matter resolve or be adjourned, the solicitor should notify the doctor as soon as possible that the doctor is no longer required at the arranged time.
 - (d) A solicitor should not issue a subpoena to secure the attendance of a doctor unless it is the only course open and in the last resort.
 - (e) Preparation and attendance fees or cancellation fees should be agreed in writing by the doctor and the solicitor at the time the booking is made. If this is not done and a dispute ensues, then the fee sought may be fixed by the Court.
- (5) A solicitor should make every reasonable endeavour to obtain payment by the client of a doctor's fees for a court appearance or cancellation, within one month of receiving the account subject to the solicitor's duty to comply with the Rules of Court and duty to the client.

5. PAYMENT OF FEES

- (1) Responsibility for payment of fees for medical reports shall be in accordance with Clause 3(3), subject to the following limitations.
 - (a) If any tests are considered necessary for the purpose of providing a report, the doctor should not incur the expenses of these without first obtaining the client's consent and the solicitor's approval for their costs.
 - (b) The doctor's account for the examination and preparation of the report should bear a proper relationship to the time taken, the difficulty involved, and the expertise brought to bear.
 - (c) In the event that the client has failed to attend or has cancelled an appointment with the doctor for the purpose of the preparation or review of a medico-legal report, a doctor may charge a fee having reference to the proposed consultation fee and the percentages set out in Schedule 1.
- (2) The scale of fees for the provision of reports should be specifically agreed between the doctor and solicitor before the service is provided. However, in seeking a fee, the doctor should be aware that:
 - (a) in South Australia with respect to workers compensation matters, the maximum fee chargeable and recoverable by the doctor is fixed by regulation;
 - (b) in South Australia with respect to motor vehicle accident compensation matters the maximum fee chargeable and recoverable by the doctor may be fixed by regulation.
 - (c) in matters such as criminal injuries compensation, legal fees are strictly limited and doctors should, in the public interest, also consider rendering reduced fees;
 - (d) in Guardianship Board matters the costs of medical reports may not be recoverable by the solicitor at all;
 - (e) in legal aid matters, the legal aid authority may limit the amount payable for reports;

- (f) in seeking a fee doctors are free to agree such fees as may be appropriate in the circumstances of a particular matter (subject to the limitations referred to above).

This statement may not be used as a condition or part of any condition for the provision or acquisition of any service.

- (3) Where the entitlement to charge for a report is limited by regulation or authority, or special considerations apply, the solicitors should so inform the doctor at the time the report is requested.

6. CONFIDENTIALITY OF MEDICAL REPORTS

A client is entitled to see a medical report obtained by his or her solicitor from an examining doctor. It should be noted that ultimately a solicitor is bound to act in accordance with his or her client's instructions. When a treating or examining doctor requests the solicitor not to disclose information, when for example disclosure may impede recovery, or endanger the safety of the doctor, the solicitor should use every endeavour to respect that request. **However a client is entitled to have access to all documents relevant to his/her claim, including such medical reports, and if a client requests a copy, the solicitor must provide it.** In that event the solicitor must notify the doctor that he is required to provide a copy of the report to the client. Almost invariably, too, a report or medical reports provided by the doctor would have to be disclosed to the other party to the litigation. Caution should be exercised in disclosing confidential matters not relevant to the claim or issue. All *personal information* (including doctor's notes, referral letters and replies, investigation reports, etc) is accessible by a patient if requested pursuant to the *Privacy Act 1988*.

7. COMPLAINTS

When a member of either profession believes that a member of the other profession has failed to act in accordance with the spirit of this Joint Statement, that member may report the matter to his or her respective professional body which should consider the matter. If of substance requiring further action that professional body should liaise with the other professional body or its appropriate committee to resolve the matter. Any unresolved matters should be referred to the Medico Legal Advisory Group for determination.

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SCHEDULE 1

If the case is called off:

with less than 24 hours notice	-- Full fee
with less than 2 working days but more than 24 hours notice	-- 75% of the fee
with less than 5 working days but more than 2 working days notice	-- 50% of the fee
with less than 10 working days but more than 5 working days notice	-- 25% of the fee
with less than 14 working days but more than 10 working days notice	-- a nominal charge, say \$25 for paperwork