

## Policy

**Subject: Nominations of Pathologists for Expert Panels**  
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Where the College is asked to provide a nominee or representative for the purpose of giving expert comment and advice then,

- The Fellow must be both competent and current in the relevant area of pathology practice.
- Definition of Currency: participation in the College CPD program or an equivalent appropriate program in pathology.
- Ideally the pathologist should be active in practice.
- If there are no suitable alternatives available that are in active practice, then a pathologist who is retired relatively recently (< 2 years) is acceptable.
- Experts in 'pathology practice' nominated by others should satisfy the same criteria of competence and currency as applies to College nominees/representatives.
- If an external agency relies on 'experts' deficient in these respects, then the College reserves the right to characterise any consequences as possibly defective.

Those pathologists nominated to provide expert advice as expert witnesses should take note of the following guidelines provided by the Federal Court of Australia in 'Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia' (2008).

### Guidelines

#### 1. General Duty to the Court

- 1.1 An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.
- 1.2 An expert witness is not an advocate for a party even when giving testimony that is necessarily evaluative rather than inferential.
- 1.3 An expert witness's paramount duty is to the Court and not to the person retaining the expert.

Broadly, the relevant principles already established in law for an expert witness include:

1. An expert witness must have specialised knowledge and this knowledge must be based upon training, study or experience. Section 79 of the *Evidence Act 1995 (Cth)* states that "if a person has specialised knowledge based on the person's training,

study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge”.

2. Specialised knowledge is only admissible if it is outside the experience and knowledge of ordinary persons. “Even if a proffered opinion is that of a person suitably qualified within an organised area of knowledge, if that area is not outside the experience of ordinary persons, the opinion will not be admissible” (Heerey, J. in *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* (2006) cited in Freckelton and Selby, 2009, p. 176).
3. “Opinion evidence is admissible if it is wholly or partly based upon specialised knowledge based on the person’s training, study or experience” (Freckelton and Selby, 2009, p. 175). Thus, the expert must establish that their opinion is based on accepted or observed facts and that these relate to the field of expertise in which the expert has specialised knowledge (Heydon, J. in *Makita (Australia) Pty Ltd v Sprowles* (2001) cited in Freckelton and Selby, 2009).
4. A witness cannot provide opinions which are outside of their area of expertise. Guideline 2.10 of the ‘Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia’ (2008) notes that “the expert should make it clear when a particular question or issue falls outside the relevant field of expertise”.
4. An expert opinion cannot be based on speculation. Guideline 2.5 of the ‘Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia’ (2008) notes that “the expert should give the reasons for each opinion” and further Freckelton and Selby (2009, p. 175) state that if a person has specialised knowledge “their opinions will be admissible, so long as the opinions are at least substantially referable to that knowledge”.

If the expert fails to show that they have complied with section 79 of the *Evidence Act 1995* (Cth), it may result in a determination of inadmissibility of evidence.