

Fitness to  
Practise

Guidance for Nurses  
and Midwives **Acting  
as an Expert Witness**



Bord Altranais agus  
Cnámhseachais na hÉireann  
Nursing and Midwifery  
Board of Ireland

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## 1. Introduction

You have been asked to act as an expert witness by the Chief Executive Officer (CEO) of the Nursing and Midwifery Board of Ireland (NMBI) in relation to a complaint regarding a nurse or midwife. The complaint will be heard by the Fitness to Practise Committee (FTPC) at a fitness to practise inquiry. The inquiry will usually take place in the NMBI offices in Blackrock, County Dublin.

The FTPC is a committee of NMBI and its function is to consider complaints against nurses and midwives. The FTPC that will hear the complaint made against the nurse or midwife usually comprises one nurse, one midwife and three lay members, i.e. persons who have never been registered as nurses or midwives.

The FTPC will also be assisted by a legal assessor, who is not a member of the FTPC. The legal assessor will be present to provide legal advice to the FTPC when required. The legal assessor is a barrister.

Expert witnesses are engaged by the CEO to produce an expert report to assist the FTPC in determining complaints against nurses and midwives involving matters on which all the members of the FTPC do not necessarily have the requisite technical or specialist knowledge. To assist the FTPC, an expert witness is asked to provide their opinion on whether the alleged conduct on the part of a nurse or midwife amounts to professional misconduct, poor professional performance or non-compliance with a code of professional conduct<sup>1</sup>.

This guidance document outlines the:

- role of the expert witness
- requirement for independence
- required competencies of an expert
- disclosure of expert reports
- cross-examination of the expert witness
- structure of expert reports

This guidance also outlines certain administrative matters that you should be aware of prior to being instructed by the CEO.

*On occasion, the Preliminary Proceedings Committee (PPC) may commission a report from an expert. The principles set out in this guidance apply in the same way to experts commissioned by the PPC as they do to experts instructed by the CEO at the FTPC stage of the process.*

<sup>1</sup> These are the most common 'grounds of complaint' against a nurse or midwife and these are defined in detail in section 12. If you are asked to express an opinion as to whether a nurse's or midwife's conduct amounts to a different ground of complaint, this ground will be fully explained to you in your letter of instruction.

## 2. The role of an expert witness

As a general rule, a witness may only give evidence of fact, not of opinion. Expert witnesses are an exception to this general rule, as expert witnesses are required to give their professional opinion to the FTPC on the matter in dispute.

Experts are engaged where their particular expertise is in an area in which all the members of the FTPC do not necessarily have the requisite technical or specialist knowledge. As the FTPC is a lay majority panel, in inquiries involving complaints concerning the care provided by a nurse or midwife, e.g. medication management, it is often necessary to engage an expert witness to assist the FTPC so that the FTPC can make its decision. This is because the FTPC will not necessarily have the required knowledge in the relevant area to make the appropriate findings without expert assistance. The lay members of the FTPC should not defer to the nurse or midwife member of the FTPC for specialist information but instead should have the required information via an expert so that each member of the FTPC can make up their own mind on the relevant issue.

Accordingly, you have been engaged by the CEO to provide your expert opinion in your area of speciality. You are required to give an objective, unbiased opinion and be able to state the facts or assumptions on which your opinion is based.

You should only give opinion evidence on matters within your particular specialism and professional competence. You should not give evidence on matters which fall outside your expertise.

Therefore, if you do not have enough information on which to reach a conclusion on a particular point, or if your opinion is qualified (i.e. in some way limited or restricted), you should state this clearly.

## 3. Independence of an expert witness

Although you have been engaged by the CEO to prepare a report and give evidence at the inquiry, you are an independent witness. Therefore, you owe an overriding duty to the FTPC to give independent and unbiased evidence. It is essential, therefore, that you approach the case objectively.

## 4. Conflict of interest

Prior to being instructed, you will be asked to confirm that you do not have an actual or potential conflict of interest in preparing a report. A conflict of interest arises where a person is in a position of influence or trust, but they have a competing personal or professional interest. For example, it may be the case that the nurse who is the subject of the complaint previously worked in the same nursing home or hospital as you. Although this may not affect your ability to be objective, it could be perceived as a potential conflict of interest.

If it is the case that you have an actual or potential conflict of interest, whether financial, personal or professional, it will not necessarily prevent the CEO engaging you if the CEO does not believe that it will affect your independence. However, in these circumstances it is likely to be necessary to disclose the actual or potential conflict to the nurse or midwife, their legal team and the FTPC.

If you believe that an actual or potential conflict arises, either now or at any stage during the course of this inquiry, please let the CEO's solicitor know immediately so that we can discuss the matter further.

## 5. Requisite competencies of an expert witness

The key competency of an expert witness is the possession of the knowledge and expertise in a particular discipline, beyond that of a layperson, which enables them to form an *expert* opinion on a particular subject matter.

In respect of our fitness to practise inquiries, complaints can relate to conduct occurring in a variety of nursing and midwifery disciplines, such as (but not limited to):

- the nursing care of the older person
- emergency nursing
- intellectual disability nursing
- paediatric or neonatal nursing
- intensive care nursing
- psychiatric nursing
- general nursing
- antenatal care, labour and birth care, and postnatal care (midwifery)

Accordingly, it will be necessary for you to have the requisite degree of expertise in the discipline to which the complaint relates. For example, if the complaint relates to the care afforded to a resident of an intellectual disability unit by a specialist intellectual disability nurse, it is essential that you have expertise in this area.

**Please consider carefully the papers we will send to you on this matter. If you do not feel that you have the necessary expertise in the area in question we would be grateful if you could let us know immediately.**

## 6. Curriculum vitae (CV)

In order for the CEO to decide whether an expert is suitable to instruct in respect of a particular matter, an expert witness is required to provide the CEO's solicitor with their CV prior to being instructed.

Accordingly, your CV needs to contain details of your professional qualifications, accreditations and training, and also contain a list of your past and present professional positions. You should also provide details of the following in your CV:

- Principal professional specialisms
- Awards, accolades and other professional responsibilities
- Memberships of professional organisations
- Research publications
- Training, qualifications and accreditation as an expert witness

We enclose a template CV ([Appendix 1](#)) to assist you with preparing this document. You do not have to use this template, but if you do not use it, please ensure that all of the information outlined above is included in your CV. As your CV will be given to the nurse or midwife who is the subject of the inquiry and the FTPC, it is not appropriate to include any personal details, such as your home address, interests or hobbies.

Please ensure that your CV is well formatted and does not contain spelling errors.

## 7. Retainer letter

Prior to being instructed by the CEO, you will receive a retainer letter which will set out the principal terms of the retainer for the supply of your services. This letter will include details of the agreed fees relating to your engagement as an expert witness.

Please read this letter carefully to ensure that you accept the terms, and then return a signed copy of the letter to the CEO's solicitor.

A copy of the template retainer letter can be found in [Appendix 2](#).

## 8. Letter of instruction

If you agree to act in this matter, you will receive a formal letter of instruction from the solicitors acting on behalf of the CEO, detailing:

- the background to the case including the:
  - » factual allegations against the nurse or midwife
  - » various parties involved
  - » nurse's or midwife's initial response to the complaint



- the grounds on which the nurse or midwife was referred to the FTPC<sup>2</sup> (and on which you will have to form an opinion), including one or more of the following:
  - » professional misconduct
  - » poor professional performance
  - » non-compliance with a professional code of conduct
- the definitions of the relevant grounds (in case you are asked to assess whether the nurse's or midwife's conduct amounted to professional misconduct, a detailed definition of misconduct will be provided in the instruction letter)
- a summary of your duties in preparing the report
- practical guidelines to assist you writing the report (see section 9 below)
- a timeline for the delivery of your report
- a list of relevant documents for you to consider when preparing your report

**You must ensure that you understand exactly what questions you are being asked to answer. If you are unclear as to the instructions provided, you should ask the CEO's solicitor for further guidance before commencing your report.**

A copy of the template letter of instruction can be found in [Appendix 3](#).

## 9. General guidelines for writing your report

There are no particular requirements for the form and content of your report. However, you must exercise reasonable care in the presentation of your report. In this respect, it is best practice to follow these guidelines:

- Your report should be addressed to the FTPC and not to the CEO.
- You should use the first person throughout.
- Set out your qualifications and experience.
- Set out details of all literature and other material you relied on in making your report.
- Make it clear which of the facts referred to in the report are within your own knowledge and indicate the source of all other factual information.
- Where material facts are in dispute, you should express your opinion on each version of the facts. You should not express a preference for one version over another unless, as a result of your experience and expertise, you consider one version to be less probable. In these circumstances, you should express your view and give reasons for it.
- You should distinguish between fact and opinion, as well as assumed and known fact.
- If there is a range of opinions on a matter dealt with in your report, you should summarise that range of opinions and give reasons for your own.

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<sup>2</sup> See section 12 for a detailed outline of the different grounds of complaint.

- You should make it clear whether the opinion you are submitting is provisional or qualified. If you are unable to give your opinion without qualification (e.g. because there is insufficient data or information available), state the qualification.
- It is helpful to use separate sections with clear headings when setting out your analysis for each of the issues on which you have been asked to express your opinion.

## 10. Structure of the report

We enclose a template expert report to assist you. You do not have to use this template, but if you do not use it, please ensure that all of the required information outlined in the template report is included. A copy of the template report can be found in [Appendix 4](#).

## 11. Factual allegations to be taken as proven

**It is not your role as an expert to give an opinion on the truth of the factual allegations. It is the role of the FTPC at the inquiry hearing to determine whether the facts, as alleged, have been proven.**

Your role is to form an opinion as to whether a factual allegation or a number of factual allegations (which are contained in a document known as ‘the notice of inquiry’) amount to one or more of the following:

- professional misconduct
- poor professional performance and/or
- non-compliance with a code of professional conduct.

Your role is confined to expressing an opinion as to whether a factual allegation **taken as proven** amounts to professional misconduct, poor professional performance and/or non-compliance with a code of professional conduct.

For example, assume it is alleged that a nurse failed to administer a medication to a patient at the time when it was due to be administered. If you were assessing this allegation, you should not attempt to make an assessment as to whether the nurse did or did not administer the medication to the patient. Instead, you should take it as already proven that the nurse failed to administer the medication, and proceed to form your opinion as to whether this failure amounts to whatever ground upon which the complaint was referred to the FTPC (i.e. professional misconduct, poor professional performance and/or non-compliance with a code of professional conduct).

## 12. The grounds of complaint

Generally, you will only be asked to form an opinion as to whether the conduct of a nurse or a midwife amounts to one or more of three separate grounds of complaint, namely:

- professional misconduct
- poor professional performance
- non-compliance with a code of professional conduct

It is necessary for you to be aware of the definition of each ground of complaint prior to assessing whether the nurse's or midwife's conduct reaches the relevant threshold for each ground of complaint. These are briefly set out below.

### 12.1 Professional misconduct

The courts have held that professional misconduct can be classified under one or both of the following headings:

**A. Infamous or disgraceful conduct**, which can be either:

- conduct involving moral turpitude, fraud or dishonesty in a professional respect
- conduct that might not, in a person who is not a registered nurse or midwife, ordinarily be regarded as infamous or disgraceful but which, because it involves (i) some moral turpitude, fraud or dishonesty and (ii) the nurse's professional duties towards colleagues or patients, is capable of being regarded as infamous or disgraceful conduct in a professional respect

**B. A serious falling short of the expected standard**

Conduct connected with the nursing or midwifery profession in which the nurse or midwife concerned has seriously fallen short, by omission or commission, of the standards of conduct expected among nurses or midwives.

In preparing your report, you should have regard to the definition of professional misconduct, and the requirement for there to be a *serious falling short* of the standards expected among nurses or midwives on the part of a nurse or a midwife. If you conclude that there has been a serious falling short of the expected standards, you should explain *why* the failings are serious.

### 12.2 Poor professional performance

Poor professional performance is defined in Section 2 of the Nurses and Midwives Act 2011, in relation to a nurse or midwife, as follows:

*'...a failure by the nurse or midwife to meet the standards of competence (whether in knowledge and skill or the application of knowledge and skill or both) that can reasonably be expected of a registered nurse or registered midwife, as the case may be, carrying out similar work.'*

This definition was considered by the Supreme Court in the case of *Corbally v Medical Council & Ors*<sup>3</sup>. The Supreme Court determined that, before a finding of poor professional performance could be made by the Medical Council, it had to be proven that the doctor against whom the complaint was made, did something of a *serious nature*.

On behalf of the Supreme Court, Mr Justice Hardiman stated the following:

*'Specifically, I consider that before a medical practitioner can be subjected to the extremely threatening ordeal of a public hearing before the Medical Council, either for professional misconduct, or for poor professional performance, there must be reason to believe that what can be proved against him is something of a serious nature. As I have said earlier in this judgement, there may be myriad matters which are plainly not 'serious' in the sense I have explained but which may legitimately aggrieve a patient or his or her relatives. But the statutory authority for the governance of the medical profession must be capable of saying to such a person that a complaint, perhaps legitimate in itself, will not proceed to the point of an inquiry before a Fitness to Practice Committee unless it is, in its nature, a serious act or omission.'*

While the decision of the Supreme Court in *Corbally* relates to a medical practitioner and not a nurse or midwife, the same principles are likely to apply to the nursing or midwifery professions. In *Corbally*, the Supreme Court placed a significant emphasis on an act or omission being a *serious act or omission*.

You must take into account the position of the Supreme Court in *Corbally* when providing your opinion in relation to poor professional performance, and comment on whether any of the allegations either individually or when taken together are, *in your opinion*, serious.

## 12.3 Non-compliance with a code of professional conduct

You may be required to assess whether the allegation(s) amount to non-compliance with a code of professional conduct. In the main, the relevant code to assess the conduct against will be the *Code of Professional Conduct and Ethics for Registered Nurses and Registered Midwives, December 2014*.

If you are assessing the nurse's or midwife's conduct against the *Code of Professional Conduct and Ethics for Registered Nurses and Registered Midwives*, you will be required to assess whether the conduct breached specific values and standards contained in the Code. You should specify in your report precisely which values and standards contained in the Code you believe have been breached.

However, if the allegation(s) against the nurse or midwife happened before December 2014, the relevant code against which to assess the conduct is the *Code of Professional Conduct for Each Nurse and Midwife, April 2000*. In this case, you will be required to review the Code and determine whether the alleged conduct amounts to non-compliance with any of its provisions.

<sup>3</sup> [2015] IESC 9.

## 13. Draft report

Please first prepare your draft report to be reviewed by the CEO and their solicitor to ensure that all relevant material has been included in your report, and that your opinion has dealt with all relevant matters.

Following the review of your first draft, the CEO's solicitors may seek clarification in respect of certain aspects of your report and you may be asked to update your report accordingly.

Please note that your draft report may be disclosed to the nurse or midwife, together with the CEO's solicitors' notes of any meetings or telephone calls with you. This is to ensure fairness to the nurse or midwife. See sections 14.2 to 14.4 below.

### 13.1 Readability

When preparing your report, you should ensure that your report is well structured and easy to follow. You should also check your draft report for spelling, grammatical and punctuation errors.

### 13.2 Timelines

The timeframe for preparing your report will vary depending on the requirements of each inquiry. More complex matters could require a longer period in which to prepare your report.

The CEO's solicitor will outline the requested timeline for the delivery of your report in their instruction letter to you. The average timeline will be four weeks for the first draft of your report, and a further four weeks for the delivery of your finalised report.

### 13.3 Responsibility for work

You are required to carry out all aspects of the work on your report personally. You are not permitted to delegate any aspect of the preparation of your report.

## 14. Disclosure of expert report and cross-examination of expert witness

### 14.1 Finalised report

Your report will be disclosed to the nurse or midwife and the nurse's or midwife's representative, if any, in advance of the inquiry.

It is likely that your report will also be submitted to the FTPC as evidence.

### 14.2 Draft report

The draft versions of your report may be disclosed to the nurse or midwife. If the draft versions are disclosed, the nurse's or midwife's representative is entitled to cross-examine you at the hearing as to your initial opinion. If your opinion changes between the draft version and the final version of your report, you could be asked to explain any differences between the versions.

### 14.3 Solicitor's instructions

You should also be aware that the CEO's solicitor's initial letter of instruction, and any further instruction letters issued to you, will be appended to the final version of your report that is served on the nurse or midwife. Furthermore, you may be cross-examined in respect of the instructions which were provided to you by the CEO's solicitor. Accordingly, you should ensure that you are familiar with the exact instructions you received and that you are able to answer any questions that may arise in this regard at the inquiry hearing.

### 14.4 Correspondence

The nurse or midwife or their representative are entitled to request copies of any additional correspondence (e.g. letters, emails and telephone attendances) between you and the CEO's solicitor. Similar to the formal instructions issued to you, you could also be cross-examined in relation to the contents of this documentation.

## 15. Giving evidence at the inquiry

You will almost always be required to give oral evidence to the FTPC at the inquiry hearing in respect of the contents of your report.

Your oral evidence at the inquiry hearing will most likely be subject to cross-examination by the nurse or midwife or their representative, who may challenge you on your opinion.

It is also possible that the nurse or midwife will engage their own expert witness, whose opinion may differ to yours and provide a basis on which to challenge your opinion.

The members of the FTPC may ask you questions so that they can understand your opinion and reasoning. If a member of the FTPC does not agree with your opinion, or parts of your opinion, they should inform you of this and give you an opportunity to respond.

Also, prior to giving your evidence to the FTPC, you will be present during the inquiry proceedings while the witnesses involved are giving evidence. If, following hearing this evidence, your opinion as to the conduct of the nurse or midwife changes, you should make this known to the CEO's solicitor. You will be asked to explain this change of opinion to the FTPC when you are giving your evidence.

## 16. Immunity from suit

As a witness before the FTPC, you are entitled to the same immunities and privileges as a witness before a court<sup>4</sup>. This means that you are entitled to 'immunity from suit', and accordingly you cannot be sued in respect of the evidence you give or the contents of your report.

However, the immunity from civil suit does not extend to immunity from professional regulation by an expert's own regulator (NMBI in this case). If your conduct during the inquiry raises the question of whether you are fit to practise, we could investigate this conduct. This is based on the principle that the extension of the immunity to regulatory proceedings would be inconsistent with the duty of a professional regulator to protect the public. Therefore, if in the course of a fitness to practise inquiry, or in preparation for an inquiry, you act in a manner to suggest that you are unfit to practise, you will enjoy no immunity from a complaint being made to NMBI regarding your conduct.

<sup>4</sup> Section 64(4) of the Nurses and Midwives Act 2011.

## 17. Confidentiality of information

Prior to being instructed, you will be asked to confirm that you will treat all information, facts, matters, documents and all other materials which come to your attention as a result of the instruction as confidential.

Also, you will be asked to direct any communications in respect of your report to the CEO's solicitor, and mark any correspondence or other documents as confidential and privileged and prepared at the request of the CEO's solicitor.

## 18. Termination

You should be aware that the CEO retains the right to withdraw their instruction at any time without notice. However, the termination will not affect your entitlement to payment of any fees which became properly payable before the date of the termination.

Upon termination, please return promptly to the CEO's solicitor all documents and materials provided to you and any copies of same you have made.

## 19. Withdrawal

If you determine that the instructions you have received have become incompatible with your duties as an expert, or have any other substantial and significant reason resulting in you considering withdrawing from the case, please discuss this with the CEO's solicitor.

If you do withdraw, you should give the CEO's solicitor written notice in this regard.

## 20. Conclusion

At the conclusion of the inquiry, the FTPC will prepare a report on its findings, which will then be considered by the Board.

If findings have been made against the nurse or midwife, the FTPC, in its report, will make a recommendation to the Board as to what it considers to be the appropriate sanction to be imposed on the nurse or midwife. An expert witness has no role in relation to the sanction to be imposed on a nurse or midwife; however, the FTPC may take into account the expert's evidence when deciding what sanction to recommend.

At the conclusion of the inquiry, you should return promptly to the CEO's solicitor all documents and materials provided to you and any copies of same you have made. All electronic records of same should be deleted.

*The material contained in this booklet is for information purposes only and does not constitute legal or other professional advice.*





# Appendices

## Appendix 1: Template CV

Curriculum vitae of: [INSERT YOUR NAME]  
Specialist field: [INSERT SPECIALISM]  
On behalf of: Chief Executive Officer  
Nursing and Midwifery  
Board of Ireland  
Prepared for: Fitness to Practise  
Committee  
Nursing and Midwifery  
Board of Ireland  
FTP Reference No.: [INSERT]

### [INSERT NAME OF EXPERT WITNESS]

#### Curriculum vitae

- **Qualifications, training, accreditation**  
[INSERT DETAILS, FOR EXAMPLE POSTGRADUATE QUALIFICATIONS IN NURSING OR MIDWIFERY, EXPERIENCE IN SPECIFIC PROJECTS, ETC. IN REVERSE CHRONOLOGICAL ORDER, I.E. MOST RECENT AT TOP]
- **Past and present positions**  
Present position: [INSERT]  
Past positions: [INSERT IN REVERSE CHRONOLOGICAL ORDER. START WITH YOUR CURRENT POST AND WORK BACK TO THE COMPLETION OF YOUR PRE-REGISTRATION EDUCATION PROGRAMME]
- **Principal professional specialisms**  
[INSERT DETAILS]
- **Awards, accolades and other professional responsibilities**  
[INSERT DETAILS OR DELETE THIS SECTION]
- **Memberships of professional organisations**  
[INSERT DETAILS OR DELETE THIS SECTION]
- **Research publications**  
[INSERT DETAILS OR DELETE THIS SECTION]
- **Training, qualifications and accreditation as an expert witness**  
[INSERT DETAILS OR DELETE THIS SECTION]

## Appendix 2: Template retainer letter

### PRIVATE AND CONFIDENTIAL

[INSERT TITLE AND NAME]

[INSERT ADDRESS]

[INSERT DATE]

Your ref: [INSERT REF]

Our ref: [INSERT]

Matter	<b>Fitness to practise inquiry in accordance with Part 8 of the Nurses and Midwives Act 2011</b>
Client	<b>Chief Executive Officer (CEO) of the Nursing and Midwifery Board of Ireland</b>
Nurse or midwife	[INSERT NAME OF NURSE OR MIDWIFE]

Dear [INSERT],

Further to our [TELEPHONE CONVERSATION OR MEETING] on [INSERT DATE], I am pleased to confirm that the CEO of NMBI (the Client) would like to retain you as an expert witness in this matter. I will specify what you will be required to do in this capacity in the letter of instruction which will follow shortly.

I set out below the principal terms of this retainer for the supply of your services. I would be grateful if you could sign and return a copy of this letter to indicate your acceptance of each of the terms and undertakings.

#### **(a) Confidentiality and communications**

Please confirm that you will treat all information, facts, matters, documents and all other materials which come to your attention as a result of this retainer as confidential (except insofar as you have to refer to them when setting out the substance of your instructions in your report).

Please direct any communications on this matter to [ME OR THIS FIRM] (and not to the Client directly), and mark any correspondence or other documents as confidential and privileged and prepared at the request of [INSERT NAME OF SOLICITOR].

#### **(b) Responsibility for work**

Please note that you are required to carry out all aspects of work on this matter personally and that it is not permitted to delegate any aspect of preparation of the report.

#### **(c) Conflicts of interest**

As discussed, this matter involves a complaint against [INSERT NAME OF NURSE OR MIDWIFE], who at the time of the complaint was working in [INSERT PLACE OF OCCUPATION OF NURSE OR MIDWIFE].

Please confirm that you do not have an actual or potential conflict of interest in accepting this retainer, whether financial, personal or professional, and that you will let us know without delay if you become aware of such a conflict.

If you inform us that you do have an actual or potential conflict of interest, we may decide that we do not consider that it affects your independence as an expert and that we do not need to withdraw your instructions. However, please note that in these circumstances it is likely to be necessary to disclose the actual or potential conflict to the nurse or midwife and their legal team and the Fitness to Practise Committee, with your curriculum vitae, [WHEN YOUR REPORT IS FIRST SERVED OR AT THE EARLIEST OPPORTUNITY], unless the conflict is obviously immaterial. Your curriculum vitae will need to contain details of the employment or activity which raises the possible conflict of interest.

**(d) Your fees**

Please confirm the following:

1. Your fee for the preparation of an expert witness report is €[INSERT RATE], which includes the review of documentation, drafts, any required redrafting and preparation of the final report. Your rate for attendance at the fitness to practise hearing is €[INSERT RATE]. Both of these amounts are exclusive of VAT.
2. The above fees will include your travelling expenses and other disbursements.

Please ensure that your invoice is marked for my attention and includes our reference number, as detailed above.

**(e) Termination**

We can terminate this retainer at any time without notice. If our retainer with the Client is terminated, you will have to seek further instructions directly from the Client. In either case, termination will not affect your entitlement to payment by the Client of any fees which became properly payable before the date of the termination.

Upon termination, all documents and materials provided to you for the purpose of this retainer must be returned promptly to [SPECIFY INDIVIDUAL AND ADDRESS].

**(f) Withdrawal**

If your instructions become incompatible with your duties as an expert, or if any other substantial and significant reason results in you considering withdrawing from the case, you are required to discuss this with us. If you do withdraw, you are required to give us written notice.

**(g) Conclusion**

Please do not hesitate to let me know if you would like to discuss any of the above or need any further clarification. I look forward to receiving a signed copy of this letter to confirm that you accept the terms of this retainer.

Yours sincerely,

[INSERT NAME]

[INSERT NAME OF FIRM OF SOLICITORS]

## Appendix 3: Template letter of instruction

### PRIVATE AND CONFIDENTIAL

[INSERT TITLE AND NAME]

[INSERT ADDRESS]

### BY POST

[INSERT DATE]

Your ref: [INSERT REF]

Our ref: [INSERT]

Matter	<b>Fitness to practise inquiry in accordance with Part 8 of the Nurses and Midwives Act 2011</b>
Client	<b>Chief Executive Officer (CEO) of the Nursing and Midwifery Board of Ireland</b>
Nurse or midwife	[INSERT NAME OF NURSE OR MIDWIFE]

Dear [INSERT],

Thank you for agreeing to act as an expert witness in this matter. This will involve producing an expert report on whether [INSERT NURSE'S OR MIDWIFE'S NAME]'s conduct amounted to the following:

[INSERT GROUND(S) OF COMPLAINT AGAINST NURSE OR MIDWIFE].

This will also involve responding to any questions in relation to your report and, if necessary, giving oral evidence at the inquiry hearing.

I set out below the background facts and the matters on which our Client would like to obtain your expert opinion.

#### **(a) Background facts**

Our Client received a complaint from [INSERT DETAILS OF COMPLAINANT AND THE NATURE OF THE COMPLAINT].

The complaint against [INSERT NURSE'S OR MIDWIFE'S NAME] was referred to the Fitness to Practise Committee (FTPC) by the Preliminary Proceedings Committee of NMBI, on the grounds of [INSERT ALLEGED GROUNDS].

**(b) Enclosures**

I enclose the following documents:

[INSERT DETAILS OF DOCUMENTS ENCLOSED]

**(c) Issues for you to address**

We would like you to address the following issues in your report:

[THE THREE MOST COMMON GROUNDS OF COMPLAINT ARE SET OUT BELOW. IF THE MATTER IS REFERRED TO THE FTPC ON DIFFERENT GROUNDS, THE LETTER WILL HAVE TO BE AMENDED ACCORDINGLY.]

- **Professional misconduct** [INCLUDE OR DELETE THIS SECTION AS APPROPRIATE]

Please consider whether, taking the facts set out in the witness statements at tab [INSERT] as proven, [INSERT NURSE'S OR MIDWIFE'S NAME]'s conduct amounted to professional misconduct.

In preparing your report, you should consider the definition of professional misconduct, and the requirement for there to be a serious shortfall in the standards expected among nurses and midwives on the part of [INSERT NURSE'S OR MIDWIFE'S NAME]. If you do conclude that there has been a serious shortfall in the expected standards by [INSERT NURSE'S OR MIDWIFE'S NAME], you should explain why the failings are serious. Professional misconduct was defined by the High Court in *O'Laoire v The Medical Council*<sup>5</sup> as:

*'...[c]onduct which could not properly be characterised as 'infamous' or 'disgraceful' and which does not involve any degree of moral turpitude, fraud or dishonesty may still constitute 'professional misconduct' if it is conduct connected with his profession in which the medical practitioner concerned has seriously fallen short, by omission or commission, of the standards of conduct expected amongst medical practitioners.'*

In the context of the nursing profession, the definition was re-articulated in the High Court in the case of *Perez v An Bord Altranais*<sup>6</sup>, as follows:

*"... 'professional misconduct', so far as a nurse is concerned, is a serious falling short, whether by omission or commission, of the standards of conduct expected among nurses and it is irrelevant that such misconduct be attributable to honest mistake."*

- **Poor professional performance** [INCLUDE OR DELETE THIS SECTION AS APPROPRIATE]

Please consider whether, taking the facts set out in the witness statements at tab [INSERT] as proven, [INSERT NURSE'S OR MIDWIFE'S NAME]'s conduct amounted to poor professional performance.

<sup>5</sup> HC, 27 January 1995, upheld by the Supreme Court 27 July 1997.

<sup>6</sup> [2005] 4 IR 298.

In preparing your report, you should consider the definition of poor professional performance and the requirement for there to be a shortfall in the standards expected among nurses and midwives on the part of [INSERT NURSE'S OR MIDWIFE'S NAME]. If you do conclude that there has been a shortfall in the expected standards by [INSERT NURSE'S OR MIDWIFE'S NAME], you should explain why the failings are serious.

Poor professional performance is defined in section 2 of the Nurses and Midwives Act 2011, in relation to a nurse or midwife, as follows:

*‘a failure by the nurse or midwife to meet the standards of competence (whether in knowledge and skill or the application of knowledge and skill or both) that can reasonably be expected of a registered nurse or registered midwife, as the case may be, carrying out similar work.’*

This definition was considered by the Supreme Court in the case of *Corbally v Medical Council & Ors*<sup>7</sup>. The Supreme Court determined that, before a finding of poor professional performance could be made by the Medical Council, it had to be proven that the doctor against whom the complaint was made, did something of a serious nature.

On behalf of the Supreme Court, Mr Justice Hardiman stated the following:

*‘Specifically, I consider that before a medical practitioner can be subjected to the extremely threatening ordeal of a public hearing before the Medical Council, either for professional misconduct, or for poor professional performance, there must be reason to believe that what can be proved against him is something of a serious nature. As I have said earlier in this judgement, there may be myriad matters which are plainly not ‘serious’ in the sense I have explained but which may legitimately aggrieve a patient or his or her relatives. But the statutory authority for the governance of the medical profession must be capable of saying to such a person that a complaint, perhaps legitimate in itself, will not proceed to the point of an inquiry before a Fitness to Practice Committee unless it is, in its nature, a serious act or omission.’*

While the decision of the Supreme Court in *Corbally* relates to a medical practitioner and not a nurse or midwife, the same principles are likely to apply to the nursing or midwifery professions. In *Corbally*, the Supreme Court placed a significant emphasis on an act or omission being a serious act or omission. You must take into account the position of the Supreme Court in *Corbally* when providing your opinion in relation to poor professional performance and comment on whether any of the allegations either individually or when taken together are, in your opinion, serious.

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<sup>7</sup> [2015] IESC 9.

- **Non-compliance with a code of professional conduct** [INCLUDE OR DELETE THIS SECTION AS APPROPRIATE]

Please consider whether, taking the facts set out in the witness statements in tab [INSERT] as proven, [INSERT NURSE'S OR MIDWIFE'S NAME]'s conduct amounted to non-compliance with a code of professional misconduct. The relevant codes are included at tab [INSERT] of the enclosed papers.

#### **(d) Your duties as an expert witness**

You have a duty to exercise reasonable skill and care in carrying out your instructions and preparing your report and you should comply with any relevant professional code of practice, but your overriding duty as an independent expert is to the FTPC.

As an expert you must give independent, objective and unbiased evidence within your area or areas of expertise. This duty overrides any obligation to the client from whom the expert receives instructions or by whom the expert is paid.

Your duty includes the obligation to define your area of expertise in the expert's report and when giving evidence in person you must draw the FTPC's attention to any question to which the answer will be outside your area or areas of expertise. You must inform the CEO if your opinion changes from that contained in a report, served as evidence or given in a statement.

Your opinion should be well researched and honestly held. You should ascertain all relevant facts and identify them in the course of your report.

If, having read this letter, you feel that you may not, after all, have the appropriate experience or expertise to deal with these matters, please do let me know immediately.

#### **(e) Your report**

There are no particular requirements for the form and content of an expert's report. However, you must exercise reasonable care in the presentation of the report. In this respect, it is best practice to follow these guidelines:

- The report should be written in the first person.
- The report should set out your qualifications and experience.
- The report should set out details of all literature and other material you relied on in making the report.
- The report should make it clear which of the facts referred to in it are within your own knowledge and indicate the source of all other factual information.
- Fact and opinion should be distinguished, as should assumed and known fact.
- Where there is a dispute over material facts, you should express your opinion on each hypothesis and not prefer one over another unless qualified to do so and explain why you have the preference concerned.
- If there is a range of opinions on a matter dealt with in the report, you should summarise that range of opinions and give reasons for your own.



- You should make it clear if the opinion you are submitting is provisional or qualified. If you are unable to give your opinion without qualification (e.g. because there is insufficient data or information available), state the qualification
- It is helpful to use separate sections with clear headings when setting out your analysis for each of the issues on which you have been asked to express your opinion.

To assist you, we have included a template report which you may wish to use. Please prepare your report in draft in the first instance so that it can be checked to ensure that it covers all relevant issues, complies with instructions, and is factually accurate, consistent and clearly presented.

**(f) Timetable**

At this stage, it is hoped to list this matter for hearing [INSERT DATE(S)]. Please let me know immediately [IF EITHER OF THESE DATES OR DATE] [DO OR DOES] not suit you. I will, of course, let you know if any of these dates change.

It would be helpful if you could review the enclosed documents in the next [INSERT TIMEFRAME], and I will then call you to discuss the relevant issues before you begin to write your report.

If you have any concerns regarding any of the questions raised or you believe that the questions are not properly directed or are disproportionate, please discuss this with me.

I look forward to discussing the relevant issues with you once you have reviewed the enclosed documents. In the meantime, if you have any questions in relation to your role as an expert in this matter, please let me know.

Yours sincerely,

[INSERT NAME]

[NAME OF FIRM OF SOLICITORS]

Enclosure

## Appendix 4: Template expert report

**NURSING AND MIDWIFERY BOARD OF IRELAND  
FITNESS TO PRACTISE COMMITTEE**

**[INSERT FTP  
REFERENCE NUMBER]**

**NURSE OR MIDWIFE: [INSERT NAME OF NURSE OR MIDWIFE] [INSERT PIN]**

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**REPORT OF  
[INSERT NAME OF EXPERT WITNESS]  
DATED [INSERT DATE]**

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Specialist field: [INSERT TITLE OF SPECIALISM]

Assisted by: [INSERT NAMES OF ASSISTANTS OR DELETE THIS LINE IF NONE]

On behalf of: CHIEF EXECUTIVE OFFICER (CEO)  
NURSING AND MIDWIFERY BOARD OF IRELAND (NMBI)

Prepared for: FITNESS TO PRACTISE COMMITTEE (FTPC)

On instruction of: [NAME OF FIRM OF SOLICITORS]

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[NAME, ADDRESS AND OCCUPATION OF THE WRITER'S FIRM (IF ANY)  
AND TELEPHONE, FAX, DX, EMAIL AND REFERENCE]

## Table of contents

1	Introduction	[INSERT PAGE NO.]
2	The background to the allegations and the issues	[INSERT PAGE NO.]
3	The expert's opinion	[INSERT PAGE NO.]
4	Summary of conclusions	[INSERT PAGE NO.]
5	Expert's declaration	[INSERT PAGE NO.]
	Schedule 1 Curriculum vitae consisting of experience, qualifications, appointments, speciality of the writer and of those who have assisted in the preparation of the report	[INSERT PAGE NO.]
	Schedule 2 Solicitor's instructions	[INSERT PAGE NO.]
	Schedule 3 Documents which have been considered	[INSERT PAGE NO.]
	Schedule 4 Texts and published material referred to	[INSERT PAGE NO.]
	Schedule 5 Photographs, drawings, schedules, laboratory reports prepared or referred to	[INSERT PAGE NO.]
	Schedule 6 Chronology [if applicable]	[INSERT PAGE NO.]

[Change as appropriate. This model is intended as a guideline only. There may be valid reasons for departing from it and/or introducing additional sections, depending on the nature of the instructions and/or the allegations. The following sections may be changed or omitted or adapted depending on the nature of the expert's instructions.]

## REPORT

### 1 INTRODUCTION

#### 1.1 Formal details

[Note 1 – state (as applicable) your full name. Give your status (for example, director of nursing), the name of your employer, the nature of its business and its address.]

[Note 2 – state your own specialist field; there is provision later on for you to deal with qualifications, experience, etc. If there are any limitations to your expertise, set these out here.]

[Note 3 – state on behalf of whom you were instructed and the name, address and business of those instructing you.]

#### 1.2 Synopsis

[Note 1 – set out concisely the general nature of the allegations.]

#### 1.3 Instructions

A copy of my instructions is appended at Schedule 2.

#### Disclosure of interests

[Note 1 – state any actual or potential conflict of interests that you may have, for example a connection with any of the parties or witnesses or advisers which might be thought to influence the opinions expressed in the report.]

[Note 2 – state (if it is so) that you have no such connection with any of the parties, witnesses or advisers involved in the case.]

## 2 THE BACKGROUND TO THE ALLEGATIONS AND THE ISSUES

### 2.1 The relevant parties

[Note 1 – set out briefly in short itemised paragraphs the names of those to whom you will refer in this report, together with a short, uncontroversial statement of their role in the relevant events.]

### 2.2 The assumed facts

[Note 1 – set out in short itemised paragraphs a background narrative of the facts you have been given which are material to the opinions you express in your report or upon which your opinion is based.]

[Note 2 – bear in mind that a full chronology, if appropriate, can be provided at Schedule 6.]

[Note 3 – this part of the report is factual only; no opinion should be expressed here.]

### 2.3 The assumptions adopted

[Note 1 – set out in short itemised paragraphs any assumptions upon which your report is based, and also state your justification for adopting those assumptions.]

[Note 2 – if you have been asked to adopt an assumption which is, in your opinion, unreasonable or unlikely, you should state so clearly.]

## 3 THE EXPERT'S OPINION

### 3.1 [Set out the first allegation and your opinion on that allegation with reasons in full].

#### 3.1.1 ALLEGATION 1

[INSERT DETAILS OF ALLEGATIONS]

Opinion:

[State whether, in your opinion, the allegation amounts to [INSERT NATURE OF COMPLAINT]]

[Note 1 – provide cross references to the text or any published material which supports the opinion.]

[Note 2 – only refer to matters of fact so far as may be necessary to the understanding of the opinion.]

[Note 3 – if there is a range of opinion on an issue, you should summarise the range of that opinion, explain the sources and the qualifications of those who hold that opinion and give reasons for your own opinion.]

[Note 4 – any material facts or matters that detract from your opinion and any points that should fairly be made against any of the opinions expressed should be set out.]

[Note 5 – if you are unable to give an opinion without qualification, you should state that qualification.]

[Note 6 – you should make clear when you are not able to reach a definite opinion, for example because you have insufficient information. You should make clear when a question or issue falls outside your expertise.]

### **3.2 [Continue to set out each allegation in turn with opinion and full reasons following the notes given above.]**

## **4. SUMMARY OF CONCLUSIONS**

### **4.1 [Set out a summary of your conclusions and opinions.]**

## **5. EXPERT'S DECLARATION**

I [INSERT NAME OF EXPERT WITNESS] declare that:

- 5.1 I understand that my duty in providing written reports and giving evidence is to help the FTPC, and that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied and will continue to comply with my duty.
- 5.2 I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.
- 5.3 I know of no conflict of interest of any kind in my providing the within report, other than any which I have disclosed in my report.
- 5.4 I do not consider that any interest which I have disclosed affects my suitability as an expert witness on any issues on which I have given my expert opinion.
- 5.5 I will advise the party by whom I am instructed if, between the date of my report and the hearing, there is any change in circumstances which affects my answers to points 5.3 and 5.4 above.
- 5.6 I have shown the sources of all information I have used.

- 5.7 I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.
- 5.8 I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.
- 5.9 I have not, without forming an independent view, included or excluded anything which has been suggested to me by others, including the party who instructed me.
- 5.10 I will notify those instructing me immediately and confirm in writing if, for any reason, my existing report requires any correction or qualification.
- 5.11 I understand that:
  - (a) my report will form the evidence to be given under oath or affirmation
  - (b) I may be required to attend before the FTPC to be cross-examined on my report.

**STATEMENT OF TRUTH**

I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

Signature \_\_\_\_\_ Date \_\_\_\_\_

**SCHEDULE 1**

**CURRICULUM VITAE CONSISTING OF EXPERIENCE, QUALIFICATIONS,  
APPOINTMENTS, SPECIALITY OF THE WRITER**

[INSERT CURRICULUM VITAE CONSISTING OF EXPERIENCE, QUALIFICATIONS,  
APPOINTMENTS, SPECIALITY OF THE WRITER]



**SCHEDULE 2**

**SOLICITOR'S INSTRUCTIONS**

[INSERT COPY OF LETTER OF INSTRUCTION FROM SOLICITOR]

### **SCHEDULE 3**

#### **DOCUMENTS WHICH HAVE BEEN CONSIDERED**

[INSERT LIST OF DOCUMENTS WHICH HAVE BEEN CONSIDERED TOGETHER WITH COPIES OF ONLY THOSE DOCUMENTS WHICH YOU REGARD AS ESSENTIAL FOR THE UNDERSTANDING OF YOUR REPORT]

[Note 1 – every effort should be made to limit the number of documents which are added to the report.]

[Note 2 – where documents are bulky, they should be listed briefly by reference to bundles and not individually.]

**SCHEDULE 4**

**TEXTS AND PUBLISHED MATERIAL REFERRED TO**

[INSERT DETAILS OF TEXTS AND PUBLISHED MATERIAL REFERRED TO  
OR DELETE THIS SCHEDULE]

**SCHEDULE 5**

**PHOTOGRAPHS, DRAWINGS  
OR SCHEDULES PREPARED OR REFERRED TO**

[INSERT PHOTOGRAPHS, DRAWINGS, SCHEDULES, LABORATORY REPORTS  
PREPARED OR REFERRED TO OR DELETE THIS SCHEDULE]

**SCHEDULE 6**

**CHRONOLOGY [IF APPLICABLE] OF PHOTOGRAPHS, DRAWINGS  
OR SCHEDULES PREPARED OR REFERRED TO IN THIS REPORT**

[INSERT CHRONOLOGY IF APPLICABLE, OR DELETE THIS SCHEDULE]

Nursing and Midwifery Board of  
Ireland

18/20 Carysfort Avenue,  
Blackrock,  
County Dublin,  
A94 R299.

Tel: (01) 639 8500

Email: [ftp@nmbi.ie](mailto:ftp@nmbi.ie)

Web: [www.nmbi.ie](http://www.nmbi.ie)



**Bord Altranais agus  
Cnáimhseachais na hÉireann**  
**Nursing and Midwifery  
Board of Ireland**