

## Telephone evidence guidance

### Introduction

- 1 This guidance is intended to help panels considering applications for a witness (including the nurse or midwife who is the subject of the allegation) to give oral evidence by telephone during a final hearing.
- 2 It does not apply to evidence by video-link or other remote means, or participation in hearings more generally beyond giving evidence.

### Background

- 3 A panel considering an allegation of impaired fitness to practise or fraudulent or incorrect entry to the register has the discretion to receive 'oral, documentary or other' evidence if it is relevant and fair.<sup>1</sup> This includes telephone evidence.
- 4 Under Article 22(1)(a) of the Nursing and Midwifery Order 2001 (the Order) a nurse's or midwife's fitness to practise may be impaired by reason of any or all of the following.
  - 4.1 Misconduct.
  - 4.2 Lack of competence.
  - 4.3 A conviction or caution in the United Kingdom for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence.
  - 4.4 Physical or mental health.
  - 4.5 Not having the necessary knowledge of English.
  - 4.6 A determination by a body in the United Kingdom responsible under any enactment for the regulation of a health or social care profession to the effect that the nurse's or midwife's fitness to practise is impaired, or a determination by a licensing body elsewhere to the same effect.

---

<sup>1</sup> Rule 31, Nursing and Midwifery Council (Fitness to Practise) Rules 2004 (the rules)

- 5 The procedure to be followed for a witness giving evidence at a hearing is set out in Rule 22 of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 (the rules).
  - 5.1 The witness shall be required to take an oath, or to affirm, before giving evidence at a hearing.<sup>2</sup>
  - 5.2 The witness shall be examined by the party calling them, may be cross-examined by the opposing party, re-examined and questioned by the panel concerned.<sup>3</sup>
  - 5.3 The panel has the power to require a witness to attend the hearing to give evidence (or produce relevant documents).<sup>4</sup>
- 6 Accordingly, a witness should generally attend a hearing and give evidence in person.
- 7 Any party who wants to depart from this approach and rely on telephone evidence should make an application to the panel. This application should usually be made at the final hearing rather than at a preliminary meeting because it relates to the admissibility of evidence.<sup>5</sup> The panel should receive advice from the legal assessor and make a decision in private.
- 8 The decision to allow such evidence should not be regarded as routine but must involve a proper consideration of any issues raised.<sup>6</sup>

## **Key considerations**

- 9 Central to the panel's consideration is whether the evidence is relevant to the allegation before it and whether it would be fair to hear the witness by telephone.
- 10 In general, the relevance of the evidence will be obvious and the decision will turn on fairness to the parties.

## **Content of the evidence**

- 11 A key consideration when deciding whether to admit telephone evidence will be the content of the witness's evidence.<sup>7</sup>
- 12 If the content is particularly important to the case, then the panel should act with caution. This is because the telephone evidence may reduce the quality of the witness's evidence, the ability of the parties to test it and the panel to assess it.<sup>8</sup>

---

<sup>2</sup> Rule 22(1) of the rules

<sup>3</sup> Rule 22(3) of the rules

<sup>4</sup> Rule 22(5) of the rules

<sup>5</sup> Directions made under rule 18(7) of the rules are not binding on the final panel hearing the allegation.

<sup>6</sup> *The Secretary of State for the Home Department v TN* [2011] UKUT 00443 (IAC), paragraph 13 ('*TN*')

<sup>7</sup> *TN*, paragraph 21f

<sup>8</sup> *TN*, paragraph 17

- 13 It may be fair for a witness to give evidence by telephone if one or more of the following applies:
  - 13.1 the content of the evidence is not materially in dispute;
  - 13.2 the credibility of the witness is not substantially in issue;
  - 13.3 the witness is primarily an investigator or exhibiting documentation and not an eyewitness to disputed facts;
  - 13.4 the evidence is not sole and decisive in relation to one or more disputed charges;
  - 13.5 the evidence is contained within a written statement supported by a signed statement of truth;
  - 13.6 the length of the evidence does not make it impractical to hear it by telephone.

### **Response from other parties**

- 14 The panel should consider whether any party to the proceedings objects to the application for the witness to give evidence by telephone.
- 15 A panel is more likely to allow an application if there is no objection by any party, as long as it is fair to do so.
- 16 Where a party objects to the application and the evidence is of importance to the case, the panel should consider whether to adjourn and require the witness to attend the hearing at a future date (see paragraphs 23-26 below).

### **Reason for non-attendance**

- 17 The panel should also consider whether the application to hear evidence by telephone is supported by clear reasons why the witness cannot attend the hearing in person.
- 18 The panel should only allow an application when the witness would otherwise not be able to give evidence at the hearing on that day.
- 19 In some cases the reason for the witness's non-attendance may be related to their health. In such circumstances, the panel should consider whether the party making the application has provided any medical evidence (for example, from a GP or other healthcare professional).
- 20 The absence of such information will not necessarily mean that the application should be refused. For example, where the health condition has come about recently, there may not have been sufficient time for the witness to get detailed medical evidence.
- 21 Other reasons may be provided for a witness's non-attendance. These should be considered carefully and weighed against the other factors set out in the guidance before deciding to hear evidence by telephone.

## Hearing evidence by telephone

- 22 If the panel decides to hear evidence by telephone, it should try to follow normal procedure as far as possible.
- 23 The chair of the panel should therefore:
  - 23.1 take such steps as are necessary to identify the witness;
  - 23.2 introduce the witness to all the parties in the hearing room;
  - 23.3 explain the procedure to the witness;
  - 23.4 ensure that the party calling the witness has provided them with any relevant documents;
  - 23.5 establish if there is anyone else in the room with the witness, and if so, who they are and the reason for their presence;
  - 23.6 ask the witness to take the oath or affirm before giving evidence.

## Adjournments

- 24 If the panel considers that it would not be fair to allow a witness to give evidence by telephone, it may be in the public interest to adjourn the hearing and direct their attendance in person at a later date.
- 25 An adjournment application may be made by one of the parties but can also be raised by the panel voluntarily.<sup>9</sup> As the panel is concerned with public protection and the wider public interest, it can play a more proactive role in ensuring the case is properly presented and that the relevant evidence is placed before it.<sup>10</sup>
- 26 If the panel considers it unfair to allow a witness to give evidence over the telephone and their evidence is important to the allegation of impaired fitness to practise, it should carefully consider exercising its power to require their attendance at a later date. This is to ensure that the case is properly considered.
- 27 In addition to the factors set out at rule 32 of the rules, the following may be relevant to such a decision:
  - 27.1 If the refusal to hear the evidence by telephone will result in a charge or charges not being pursued and there is risk of harm to the public or public confidence in the profession<sup>11</sup>.

---

<sup>9</sup> Rule 22(5) and 32 of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004

<sup>10</sup> PSA v NMC and Jozi [2015] EWHC 764 (Admin) paragraphs 21-21 and 33

<sup>11</sup> Article 3(4) Nursing and Midwifery Order 2001 states the over-arching objective of the NMC's Fitness to Practise (FtP) function is to protect the public. Article 3(4A) states that this is achieved by undertaking to: a) protect, promote and maintain the health, safety and well-being of the public; b) promote and maintain public confidence in the professions regulated under this Order; and c) promote and maintain proper professional standards and conduct for members of those professions.

- 27.2 If it is likely that the witness will be able to attend a hearing in person in the future.
- 27.3 The impact of an adjournment on the timetable of the hearing and the public interest in concluding the case.
- 27.4 The impact on the nurse or midwife facing the allegation in adjourning the case.

**Approved by Director of Fitness to Practise 25.06.15**

**Effective from 29.06.15**

**Updated version approved by the FtP Director on 24.06.16**

**Effective from 26.09.16**