

本期企劃

揭開醫療鑑定之神秘面紗 —簡評刑事訴訟法 鑑定章節之修正草案

Disclosing the Mysterious Veil of the Medical
Assessment—Comment on the Amended Draft for
the Chapter of Expert Witness in Criminal Procedure

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摘要

臺灣憑藉著醫療技術及人民自製配合，在全球的防疫成績排比上名列前茅，然而醫療糾紛卻仍是層出不窮，其中醫療鑑定不論是在民事或刑事訴訟扮演舉足輕重之角色，審判實務上，當事人一旦面臨醫療糾紛，通常會先提出刑事告訴，隨後若檢察官偵查起訴，再以刑事附帶民事訴訟之方式，一併提出民事之求償，以致於醫療鑑定大抵係由檢察官或法官委由行政院衛生福利部醫事審議委員會所設醫事鑑定小組進行書面鑑定，由於醫鑑小組具有書面鑑定與回覆及評議內容不公開等特色，加上醫鑑小組鑑定醫師有疏失

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關鍵詞：交互詰問（cross-examination）、書面鑑定（written appraisal）、透明化（transparency）、醫事鑑定小組（medical task force on assessment）、醫療鑑定（medical assessment）

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之比率過低，不免令人萌生醫醫相護之感，也引發學者建議即便是醫鑑小組該機關所為之鑑定，仍應具名並到庭說明或接受交互詰問，方能使當事人明瞭鑑定內容及保障當事人之詰問權。司法院於2019年亦推出刑事訴訟法關於鑑定章節之修正草案，草案即規定機關鑑定仍應由鑑定人具名及到庭說明，惟此次修正是否會引發醫師因無暇到庭說明等因素，引發拒卻鑑定之情形，抑或縱然醫師具名能否達成定紛止爭之效果，值得探討。

Depending on the medical technology and the self-willing cooperation of people, Taiwan comes out in front concerning to the epidemic prevention. Nevertheless there are still lots of medical litigations there. There in the medical expert witness plays an important role in Civil as well as Criminal Procedure. Concerning to legal praxis, once parties faced to the medical litigation, they filed a criminal accusation and then a civil accusation after the prosecution of the prosecutor on the base of investigations. Under the Assignment from the prosecutor, the medical expert witness would generally be written by the medical task force on expert witness which was set up by the Medical Review Committee belongs to Minister of Health and Welfare. Due to the features of the task force that the expert witness as well as the response would only be written and that the content of the review wouldn't be in public, not to mention that the physician would seldom be reviewed as negligent, it is inevitably to image that physicians could shield one another. Scholars had suggested once that the medical task force on expert witness should put their name to a document in the court or be cross-examinated to make the parties realize the content of the assessment, guaranteeing the parties' right of

confrontation. Justice Yuan has proposed an amended draft for Criminal Procedure concerning to the expert witness in 2019, regulating that the expert witness should put his/her name to a document and explain in the court. It would be worth to analyze whether the physicians would refuse to be the expert witnesses because of having no time to be in the court, or whether it would be helpful to solve the problems.

壹、刑事訴訟醫療鑑定之現況與特色

一、委由機關鑑定之運作現況

因新冠肺炎疫情席捲全球，臺灣這次在疫情肆虐的大浪中能夠穩住腳步，無非是靠著醫療系統中各位醫事人員的無私奉獻及民眾的自主配合而成；相較美國疫情失控，死亡率每10萬人口高達36人，臺灣死亡率低至每10萬人口僅0.03人。美國前總統歐巴馬顧問、賓州大學醫學教授Ezekiel Emanuel接受媒體CNN訪問時提及美國應向臺灣學習¹，可見臺灣的醫療品質及水準備受肯定。然而臺灣醫療糾紛之發生卻仍層出不窮，據研究指出，醫療糾紛之所以會進入刑事訴訟程序，多半起因於病人於醫療過程中死亡²。平均而言，每個進入刑事審判程序的醫療糾紛案件，不論有罪或無罪，大約要花4年半左右時間才能定讞³。而醫療糾紛發生之原因究竟是醫師執行醫療行為有無違反醫療常規，抑或是病人本身及其家屬期望過高產生誤解所致，囿於醫療行為本身具有高度專業性，透過醫療鑑定來定

1 江慧君，臺灣防疫成績為何全球第一？前歐巴馬顧問：人手一張健保卡，載於天下雜誌，<https://www.cw.com.tw/article/5101380>（瀏覽日期：2021年2月19日）。

2 陳榮基，臺灣醫療糾紛的頻率及原因的分類，臺灣醫界，37卷6期，2020年6月，102頁。

3 廖建瑜，當醫師走法律鋼索，中國時報，2008年1月21日，A4版。