

Guidelines for the Physician Assistant Serving as an Expert Witness

(Adopted 1977, Amended 1987, 1991, 2001)

(1) A physician assistant may serve as a witness in a legal proceeding in one of several capacities.[1] These guidelines discuss serving as expert witness and giving opinions in professional liability (medical malpractice) cases. Accompanying notes and references outline other roles a PA may have as a witness or consultant, preparation for testifying, legal terms, strategies and tactics that may be encountered.

(2) It is the intent of the Academy to inform physician assistants about the duties PAs have, as health care professionals, to society, the legal system, and the profession. These guidelines and comments are not legal advice. Physician assistants involved in legal matters are urged to obtain legal advice from a qualified attorney.

(3) A physician assistant may be called upon or directed to give an expert medical opinion in the judicial system because knowledge about medicine and PA practice is generally considered beyond the average judge or juror's experience. A patient who alleges injury (plaintiff) and the judge or jury will need opinions about standards of medical care, if and how a standard of care was met, and, if not, how falling below a standard caused injury to the patient. The practitioner (defendant) may also need expert opinions and may serve as an expert witness in his or her own behalf.

(4) The responsibility of providing a professional opinion as an expert witness should be undertaken after careful self-evaluation and thorough preparation with an attorney. The PA should have an understanding of medical, legal and ethical principles involved.[2]

(5) Guideline 1: A physician assistant serving as an expert witness should have current experience and knowledge in the area(s) about which he or she is to testify.[3]

(6) A PA's knowledge and experience alone may not sufficiently satisfy an attorney or qualify the PA to testify in court as an expert witness. Maturity, integrity, composure and other personal characteristics should be evaluated with an attorney prior to offering testimony. Prior testimony, income from testifying, potential conflicts of interest with, or bias toward, other parties involved in the case may render a PA unsuitable as a witness. If, after meeting with an attorney, the PA is unclear on issues about which he or she will testify, feels uncomfortable offering an opinion, or has no opinion, voluntary testimony should not be given.

(7) Guideline 2: A PA expert must objectively evaluate facts and provide an opinion. If no opinion can be derived from available facts, this should be stated to the attorney. The PA's review of medical facts should be thorough, fair, and impartial and should not exclude any relevant information in order to create a view favoring either the plaintiff or the defendant. The expert should champion what he or she believes to be the truth.

(8) PAs serving as expert witnesses have an ethical responsibility to the profession. The Guidelines for Ethical Conduct for the Physician Assistant Profession admonishes a PA from participating in AN activity that will discredit or dishonor the profession. Providing an expert opinion in a judicial process is never a trivial matter. There are risks to the witness, profession, other parties, and society. Yet, AAPA Policy further asks PAs to expose without fear or favor, any illegal or unethical conduct in the medical profession. Participating in a judicial proceeding as an expert witness, like peer review, is a necessary obligation of the profession and its members. Expert opinion may support or criticize a colleague.

(9) This duty, to serve for the good of society and the courts, is a guiding principle. This responsibility may override the concept that PAs should act, in these situations, as advocates for a patient or serve only a patient's interest. Expert opinion may help or hinder a patient's cause.

(10) Guideline 3: It is incumbent upon a PA giving testimony in legal proceedings that his or her testimony does not attack performance that falls within accepted standards of practice or, conversely, support obviously deficient practice. Since experts establish the standards of practice in a given case, care should be exercised to ensure that such standards do not narrowly reflect the experts' views to the exclusion of other acceptable choices.

(11) An expert witness should recognize that there is uncertainty inherent in medical practice. It is a dynamic and changing discipline based on concepts of probability rather than on absolute certainty. Principles drawn from the experience of a number of patients and providers are applied to individual patients with hope for success. Further, with technologically advanced medical care, both benefits and risks are likely to be increased. Risks of complication in the practice of technical specialties can be frequent and/or severe. In providing expert testimony, a PA should have in mind a clear distinction between the occurrence of unavoidable and/or severe complications which do not represent malpractice (good medical care, but a bad outcome), and the occurrence due to negligence^[4] (poor medical care that contributes to or causes a bad outcome).

(12) Testimony is usually given concerning customary or standard practice. Innovation in medical practice is sometimes considered in a legal proceeding. An innovation may or may not fall outside of the standard of care. Many advances in medical practice rely on innovation.

(13) Guideline 4: A physician assistant offering an opinion should know what constitutes customary practice. Testimony about innovation in medical practice should be identified as such.

(14) A physician assistant may offer an expert opinion several times in one legal proceeding or in several separate proceedings. Expert testimony offered by the PA in

previous cases and proceedings is often reviewed and compared by attorneys and other experts. All testimony should be truthful and consistent.

(15) Guideline 5: The PA should testify truthfully and consistently, recognizing his or her testimony may be subject to peer review.

(16) Custom and rules governing compensation for legal witnesses vary. The PA should be fairly compensated for time spent preparing, appearing and testifying as an expert witness.

(17) Guideline 6: The PA should not accept a contingency fee - compensation based on the outcome of a case in which testimony is given — or derive personal, financial, or professional favor in addition to compensation.

Summary of Academy

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(18) The PA should have current experience and ongoing knowledge in the areas of clinical practice about which he or she is testifying.

(19) The PA should objectively evaluate the facts and provide an opinion. The PA's review of medical facts should be thorough, fair and impartial and should not exclude any relevant information in order to create a view favoring either the plaintiff or the defendant. The expert should champion what he or she believes to be the truth, not the cause of one party in a dispute.

(20) The PA's testimony should reflect an evaluation of performance considering generally accepted standards, neither condemning performance that clearly falls within generally accepted practice standards nor condoning performance that clearly falls below these standards. The PA should examine the relationship of an alleged substandard practice to the outcome and acknowledge, when necessary or uncertain, that a deviation from a practice standard is not always causally related to a bad outcome. The PA should make a clear distinction between medical malpractice and the occurrence of unavoidable complications, which do not arise from negligence.

(21) The PA should identify testimony about customary practice and testimony about innovation.

(22) The PA should offer testimony recognizing it may be subject to peer review. Testimony given should be truthful and consistent.

(23) The PA expert witness should be fairly compensated for time spent preparing, appearing and testifying. The PA should not accept a contingency fee based on the outcome of a case in which testimony is given, or derive personal, financial or professional favor in addition to compensation.

Recommended Reading

1. American Academy of Physician Assistants. "Guidelines for Ethical Conduct for the Physician Assistant Profession," May 2000.
2. Babitsky S. The Ten Biggest Mistakes Experts Make During Deposition. Available on ExpertPages.com.
[wysiwyg://162/http://expertpages.com/news/ten_biggest_mistakes.htm](http://162/http://expertpages.com/news/ten_biggest_mistakes.htm)
3. Babitsky S, Mangraviti JJ. How To Excel During Cross Examination: Techniques for Experts that Work. SEAK Inc. Falmouth, MA, 1997.
4. Bronstein DA. Law for the Expert Witness. CRC Press. Boca Raton, FL, March 1999.
5. Kolczynski PJ. How To Be a Successful Expert Witness. Copyright 1997 by the author. Available on ExpertPages.com.
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6. Leonetti KM. In The Professional Liability Handbook: A Basic Guide for Physician Assistants. American Academy of Physician Assistants, Alexandria, VA, 1990.
7. Lubet S. Expert Testimony: A Guide for Expert Witnesses and the Lawyers Who Examine Them. National Institute for Trial Advocacy, Notre Dame, IN, 1998.
8. Malone DM, Zwier PJ. Expert Rules: 100 (and more) Points You Need to Know about Expert Witnesses. National Institute for Trial Advocacy, Notre Dame, IN, 2001.
9. Malone DM, Zwier PJ. Effective Expert Testimony. National Institute for Trial Advocacy, Notre Dame, IN, July 2000.
10. Merenbach DG, Stephen A. How To Be an Expert Witness: Credibility in Oral Testimony. Fithian Press, Santa Barbara, CA, April 1993.
11. Poynter D. Expert Witness Handbook: Tips and Techniques for the Litigation Consultant. Para Publishing, New York, June 1997.
12. Tsushima WT, Nakano KK. Effective Medical Testifying: A Handbook for Physicians. Butterworth-Heinemann Medical, Woburn, MA, March 1998.

Endnotes

1. Testimony may be given at the request of either party in a lawsuit. Testimony may be given by affidavit, at a deposition, transcribed and then used in court by either party, or testimony may be given directly in court. There are several types of medical testimony. When a PA has a prior relationship, such as treating or providing a consultation for the patient, there is a duty to assist that patient in legal matters pertaining to the medical care. RS Toth, *Legal Medicine: Legal Dynamics of Medical Encounters*, American College of Legal Medicine; Mosby (St Louis) 1988. An example of this is treating a patient who was involved in an automobile accident or job-related injury and later testifying about the observed injuries or extent of disability. In this circumstance, the PA may testify voluntarily or, less frequently, may be compelled by subpoena to give factual testimony. The testimony may be given in person or in writing.

In contrast, a non-treating PA may provide expert opinion testimony in a malpractice case about a standard of care -- possessing and using that degree of skill and learning which is customarily expected of practitioners acting under the same or similar circumstances. During litigation, a general standard of care is applied to the facts of a case by the introduction of expert witness testimony. See Toth.

Time spent preparing for and giving testimony, possible future court appearances and compensation for these services should be agreed upon with the attorney before undertaking these activities.

During testimony, a factual (percipient) witness may be asked to give an opinion and in doing so offers expert testimony without being called as an expert witness. Similarly, a PA performing chart review as an expert consultant in a legal matter may be called upon to give an expert opinion. To understand your situation and to prepare adequately for testifying you should ask the attorney who wants your services or testimony to specify the request in writing. This may be a letter, contract, or, less often, a formal notice (a subpoena) to compel your testimony. A subpoena, citation or other court order may be issued, if only to help the attorney follow legal procedures should you not be available or qualified to testify.

Whether compelled or testifying voluntarily and regardless of your intent to provide only factual testimony or consultation, you still may be asked to give an expert opinion. An attorney should advise you on the best course of action.

There sometimes are exceptions for having to give expert, opinion testimony. There may be insufficient information on which to base an opinion. Also, a practitioner who treats a patient may refrain from giving an expert opinion on the standard of care in a malpractice case if the injury is alleged to have occurred before the practitioner's care and someone else is alleged to have caused the injury.

Legal jurisdictions have rules about expert opinion, qualifications of experts, applicable fees and types of testimony. Local custom in the medical and legal communities may dictate fees that are appropriate.

2. Testimony given by a PA expert may cover one or several areas such as clinical practice and procedures, professional standards, conduct and ethics, scope of practice or statutes and regulations relating to practice. In civil and criminal proceedings, PA experts may also offer testimony such as cause of injury or disability, extent of temporary or permanent disability, and medical findings in assault or abuse cases.

3. The Federal Rules of Evidence define an expert witness as anyone "...qualified as an expert by knowledge, skill, experience, training, or education." (Rule 702) Although most cases in which a PA might testify will be conducted in state courts, which are governed by the particular state's rules of evidence, Federal Rules of Evidence will be cited here to offer generic illustration. There are expert witnesses representing every type of human activity (accountants, engineers, homemakers, mechanics, nurses, physicians, etc.).

4. The legal definition of negligence has four elements: (1) that the PA owed a legal duty to the patient. A PA owes each patient the duty to possess and use on the patient's behalf that degree of knowledge, skill, and care usually exercised by reasonable practitioners under similar circumstances. This duty creates a standard of care for various medical acts. (2) That the PA breached the duty, failed to comply with the standard of care. (3) That the patient sustained actual damages, such as physical impairment, emotional injuries and/or financial consequences. (4) That the PA's breach of duty proximately caused the patient's injuries. All four elements must be satisfied for a finding of negligence. Expert witness testimony is often needed to support any or all of these elements. Expert opinion testimony often defines the standard of care in malpractice cases. KM Leonetti, in *The Professional Liability Handbook: A Basic Guide for Physician Assistants*, AAPA (Alexandria), 1990. RS Toth, *Legal Medicine: Legal Dynamics of Medical Encounters*, American College of Legal Medicine; Mosby (St Louis), 1988. MD McCafferty and SM Meyer, *Medical Malpractice Bases of Liability*, McGraw Hill (Colorado Springs), 1985.

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