

Guidelines for the PA Serving as an Expert Witness
(Adopted 1977, reaffirmed 2004, 2009, amended 1987, 1991, 2001, 2014, 2018, 2023)

Executive Summary of Policy Contained in this Paper

Summaries will lack rationale and background information and may lose nuance of policy.
You are highly encouraged to read the entire paper.

- A PA serving as an expert witness should have current experience and knowledge in the area(s) about which the PA is to testify.
- The PA's review of medical facts should be thorough, fair, and impartial without intentionally or deliberatively excluding any relevant information.
- A PA offering an opinion should know what constitutes standard of care.
- The PA should not accept a contingency fee or derive personal, financial, or professional favor in addition to compensation.
- The PA serving as an expert witness should not attempt to review or accept for review matters solely on behalf of either the plaintiff or the defense.

Introduction

A PA may serve as a witness in a legal proceeding in one of several capacities. 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.

It is the intent of AAPA to inform PAs about the duties PAs have, as healthcare professionals, to society, the legal system, and the profession. These guidelines and comments are not legal advice. PAs involved in legal matters are urged to obtain legal advice from a qualified attorney.

A PA 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 or plaintiff and the judge or jury will need opinions about standards of medical care, if and how a standard of care was met, or how the failure to meet the accepted standard of care caused injury to the patient. The defendant or accused practitioner may also need expert opinions or may testify on their own behalf.

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.

Guideline 1: A PA serving as an expert witness should have current experience and knowledge in the area(s) about which the PA is to testify.

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 the PA will testify, feels uncomfortable offering an opinion, or has no opinion; voluntary testimony should not be given.

Guideline 2: A PA serving as an expert witness 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 PA serving as an expert witness should champion what the PA believes to be the truth.

PAs serving as expert witnesses have an ethical responsibility to the profession. The Guidelines for Ethical Conduct for the PA 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, the 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.

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.

Guideline 3: It is incumbent upon a PA giving testimony in legal proceedings that the PA 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.

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 (poor medical care that contributes to or causes a bad outcome).

Guideline 4: A PA offering an opinion should know what constitutes the standard of care.

Testimony about innovation in medical practice should be identified as such.

A PA 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.

Testimony is usually given concerning standard of care 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.

Guideline 5: The PA should testify truthfully and consistently, recognizing any testimony may be subject to peer review.

Customs 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.

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.

Providing expert testimony based on a contingency fee is against public policy in that it allows an expert to promote litigation out of self-interest (i.e., for the sake of collecting fees) rather than for the interest of the real party (i.e., plaintiff or defendant). Entering into a contingency agreement may be grounds for disqualification of an expert (1).

Guideline 7: The PA serving as an expert witness should not attempt to review or accept for review matters solely on behalf of either the plaintiff or defense.

When a PA serving as an expert witness solely reviews of testifies in matters pertaining to one side of a potential litigation, plaintiff or defense, it raises questions of an inherent bias in the expert's opinion or motivation for serving as an expert witness. It is the duty of an expert to provide an honest and ethical opinion regarding the standard of care no matter which party retains the expert.

Summary of AAPA Guidelines for the PA Serving as an Expert Witness

The PA should have current experience and ongoing knowledge in the areas of clinical practice about which the PA is testifying.

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 intentionally or deliberately exclude any relevant information in order to create a view favoring either the plaintiff or the defendant. The PA serving as an expert witness should champion what the PA believes to be the truth, not the cause of one party in a dispute.

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.

The PA should identify testimony about standard of care and testimony about innovation.

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

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 and Resources

AAPA. "Guidelines for Ethical Conduct for the PA Profession," May 2023.

The Academy of Physician Assistants in Legal Medicine (APALM). www.aapalm.org

Babitsky S. The Ten Biggest Mistakes Experts Make During Deposition.

Mangraviti JJ, Babitsky. How to Excel at Your Expert Witness Depositions. Seak 2013.

Bronstein DA. Law for the Expert Witness. CRC Press. Boca Raton, FL, December 2011.

Lubet S. Expert Testimony: A Guide for Expert Witnesses and the Lawyers Who Examine Them.

National Institute for Trial Advocacy, Notre Dame, IN, 1998.

Malone DM, Zwier PJ. Expert Rules: 100 (and more) Points You Need to Know about Expert Witnesses. Lexis/Nexis, 2012.

Malone DM, Zwier PJ. Effective Expert Testimony. National Institute for Trial Advocacy, 2006.

Poynter D. Expert Witness Handbook: Tips and Techniques for the Litigation Consultant. Para Publishing, January 2012.

Furrow, B, Greaney, T, Johnson, s, Stoltzfus Jost, T, Schwartz, r. (2015) *Health Law* (pp 277-292). West Publishing Co.