
POSITION STATEMENT

Guidelines for Expert Witness, Qualification and Testimony

Preamble

The Australian legal system in the Federal and State jurisdictions often requires expert medical testimony in relevant cases. Proper functioning of this system requires that when such testimony is needed, it be truly expert, impartial, and available to all litigants. To that end, we advocate the adoption of the following rules by The Australian Society of Anaesthetists Ltd (ASA). These rules should apply to all ASA Members providing expert opinions to the Courts, litigants or lawyers in the context of civil or criminal matters and include written expert opinions as well as sworn testimony.

Role of expert testimony as part of normal practice

The provision by a specialist anaesthetist of expert opinion and testimony as an expert witness is viewed by the ASA to be a normal component of specialist anaesthetic practice and as such is to be governed by the rules, ethics, standards, responsibilities and sanctions of specialist anaesthetic practice.

Qualification as an expert witness

An anaesthetist providing testimony or opinion shall only be designated as an expert witness if:

1. He/she has sufficient knowledge and experience of the specific subject(s) or area(s) of his or her written expert opinion or sworn oral testimony, related to current anaesthetic practice, which is thought to be beyond the comprehension of the average layman;
2. He/she is in current active practice as a specialist anaesthetist and has current experience in the area of anaesthetic practice forming the basis of their opinion or testimony;
3. He/she is accepted as an expert by their peers in the area of anaesthetic practice forming the basis of the opinion or testimony being proffered.

Requirements and responsibilities of expert witnesses

Expert witnesses are expected to be truthful, thorough and impartial and must not adopt a position of advocacy, except as spokesman for the field of special knowledge that they represent. They should not exclude any relevant information to create a view favouring either the plaintiff or the defendant. The ultimate test for accuracy and impartiality is a willingness to prepare testimony that could be presented unchanged for use either by the plaintiff or the defendant. The expert witness must testify as to the practice behaviour of a prudent specialist anaesthetist, giving different viewpoints, where applicable. In offering any expert testimony or opinion, the expert witness:

1. Should review and become familiar with all the pertinent data of the particular matter at hand. The anaesthetist, as an expert witness, should diligently and thoroughly prepare himself or herself with relative facts relating to the particular patient or case so that he or she can, to the best of his or her ability, provide the court with accurate and documentable opinion on the appropriateness of anaesthetic management of the patient.
2. Should review prior and current concepts related to standard anaesthetic practice on the matter at hand before giving testimony or providing written opinion about such practice standards. The expert's testimony should reflect an evaluation of performance in light of generally accepted standards, reflected in relevant literature, neither condemning performance that clearly falls within generally accepted practice standards nor endorsing or condoning performance that clearly falls outside accepted medical practice
3. Should not concern him/herself with the legal issues of the matter in question.
4. Should identify as such, personal opinions not generally accepted by other anaesthetists. Expert testimony should reflect not only the

opinion of the individual but also honestly describe where such opinion varies from common practice. The expert should not present his or her views as the only correct ones if they differ from what might be done by other anaesthetists.

5. Should champion what he/she believes to be the truth, not the cause of one party or the other.
6. Should have no financial or other interest in the outcome of a case in which opinion or testimony is offered.
7. Should recognise and correctly represent the full standard of anaesthetic care and should with reasonable accuracy state whether a particular action was clearly within, clearly outside of, or close to the margins of the standard of anaesthetic care.
8. Should not be evasive for the purpose of favouring one litigant over another and should answer all properly framed questions pertaining to his or her opinions on the subject matter thereof.

Compensation of expert witnesses

The anaesthetist expert witness should not accept a contingency fee for providing expert medical opinion services.

Charges for medical expert opinion services should be reasonable and commensurate with the time and effort given to preparing and providing those services.

Sanctions for breach of rules

A review by a specially appointed “Review Committee” of the ASA (consisting of 2 Past Presidents of the ASA and 3 current ASA Executive Committee Members), is permitted, following complaint by an ASA member, of expert witness testimony given after 1PstP January 2005 in civil and criminal judicial proceedings. Should such a review

result in a determination that the testimony is inconsistent with the newly revised ASA “Guidelines for Expert Witness Qualification and Testimony,” the ASA Executive Committee would be authorised to penalise an ASA member giving the testimony with censure, suspension of membership or revocation of membership.

If the ASA Review Committee determines that the complaint is not valid, it so advises the complainant and respondent, and its decision will be final. If it determines the complaint is valid, it notifies the parties, issues written findings of fact, including the conclusion that the guidelines have been violated, and recommends an appropriate sanction — censure or suspension or revocation of membership — to the ASA Executive Committee for final action.

At the meeting of the ASA Executive Committee, the respondent expert is afforded a final opportunity to present arguments against the Review Committee’s recommendation for sanction. The Review Committee’s findings of fact are deemed to be final, but the Executive Committee will exercise final authority with respect to disposition of the complaint, including dismissal of the complaint or alteration of the sanction recommended by the Review Committee. All of the foregoing proceedings are confidential. Only if the Executive Committee imposes a sanction shall that fact be made public.

The ASA program will extend only to possible sanctions by the ASA on members providing expert testimony. For obvious reasons, a medical society enjoys no power to impose membership sanctions on any expert not enjoying membership therein; the ASA procedure does provide, however, that an attempted resignation by an ASA member giving expert testimony will not be accepted when a complaint has been filed with respect to the testimony.

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