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# Testimony Toolkit





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## Introduction

The following guidance is applicable whenever a clinician is preparing for testimony, be it for criminal, civil, or administrative trials, depositions, or proceedings in federal, military, state, and/or tribal courts. Clinicians should consult with the attorney for whom they are testifying about material differences among the aforementioned proceedings.

Clinicians are most often called to testify by prosecutors in criminal cases. Therefore, for ease of reference, this guidance will most often refer to prosecutor as the attorney calling the clinician to testify. Clinicians should nonetheless be aware that other types of attorneys can subpoena them to testify. For consistency, this guidance will also refer to the clinician's patient as the "victim" or "victim-patient." During testimony, clinicians will typically refer to the victim as "the patient," by their name, by their Initials, or a by a pseudonym, as the court allows.

As medical professionals, clinicians are neutral and impartial witnesses. Therefore, as a general matter, clinicians should not post anything on social media that could call their neutrality or objectivity into question. This Includes posting about their duties, upcoming or past testimony, or thoughts/observations about the proceedings in which they were, are, or may be involved.

Professionalism and diligent preparation with the attorney calling the clinician to testify are essential.



## When a Clinician Receives a Subpoena

Clinicians should notify their supervisor and/or medical institution when they receive a subpoena if that is their routine practice or consistent with institutional policy.

A subpoena may be issued for a specific date and time, or it may be issued for a date range. Upon receiving the subpoena, the clinician should consult the attorney who issued the subpoena to determine:

- Who the attorney represents (particularly if the issuing attorney is not a prosecutor)
- When the clinician's is expected to testify, i.e., whether the clinician should expect to testify on the exact date of the subpoena or sometime during the days that follow.
- Whether there is flexibility in scheduling testimony to accommodate the clinician's availability
- The logistics of testifying, i.e., where the clinician should wait to be called; what the clinician should bring with them, e.g., copy of medical report, copy of CV or resume.
- Whether the clinician can discuss their testimony with other witnesses and non-witnesses.
- When the attorney is available to meet with the clinician to prepare for testimony



## Subpoenaed by the Prosecution

Clinicians most often receive subpoenas from prosecutors who represent the government in criminal cases in which defendants, i.e., offenders, are charged with crimes. Victims' attorneys may also subpoena clinicians to testify in non-criminal proceedings.







## Subpoenaed by the Defense

Defense attorneys who represent offenders/defendants in either criminal or civil cases may subpoena clinicians. Clinicians should follow the same practice they would follow when receiving a subpoena from the prosecutor or attorney for the victim, with additional considerations:

- The clinician should notify the prosecutor (or attorney for the victim) that they were subpoenaed by the defense. Most prosecutors would want to know that a defense attorney has subpoenaed the clinician, even if it is for civil proceedings, and even if the clinician also received a subpoena from the prosecutor.
- Even if a clinician receives a subpoena from a defense attorney, prosecutors (or attorneys for the victim) may want to meet with the clinician -- and likewise clinicians may benefit from meeting with the prosecutor.
  - Note: When a clinician is called as a defense witness in a criminal case, the prosecutor will have the opportunity to cross-examine the clinician during which the prosecutor is permitted to ask either open-ended or leading questions that could potentially strengthen the prosecution's case. That is why it is good practice for a clinician to meet with the prosecutor prior to a clinician testifying as a defense witness.
- If the defense attorney requests to meet with the clinician prior to testimony, it is the clinician's choice whether to alert the prosecutor and/or to meet with the defense attorney. The clinician may prefer the prosecutor to be present for the meeting, and if so, the clinician should advise the defense attorney.
  - Note: If the clinician refuses to meet with the defense attorney:
    - In some jurisdictions, a judge may order the clinician to sit for a deposition by the defense attorney. Because this is jurisdiction-specific, clinicians may want to consult with the prosecutor about the potential consequences of refusing to meet with the defense attorney.
    - The clinician's reluctance to speak with the defense attorney could be used by the defense attorney during the clinician's testimony to show the clinician's lack of impartiality.



## Materials for Prosecutors in Criminal Proceedings

The clinician and/or medical institution may have previously provided materials to law enforcement based upon the victim-patient's waiver of confidentiality and consent to release medical records or via a lawfully-executed subpoena or court order. Nonetheless, it is good practice for the clinician to ensure that the prosecutor has a copy of the records related to the medical forensic care of the victim-patient (including the clinician's report and any related TeleSAFE documentation, if applicable). The clinician should also provide a copy of the clinician's resume or curriculum vitae.

Even if the prosecutor or law enforcement did not request certain materials, the clinician should notify the prosecutor of the existence of all materials in the clinician's possession, including any handwritten materials and photographs that are not included in the patient's formal medical records.

Some medical facilities may maintain sensitive photographs separately from the patient's formal medical records. Clinicians should be aware of and follow any such procedures/protocols regarding maintaining those photographs and the victim's privacy. Clinicians should nonetheless tell the prosecutor that such photographs exist.



Note about medical records generally: Because medical facilities have policies and procedures in place to protect patient privacy based on HIPAA and other relevant regulations, clinicians should consult with their supervisor and appropriate personnel to ensure that they comply with policies and procedures before providing materials to the attorney who has subpoenaed them.



## Meeting with the Prosecutor to Prepare to Testify

Clinicians may have to testify at trial, preliminary hearings, pre-trial hearings, depositions, or before a grand jury. Regardless of the type of hearing, clinicians should meet with the prosecutor (and/or attorney calling the clinician as a witness) to ensure they have a thorough understanding of the purpose of the hearing, what questions will be asked, and how the hearing will be conducted.

The more preparation the better; a subpoena does not have to prompt preparation. Rather, prosecutors and clinicians should meet early in the lifespan of an investigation. This will give the prosecutor an opportunity to learn about the clinician's findings and take additional investigative steps if necessary. Typically, prosecutors will request to meet with a clinician because a clinician may not know that case has been charged until they hear from the prosecutor. If a prosecutor contacts a clinician prior to the issuance of a subpoena, clinicians should meet with the prosecutor because they or the investigator may have questions as an investigation progresses or as charges are being considered. Moreover, depending on the jurisdiction, attorneys may have to provide notice to opposing counsel of their intent to call expert witnesses (which can include calling the clinician). Some jurisdictions have more stringent requirements for these expert notices. Prosecutors may want to meet with clinicians well before a scheduled trial in order to adhere to the jurisdiction's notice requirements.

Clinicians should not hesitate to ask prosecutors all questions they have. Prosecutors may prefer to discuss questions or concerns orally rather than in writing; Written communications with the prosecutor may be discoverable, and therefore may have to be provided to the defense attorneys.



## The Clinician's Documentation

Medical forensic exams are well-documented. Clinicians should be familiar with the exam and their own documentation, but testimony is not meant to test the clinician's memory. When preparing for testimony, the clinician should review their documentation both before and while speaking with the prosecutor. Accuracy is paramount and therefore, if needed, clinicians can use their documentation to refresh their recollection during testimony.

Clinicians should discuss with the prosecutor the process for refreshing recollection and whether they should bring a copy of their report with them to court or whether the prosecutor will have a copy available. It is not advisable to a clinician to create their own notes for the purpose of testimony.

The clinician should ensure that the prosecutor fully understands the meaning and significance of each notation in their report and other medical records and discuss with the prosecutor any medical or forensic issues that the clinician views as important, even if the prosecutor does not specifically ask about it. The clinician should not assume that the prosecutor understands the entire report, nor should the clinician presume the areas on which the prosecutor wants to focus. The clinician and prosecutor should also review any associated photographs, consistent with the discussion above.

## Topics to Discuss

- The process of direct examination, cross-examination, re-direct examination, and re-cross examination (if applicable) and how best to answer the defense attorney's questions: by carefully ensuring the clinician understands the question and then answering the question being asked.
- The process of qualifying the clinician as an expert, which includes the clinician's educational and professional background and whether the clinician has previously been qualified as an expert in a legal proceeding and the scope of such qualification.





- The prosecutor's anticipated questions and the clinician's anticipated answers, including questions for identifying evidence collected during the medical forensic exam, chain of custody, and expert opinions.
- The mechanics of trial objections: Clinicians should pause and wait for the judge to rule. If overruled, the clinician can answer. If sustained, the clinician should not respond.
- Relevant pre-trial rulings that impact the clinician's testimony, i.e., whether there are areas of testimony that the clinician is not permitted to discuss during testimony.
- The patient's medical history and whether there are any areas which the prosecutor will not discuss.
- Whether the prosecutor will enter photographs and/or the clinician's report into evidence and the process for doing so. Note that whether the report is entered into evidence is jurisdiction-specific.
- Whether demonstrative aids or other evidence, e.g., sketches of the anatomy or diagrams, unused sexual assault kits, samples of disposable speculums, will help the jury understand the clinician's testimony.
- Potential defenses and how the clinician's testimony may rebut those defenses in the context of other evidence; the questions that the prosecutor anticipates the defense attorney will ask and strategies to incorporate answers to those questions into direct examination.
- Any concerns that the clinician may have, especially regarding questions by the defense attorney about the medical record, the clinician's report, statements made by, or demeanor of the patient-victim during the examination, or the clinician's personal concerns related to their own prior experiences when testifying.



## Testifying: An Overview

Clinicians will likely testify about the process of the exam, observations of the victim and statements by the victim, as well as photographs, evidence collection of swabs, and chain of custody of the collected evidence.

Prosecutors are not permitted to ask the clinician about (1) whether a sexual assault occurred, or (2) whether the clinician thought the victim was credible. Those determinations are left to the jury. However, clinicians, who are qualified as experts, may be asked e.g., if certain injuries are consistent with penetration and/or sexual assault, whether the clinician would anticipate physical injury based upon the history provided by the patient, or if certain behaviors are consistent with trauma.

Because clinicians are often permitted to testify to their opinions based on their expertise, it is all the more important for clinicians to meet with prosecutors in advance of their testimony to discuss those opinions.



## **Testifying: Qualifying a Clinician as an Expert**

The prosecutor can call a clinician to testify as a fact or an expert witness. If a clinician is called as a fact witness, the prosecutor will only ask questions about patient care and treatment provided. However, clinicians will typically be called and qualified as expert witnesses because they have specialized training and have significant experience performing exams.

Some jurisdictions may require the attorney to establish the clinician's expertise at a pre-trial hearing or outside the presence of the jury. As part of preparation for testimony, clinicians should ask the attorney about the process for qualifying them as an expert.

For TeleSAFE examinations, both the clinician performing the exam and the supervising clinician may be called to testify. Typically, the supervising clinician will be qualified as an expert witness to offer an opinion. The clinician performing the exam may also be qualified as an expert but will more likely testify about the victim-patient's statements and demeanor as well as about chain of custody of the evidence, i.e., evidence collection.

Establishing a clinician's expertise allows an attorney to ask the clinician's opinions, such as the significance and relevance of getting patient history, why they performed each aspect of the exam, why they did or did not attempt to collect certain evidence, the significance of the presence or absence of injury or semen, their general expertise as a forensic nurse examiner as it relates to the alleged crime, and the meaning of medical terminology. Clinicians may also testify about the victim's demeanor and some or most of the victim's statements made during the exam, though clinicians need not be qualified as an expert to do so.

To qualify as a clinician as an expert, prosecutors will ask questions that illustrate the clinician's expertise to the jury. This includes questions about SANE certification, education, experience conducting exams, and whether a clinician has been qualified as an expert before. Note that a clinician can be qualified as an expert, even if they have not been qualified as an expert in the past.



Prosecutors will typically ask questions that look like this:

- Are you certified to do the work of a Sexual Assault Nurse Examiner?
- Please describe what coursework and testing is involved in this process, including hours of coursework and clinical component.
- Is an examination administered? Is a passing score required?
- Did you successfully complete this process and obtain certification?
- Is certification required to perform your work and care for your patient as a medical professional?
- Is certification required to reach a diagnostic impression based on the medical history, history of the assault, and conduct a physical examination of the patient?
- Have you ever testified as an expert before? If so, how many times?
- How long have you worked in your position? Please describe your responsibilities.
- Have you been published in any medical journals or in other resources on topics related to your field? If so, how many times? Please tell us the titles and dates of published articles.
- What if any tests or procedures did you perform for your patient – including the collection of any samples? Are those tests and procedures standard within your profession?



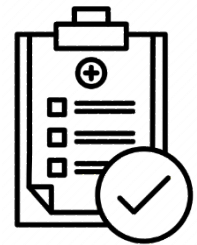
## Testifying: Conducting the Medical Forensic Exam

The prosecutor will typically start their direct examination (after qualifying the clinician as an expert, if applicable) by asking the clinician on what date they first encountered the victim and conducted the exam. The questions will then be about the clinician's initial contact with the victim, including where the exam took place, any initial triage information prior to meeting with the victim, who was present during the exam, and the victim's demeanor throughout the exam.

The prosecutor may ask questions related to the victim's medical history and how that history informed the examination and care that the clinician provided. The questions may relate to what the patient reported about the assault, including the identity of the perpetrator, when the assault occurred, the significance of when it occurred for evidence collection, and the patient's demeanor as they described the assault.

The clinician will likely also testify about the medical examination itself, beginning with the "head to toe" physical examination, including any oral, genital, or anal examination that was performed and the manner in which swabs were collected and photographs taken. The prosecutor will ask whether there were any findings and for a description of the findings. Depending upon the case, the prosecutor may ask about the significance the clinician ascribes to these findings. Findings can include: visible injury such as bruises, petechiae, lacerations, abrasions, anogenital injury, presence of potential bodily fluids, or presence of any foreign debris, including hair.

The prosecutor may ask the clinician about discharge planning, and the importance of follow-up care, including an individualized plan depending upon the health, crisis status, and safety of the victim. The clinician may also testify about follow-up treatment such as prophylactics for sexually transmitted infections.







For cases involving child victims, the most significant difference is that a parent or caregiver may be present with the child during the examination. Because the clinician may ask the caregiver to answer questions about the child's medical history, the clinician may have to testify that the caregiver did not answer questions about the assault; Rather the child did, and the clinician may have to explain during testimony that they asked open-ended questions of the child to get that information. The clinician may have to further describe training the clinician received to ask questions in such a manner.

The clinician may have to testify similarly about language access if an interpreter was present for the exam. Likewise, the clinician may have to testify about adaptations and access if the victim-patient had a disability.



## **Testifying: Evidence Collection, DNA, and Establishing Chain of Custody**

During the course of testimony, the prosecutor must establish that the clinician collected evidence from the victim and the chain of custody of that evidence.

Prosecutors will first ask clinicians about the specimens they obtained from the victim's body and why the clinician chose to collect such specimens. The clinician's testimony will reference what the victim reported about their medical history, the description the victim provided about the assault, and the clinician's own knowledge and expertise about the types of evidence and areas of the victim's body that may yield DNA foreign to the victim. In so doing, the clinician may have to testify about the use of medical equipment, alternative light sources, or the use of toluidine blue.

Then, to establish chain of custody, prosecutors will ask the clinician if they recognize the evidence/swabs/samples that they collected. Clinicians are typically able to recognize the evidence they collected based on the clinician's signature or initials and the date. Clinicians will testify how and from where they collected each sample and how each sample was packed, stored, and secured. Clinicians will then testify when and how the evidence was provided to law enforcement.



## Testifying: Photographs

If photographs of the victim are relevant and helpful to the judge or jury, the prosecutor may seek to enter them into evidence. The prosecutor will first mark the photograph as an exhibit and then will ask the clinician to authenticate the photograph. To do so, the prosecutor will ask foundational questions, i.e., prosecutors will ask the clinician if they recognize the photograph, how and by whom the photograph was taken, and whether the photograph truly and accurately depicts the injury/abnormality that they saw on the date of the exam. If magnification or alternative light sources, or other forensic photography was used, the prosecutor will ask the clinician to explain that.

Once the prosecutor asks the foundational questions, they will move the photograph into evidence. At that point, the prosecutor will ask clinician specific questions about the photographs and the significance of the injuries that are depicted. Similarly, prosecutors may ask clinicians about the absence of injury and its significance or lack thereof.



The prosecutor may also ask how injuries may have been inflicted based upon the clinician's expertise. Clinicians should prepare with prosecutors prior to testimony so that they can fully explain all the different ways that the injury could have reasonably been caused. This detailed line of questioning strategically preempts any issues the defense may raise on cross-examination.

Note that photographs of the breasts, genitals, or anus may not be presented during the proceedings to protect the privacy of the victim. Instead, prosecutors may use an illustrative drawing that allows the clinician to describe the injury, where it appears, and the significance of the location of the injury.



## Testifying: Expert Opinions

After the clinician testifies about the details of the medical forensic exam and evidence collection, the prosecutor will typically ask the clinician's opinions relative to injury, semen, and other evidence collection, and the victim-patient's demeanor as it relates to trauma.

It is essential for the clinician to discuss their opinions with the prosecutor prior to testifying because the clinician cannot opine about the victim's credibility or whether a sexual assault occurred.

However, the clinician can testify about the presence or absence of injuries or semen and explain whether they would expect to find such evidence based on their expertise and what the victim reported. Likewise, the clinician can testify whether certain injuries are consistent with penetration and/or sexual assault, whether the clinician would anticipate physical injury based upon the history provided by the patient, and if certain behaviors are consistent with trauma.





## **Testifying: Cross-Examination by Defense Attorneys**

Clinicians, as with all witnesses, must always testify truthfully whether on direct examination or cross examination. Clinicians should rely on their expertise, their education, and knowledge of the exam they conducted. Testimony should be clear, objective, and align with the ethics of their profession. If a clinician is unclear about what is being asked, the clinician should ask the attorney to rephrase or clarify the question.

Cross-examination typically entails leading questions that call for a yes or no answer. Although clinicians may not be permitted to provide a more detailed explanation during cross-examination, the prosecutor will, if necessary, ask for a detailed answer on re-direct examination. This will allow for the clinician to provide a more comprehensive answer with context. For example, a defense attorney may suggest an alternative cause of injury, and consequently, the clinician may agree during cross examination that it is possible for a victim to sustain the injury from something other than sexual assault. On redirect examination, the prosecutor can then give the clinician an opportunity to explain if there was any indication the victim engaged in any activities that could have caused the injury recently (if ever).

The best way for a clinician to prepare for cross-examination is to meet with the prosecutor prior to testifying. Prosecutors will be able to anticipate most of the questions that the clinician will be asked, avoiding surprise for the clinicians. Moreover, while the overall defenses to sexual assaults are generally the same, depending on the case, defense attorneys may challenge the way in which evidence was collected, the manner in which the exam was conducted, or the way in which the victim, particularly child victims, were questioned. Just because a defense attorney asks questions about those subject areas does not mean that the clinician did anything wrong or that the evidence is problematic. Yet the clinician needs to be prepared to answer such questions.

When preparing for cross-examination, clinicians should understand that the defense to most sexual assault cases (where the identity of the perpetrator is not at issue) is that the victim is not telling the truth about the sexual assault: Either the sexual conduct did not occur, or it was consensual. Note that while both defenses are available for cases involving





adult victims, for cases involving child victims, typically, consent is not the defense. Therefore, in those cases, the questions during cross examination will focus on casting doubt on whether the sexual conduct occurred. For example, the defense attorney will question whether lack of injury and/or lack of semen is consistent with lack of sexual conduct, or whether the cause of injury could result from something other than sexual conduct. Where consent is the defense, the questions during cross-examination will be designed to cast doubt on evidence that is consistent with sexual assault, i.e., lack of consent. For example, the defense attorney will question the clinician as to whether the presence of injuries and/or semen can be consistent with consensual sex.

Defense attorneys may also question the clinician about whether they always believe victim-patients. Clinicians can explain the process of identifying the patient's chief complaint and obtaining the medical history of patients to assist in the development a care plan, delivery of treatment, and medical diagnosis. Clinicians can also explain that this process is consistent across all patients, regardless of the patient's reason for accessing healthcare. Note, however, that if a defense attorney asks a question about believing the victim, it may also be a basis for allowing the clinician to testify more about the victim's credibility than they would ordinarily be permitted to do. Prosecutors will be able to advise the clinician as to what sort of answer is allowable.