

Advocates as Expert Witnesses: Weighing Benefits and Drawbacks

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with contributions from
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NATIONAL CLEARINGHOUSE FOR
THE DEFENSE OF BATTERED WOMEN
Working for justice for victims of battering charged with crimes

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Preface

Between April 2013 and November 2016, the National Clearinghouse for the Defense of Battered Women conducted 15 webinars related to the use of expert witnesses. This paper is one (of four) papers based on webinars in that series. The other papers include:

Domestic Violence Expert Testimony: Legal Settings and Issues by Cindene Pezzell

Domestic Violence Expert Witnesses: Tips to Help Prepare for Your First Case by Scott Miller and Melissa Scaia

Domestic Violence Expert Witnesses: Immigration Proceedings by Noël Bridget Busch-Armendariz and Edna Yang

The webinar series included webinars on weighing possible benefits and drawbacks of advocates being experts, use of expert witnesses in immigration proceedings involving victims of battering, lessons learned from the witness stand, and the use of expert witnesses in civil legal proceedings.

Download the papers from this series and other papers on expert witness-related topics at <https://www.ncdbw.org/publications>

Find the expert witness series webinars at http://www.ncdbw.org/experts_recordings.htm

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Melissa Scaia, who contributed to the appendix on expert assistance policy considerations, is a longtime anti-domestic violence advocate who has provided expert testimony in criminal domestic violence cases and in custody trials within family court. As an executive director of community-based domestic violence organizations, she has been involved in writing and implementing a wide range of policies.

Sue Osthoff and Jane Sadusky also contributed to this paper and the appendix.

Introduction

Throughout the country, anti-domestic violence organizations are recognizing a need for expert assistance, including testimony, to support victims of battering in different court systems.¹ Many advocates have the required experience and expertise to qualify as expert witnesses. Some are quite adept in this role and have helped victims of battering to achieve more just outcomes in various legal systems.² However, organizations contemplating whether to provide expert witness services — by

“Domestic violence” and “battering”

Often the domestic violence that comes to the attention of court systems is what has come to be known as battering in intimate partner relationships. Battering is characterized by its ongoing pattern of violence and coercive behavior, as well as its negative impact on the victim, including the level of fear it produces; risks to physical and mental health, overall well-being, and liberty; and its potential for lethality. While the terms “domestic violence” and “battering” are often used interchangeably in court systems, and by advocates, not all domestic violence is battering. It is often the task of an expert witness to make the distinction clear.

training their own advocates to fill the role and/or by providing training and support to other potential experts — would be well advised to identify and reflect on the implications of such an undertaking before embarking. Having the skills in-house does not automatically mean it is wise or appropriate to use them to provide expert testimony in court.

If you are management and staff of community-based organizations working with victims of domestic violence, or a practitioner or advocate working in a similar capacity, you are the primary audience for this guide. The guide is

designed to help you evaluate the benefits and drawbacks of providing domestic violence expert testimony. It will walk you through important things to think about

¹ Expert assistance may include consultation with the attorney who hires the expert, as well as providing testimony. While this paper focuses primarily on drawbacks and benefits related to expert testimony, similar considerations apply to any level of expert assistance.

² Many community-based advocates and practitioners in the field reject the term “victim” and choose the term “survivor” to describe someone who has been battered. It is important to honor the resiliency of those who have, indeed, survived being battered. Because this guide is specific to the context of expert witness testimony in the legal system, however, we are using the term “victim of battering” or “victim.” Expert testimony is ultimately about establishing the ways in which a person has indeed been a victim of a specific kind of harm.

when assessing whether to take on such a role. It will help you answer key questions, including:

- Is there a need in your community and/or the area you serve for expert witnesses in the legal systems?
- Does providing expert testimony fit within the mission of your organization?
- Do the benefits of providing expert testimony outweigh the drawbacks, for victims of battering as well as for your own organization?

For programs that decide to provide expert assistance, including testimony, the appendix provides guidance in developing a policy.

Assessing the needs in your community

Chances are you have already determined that victims of battering in your community could benefit from greater availability of expert testimony. It is important, then, to examine what types of expert testimony are needed and in what kinds of cases. Expert testimony is not “one size fits all” and knowing the nature of the needs in your community can help you determine whether you or your program are equipped to meet them.

- Has your organization been receiving requests for expert testimony? From whom?
 - Victims of battering
 - Prosecutors
 - Defense attorneys
 - Civil attorneys
 - Judges
 - Others?
- What kinds of requests? Is it clear what kinds of testimony people are looking for? For example:
 - Why victims of battering sometimes minimize the abuse they have experienced
 - Why many victims of battering cannot or do not leave abusive relationships
 - Potential impacts on children of witnessing domestic violence
 - Battered mothers and parenting
 - “Parental Alienation Syndrome”
 - “Battered Woman Syndrome” or battering and its effects
 - What else?
- Have you or has your organization been receiving subpoenas for expert testimony (as distinct from “fact” testimony regarding your records, a victim’s involvement in programming, etc.)?
- Are you and/or your community partners observing that victims of battering experience negative court outcomes because the fact finder(s) lack knowledge about domestic violence and battering? What are the most common settings for these poor outcomes? For example:
 - Prosecution of batterers
 - Prosecution of victims of battering

- Civil protection order hearings
 - Family court proceedings (divorce, custody)
 - Dependency proceedings (child welfare system, child protective services)
 - Where else?
 - What kinds of problems in the court response might the wider availability of expert testimony help fix? For example:
 - Judges' and juries' disbelief that abuse occurred
 - Misunderstanding the evidence of abuse that is presented
 - Using evidence of abuse against victims of battering (for example, blaming a victim for not leaving the relationship and thereby exposing her children to violence)
 - What else?
 - Do many batterers use expert testimony against victims of battering? How and in what kinds of cases?
 - What else? Are there other reasons you believe that expert testimony is a needed service in and around your community?
-

Two different mission statements, two different outcomes?

(1) "Consistent with our belief in the value, worth and dignity of each person, we seek to eliminate domestic violence by providing victims, offenders and the community with appropriate, effective programs and services. We advocate for an environment free from domestic violence."

(2) "To provide a supportive environment in which domestic abuse survivors can assess their needs, evaluate alternatives, access caring and compassionate services, and be empowered to make decisions about their future."

Do these two mission statements provide different guidance about whether providing expert witness services is an appropriate role of the organization? Why? Why not?

Using your mission statement as a guide

Does providing expert witness services fit within the mission of your organization and its programs? There might not be a straightforward answer to this question, but using your mission/vision statement and principles as guides when questions arise can help you reach a well-reasoned, informed decision.

- Do you work on behalf of all victims of battering in any location or are you limited to those in your community or certain geographic area?

(Note that organizations that provide expert testimony often do so only outside their “home” community and in cases involving victims who are unknown to them.)³

- Does your organization support self-determination for all victims of battering? If so, how will you determine whether your testimony in any given case supports or undermines the victim’s self-determination?
- Is educating the community a mission of your program?
- Is accountability for people who batter their partners part of your mission?

³ Many advocates that provide expert testimony will do so only outside of the community in which they work so that their program’s records are less vulnerable to subpoena. Advocate experts who testify only outside their communities also want to ensure that they have no personal knowledge of the parties in case and that the parties would be unlikely to seek services from the organization that the advocate expert works. For more information on policy development related to expert witness services, please contact the National Clearinghouse.

Weighing the benefits and drawbacks of providing expert testimony

Determining that your organization and staff have the required capacity (resources, expertise, teaching skills, etc.) to provide expert services is a crucial step, but it's only the first step. Unexpected and serious consequences can arise when anti-domestic violence organizations provide expert witness services. The National Clearinghouse for the Defense of Battered Women takes the position that, in a perfect world, advocates at community-based programs would **not** testify as expert witnesses.⁴ Of course, we know the world is far from perfect, which is why we encourage careful consideration of all the potential benefits and drawbacks before a decision is made.

Once you have assessed and evaluated community needs and the extent to which expert witness services fit within your organization's mission, step back and answer the following questions about possible impacts and dilemmas related to advocates as expert witnesses.

- Can an expert's duty to be a neutral, unbiased witness fit within the principles of your advocacy organization? In other words, would providing expert testimony present an inherent role conflict for advocates who testify as experts?

Advocates are people who support and advance the interests of others. It is an advocate's role to provide this support by believing victims of battering and by supporting victims' self-determination. Experts, though they are usually called as a witness by one side or another, are NOT advocates. In fact, experts who are perceived as having bias toward one side will usually not be considered credible.

- Is it possible that making advocates available to testify as experts will create a perception that certain victims are "deserving" of expert testimony and others are not?

When an advocate or other person associated with an advocacy program testifies in some cases but not others, assumptions might be made by judges and by others about why that is so. For example, cases in which an advocate expert testifies on behalf of the defense for a victim of battering charged with a crime might be viewed

⁴ It is the position of the National Clearinghouse that, in a perfect world, advocates would not testify as expert witnesses because of the inherent role conflict, possible infringement on victim self-determination, and potential chilling effect on victims' relationships with advocates. We urge all those who are considering testifying as an expert to carefully consider the benefits and drawbacks. These issues are discussed further in this guide. We urge programs to develop thorough written policies covering the specific circumstances under which expert testimony will be offered as a service, as addressed in the Appendix. For more information about expert witness policies for advocacy organizations, please contact the National Clearinghouse.

as the only ones in which the defendant is a “real” victim. This can be particularly true in communities in which community-based advocacy programs work closely with court systems. Some victims of battering who don’t receive expert testimony in their cases — because they aren’t known to the advocacy program, for example — might be the very people who would benefit most from expert witness services.

- Will your resources allow you to provide expert services for all court-involved victims of ongoing battering in your community? How will any limitations (such as testifying only on behalf of the prosecution) leave out some victims of battering, and to what effect?

It is highly unlikely that any community-based program will be able to provide expert services every time such assistance is requested, which means that decisions must be made about which cases to accept. Sometimes, creating guidelines about which cases to accept and which to decline will mean that victims who are in the most need of expert assistance won’t get it. For example, some programs may have to turn down cases that are too time intensive or too complicated, such as cases in which the victim is accused of failing to protect her children from her abusive partner.

Potential benefits and drawbacks for victims of battering

This section explores some of the potential benefits and drawbacks to victims of battering who have access to advocates who serve as expert witnesses. Which benefits might apply in your community? Are there some benefits which do not apply? Are there other benefits to victims of battering that aren't listed below? How will you anticipate and evaluate potential drawbacks? Which drawbacks are most likely to be a problem?

See further discussion following the overview of benefits and drawbacks.

Benefits for Victims of Battering	Drawbacks for Victims of Battering
Potentially better outcomes in court	Potential to inhibit victim self-determination
Better educated judges, lawyers, and other court personnel	Possible "chilling effect" on victim trust in advocacy and the advocacy organization
Increased availability of an important resource to indigent victims	Creation and enforcement of stereotypes about victims and their experiences
Greater access to expert services in rural areas	Increased vulnerability of confidential records
Other benefits?	Other drawbacks?

BENEFITS FOR VICTIMS OF BATTERING

- Potentially better outcomes in court

Victims of battering are frequently involved in court systems and often enmeshed in more than one. A victim of ongoing battering could be either party in a legal action; she could be on either "side" of a criminal or civil court case or she could

be involved in an administrative matter with a government agency.⁵ For example, expert testimony might assist a victim of battering in the following court settings:

- Criminal court, when the testimony is offered on behalf of the prosecution
- Criminal court, when the testimony is offered behalf of the defense
- Civil and domestic relations court in disputes regarding custody, divorce, protection order hearings, or torts (lawsuits against or initiated by a victim's batterer)
- Dependency/family court, when the testimony is offered on behalf of a battered parent or children
- Immigration and other administrative proceedings

Giving testimony for one "side" or the other isn't the only way an expert can help victims of battering achieve better outcomes in court. Experts can also serve at the request of the court, appointed by the judge and not by either party. Experts can also act as case consultants to a victim's legal counsel, assisting with case strategy, attorney education, and research even if expert testimony is not wanted or required.

- Better educated judges, lawyers, and other court personnel

Victims of battering are bound to have a better experience in court when all legal system personnel have more knowledge about domestic violence, the specific dynamics of battering, and the nature and impact of trauma related to battering. This knowledge can accumulate over time; ongoing use of expert testimony can therefore have an impact that goes beyond any individual case. Judges, juries, and lawyers who are tasked with making decisions that can have dramatic impacts on victims' lives are better prepared to make more informed and just decisions when educated about battering and domestic violence. Similarly, with the many other court personnel that victims may have to deal with: the more that court officers, clerks, sheriffs, and others know about battering through exposure to expert testimony over time, the better the court experience is going to be for victims. Increasing the utilization of expert testimony in court systems could therefore result in long-term positive impacts, such as:

- Just verdicts and decisions
- Better-informed lawyers
- Increased fairness in charging decisions
- Better treatment of victims involved in court systems

⁵ For more information on some of the court systems in which domestic violence experts commonly testify, see *Domestic Violence Expert Testimony: Legal Settings and Issues*, published by the National Clearinghouse.

- Better ability to communicate with litigants who are victims of battering
- Increased availability of an important resource to indigent victims of battering

With few exceptions, parties wishing to hire experts must bear the cost of doing so themselves. An expert's bill can be very high, as it can include the time spent preparing for the case and appearing in court, plus travel and other expenditures. Hiring an expert witness can be cost-prohibitive for many, if not most, victims. Advocate experts can often be available to testify for little or no cost to individual victims, however. Community-based programs may have funding to pay for some, if not all, of the expert's time, especially if the work happens during the advocate's regular schedule.

- Greater access to expert services in rural areas

In rural areas, advocates are often the only people available who have expertise on domestic violence and battering. There simply may not be other types of professionals with the relevant knowledge and experience who are in or able to travel to rural communities.

REFLECT: Do these benefits apply or are they likely to apply to victims of battering in your community? Why? Why not? Can you think of other potential benefits to victims if your program were to provide advocate expert witness services?

DRAWBACKS FOR VICTIMS OF BATTERING

- Potential to inhibit victim self-determination

One of the core principles embraced by those who work on behalf of victims of battering is that victims have a right to self-determination. This means that advocates at community-based programs respect and support the decisions that victims make about their own lives. Programs providing expert testimony have the potential to run afoul of this important principle.

The issue of victim self-determination highlights the very different roles of advocates and experts. Expert witnesses are expected to be neutral and unbiased, offering opinions based on their knowledge and experience rather than on a desire to see one side or the other win the case. This expectation about expert witness neutrality raises several questions, including:

- If an advocate gives expert testimony only with the approval of the victim of battering, is the advocate expert truly unbiased?
- Are advocates who testify as experts serving victims or serving legal systems?
- Will advocates agree to testify on behalf of the prosecution when the victim/complainant doesn't want the case to go forward?

- Possible chilling effect on victim trust in advocacy

Understandably, many victims of battering have a difficult time seeking help and sharing their experiences, even with people who offer support and non-judgment. Advocates win the trust of the people they serve by honoring confidentiality, as well as the victim's right to self-determination. This means that advocates face hard questions when contemplating whether to testify as experts, including:

- Will victims of battering be less trustful of advocates in communities where advocates testify in court?
- Will putting advocates on the stand make victims feel like their conversations and relationships with advocacy programs may not be confidential (even though advocate experts usually do not provide case-specific testimony)?
- Will victims — and the community — believe that advocates truly support self-determination when they see advocates testifying contrary to the apparent wishes of the victim?

- Creation and enforcement of stereotypes about victims and their experiences

In general, advocates do not provide case-specific expert testimony. Instead, they testify based on their knowledge and experience as to general information about battering and domestic violence. There are certain topics that are often the subject of expert testimony, such as common reasons why victims of battering may stay in abusive relationships. But we know that not all victims of battering are the same. We must ask ourselves what it might mean to have advocates providing the same domestic violence education in cases that look very different from one to the next. In other words, providing general testimony about "common characteristics" of victims of battering has the potential to reinforce false ideas about who is and is not a "real" victim.

- Increased vulnerability of confidential records

When advocates who testify as experts in cases involving victims who have received services at their programs, it is likely that the opposing party will at least attempt to access the records of that victim, regardless of whether the advocate expert avoids testifying personally about the victim. The worst-case scenario is that the opposing party is successful. Even in cases where the program prevents the victim's records from being accessed, however, important resources may be spent in dealing with the attempt.

Regardless of whether the program has worked directly with the victim in the case, it is always possible for advocate experts to be asked questions about services provided or not provided to her. Responding appropriately can raise serious questions about confidentiality, including:

- Do existing confidentiality laws and policies prevent advocates from confirming *or denying* that an individual has received services?
- Will refusal to confirm or deny whether the advocate expert's organization has provided services to a named victim render its records vulnerable to subpoena? In other words, will courts believe that by providing testimony, the advocate expert opened the door to having to disclose whether the organization served the victim?

If the victim *has* received services at the program where the advocate expert works, confidentiality laws may not protect her records from being accessed once the advocate expert testifies. In addition, the advocate expert may be asked very personal and potentially harmful questions about the victim.

REFLECT: Which of these potential drawbacks for victims might apply in your community? Are there any other potential drawbacks you have considered? Can you think of ways to mitigate these drawbacks, while still providing expert testimony?

A self-determination dilemma?

Suppose Roxanne calls the police because John, her husband, beat her up. John gets arrested and makes bail. John's boss tells him that if he's not convicted, he can keep his job. Roxanne asks the prosecutor to drop the charges, but the prosecutor refuses.

The prosecutor believes she can secure a conviction without Roxanne's testimony and calls a domestic violence expert to testify about why some victims of battering won't testify against their batterers.

If the advocate expert testifies, does that go against Roxanne's right to self-determination?

Does testimony by the advocate expert violate the principle that all victims are entitled to be the decision-makers about their own lives?

Does it matter that the advocacy is from a different community than Roxanne?

Does it matter whether the advocate knew anything about Roxanne or the case?

Potential benefits and drawbacks for advocacy programs

Not only can victims of battering benefit when advocates testify as experts, community-based organizations can benefit as well. This section lists some of the ways your advocacy program could benefit by providing expert witness testimony as a service. It also outlines some of the drawbacks. Potential downsides for your program may also be potential downsides for the people you serve.

See further discussion following the overview of benefits and drawbacks.

Benefits for Advocacy Programs	Drawbacks for Advocacy Programs
Increased visibility, credibility, and accessibility to the legal community	Increased likelihood of subpoena
Increased comprehensiveness of services offered to victims of battering	Strain on already scarce resources
Help to fulfill the mission of community education	Possible claims of gender bias
Other benefits?	Other drawbacks?

BENEFITS FOR ADVOCACY PROGRAMS

- Increased visibility, credibility, and accessibility to the legal community

Advocates and their organizations can be extremely helpful to attorneys who represent victims of battering in court systems, but only when those attorneys are knowledgeable about and open to what advocates can offer. Unfortunately, some lawyers who represent victims of battering fail to see a role for advocates or recognize how having an advocate on the legal team can be helpful (whether serving as an expert witness or not). When advocates participate as experts within the legal system, attorneys may get a better idea about the wealth of information that advocates and their programs can offer, and see them as partners in achieving just court outcomes for victims of battering. This increased awareness can also help in building relationships with other agencies, particularly those that haven't traditionally been allies, such as public defender offices or child welfare agencies.

- Increased comprehensiveness of services offered to victims of battering

Providing expert witness services can help to fill a gap in needed services for victims of battering. Many programs strive to prioritize the services that victims identify as being the most needed. If victims and their attorneys are asking for expert witnesses, then providing this service falls into a true “victim-centered” approach.

- Help to fulfill the mission of community education

Many community-based organizations include projects and efforts designed to educate the public about domestic violence. They seek to bring information and awareness to the community at large, as well as serve individual victims. Expert testimony — particularly in cases with juries — can bring this much-needed information directly to members of the public.

REFLECT: Do these benefits apply to your organization and advocacy program? Why? Why not? Can you think of other potential benefits?

DRAWBACKS FOR ADVOCACY PROGRAMS

- Increased likelihood of subpoena

It isn't just an individual victim's records that might be sought when advocates testify as experts. Opposing counsel may seek as much information as they can get about the advocate expert and the organization for investigative purposes. If the advocate expert's opinion is based on experience working with victims, it isn't far-fetched that opposing counsel will seek to learn as much about that work as possible. One of the key ways that an expert can be challenged is by questioning the basis of the claimed expertise.

- Strain on already-scarce resources

Many costs are associated with providing expert testimony, including ongoing training for advocate experts, travel costs, “sit-and-wait” time in court that could be spent on other work, and the prep time spent on individual cases. For many advocacy organizations, providing expert testimony services may mean diverting staff resources from other needed program areas or postponing or limiting services in some situations.

- Possible claims of gender bias

Since most victims of battering are women, an advocacy organization providing expert testimony services may be only ever asked to testify on behalf of women. Such a reality might lead to a program being judged unfairly to have a bias against serving men, regardless of the services that are in fact available. Responding to

such claims inevitably requires time and resources that could be spent on other needs.

REFLECT: Do these drawbacks apply to your organization or program? Can you think of other drawbacks that advocates as expert witnesses might raise for your overall services or relationships with other agencies (such as the district attorney's office or police)?

What might be the impact of a subpoena?

Keisha testifies that she has 6 years of experience working as an advocate and has assisted over 300 victims. Later in her testimony, she says that based on her experience, she knows that it is common for victims of battering to resist the violence by fighting back. Opposing counsel asks the court to be able to examine all records of the cases on which the expert has based her opinion.

If Keisha is an advocate expert witness in your program, would it be likely that opposing counsel would be able to access the records as requested?

What would your program have to do to resist or comply?

What kind of resources would it take to prevent having to disclose or provide access to the records?

Conclusion

Deciding whether community based-advocates can and should provide expert assistance as a part of the services offered by your organization is far from a quick, simple decision. Many complicated issues come into play, with far-reaching ramifications. We encourage anyone who is considering doing this work to reach out to programs that already provide expert assistance (including testimony) for some first-hand information on their experiences and recommendations. The National Clearinghouse can help make those connections.

For organizations that decide to provide expert assistance, the appendix provides guidance in developing an organizational policy governing the provision of expert witness assistance by staff or volunteers.



Comments or questions? Need more information? Please contact the National Clearinghouse:

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Appendix: Expert witness assistance policy for anti-domestic violence organizations: Questions and features

This appendix was developed by Melissa Scaia, in collaboration with the National Clearinghouse for the Defense of Battered Women. Melissa is long-time advocate from Minnesota who has served as executive director of anti-domestic organizations. She has also served as an expert witness.⁶

INTRODUCTION

Whether a community-based domestic violence advocacy organization will provide expert witness assistance, including testimony, is a decision that is highly specific to each organization. There is no one-size-fits-all approach or formula. Such a decision requires a thorough self-assessment of mission, capacity, resources, expertise, and community needs. The paper accompanying this appendix — *Advocates as Expert Witnesses: Weighing the Benefits and Drawbacks* — and others in the expert witness series help inform and guide the decision-making process. We encourage you to take full advantage of these discussions.

This appendix is a resource for community-based advocacy organizations that have decided to provide expert assistance and want to develop an organizational policy governing the provision of expert witness assistance by staff or volunteers. By *expert witness assistance*, we mean a range of services that may include consultation with the attorney who hired the expert, as well as providing testimony. This appendix includes sample policy language, and questions to consider in developing policy tailored to the organization and its approach to expert assistance.

Some organizations may decide to include expert assistance as a service of their organizations and want a policy that addresses who can provide those services and under what circumstances. Others may exclude expert assistance as part of their

⁶ To develop this appendix, we drew upon the experience and critical thinking reflected in expert witness materials, including draft policy language, developed or collected by Debby Tucker, Toby Myers, Sarah Buel, Noël Bridget Busch-Armendariz, Janet Kerr, Margaret Bassett, Laurie Schipper, and Kirsten Faisal. We apologize if we have missed acknowledging anyone we should have. Additional thanks go to the National Center on Domestic and Sexual Violence and the University of Texas School of Social Work for their training programs on the use of expert witnesses in domestic violence cases. The program planners, faculty, trainings, and related materials have been extremely helpful in advancing our thinking on the use of experts in domestic violence-related cases.

services but want a policy that addresses circumstances in which staff or volunteers of the organization can provide expert assistance on their own time.⁷ The appendix includes sample policy language and considerations for both approaches.

We encourage organizations that develop expert assistance-related policies to include the board of directors, staff, and volunteers of the organization in crafting the policy.⁸ In addition, we also encourage you to reach out to your state domestic violence coalition (if you have not already done so) to see if they have sample policies or know of other organizations in your state that have developed policies. It also will be helpful for your coalition to know who is providing expert assistance in the state so they can refer attorneys to your expert witness services.

DEVELOPING A POLICY

Boards of directors set the policies for community-based non-profits, although the level of hands-on involvement in writing policy differs across organizations. Each community-based domestic violence advocacy organization has its own process for writing, approving, and revising policy. Your organization can obtain assistance in overall policy development from one or more of the following resources:

- National Council of Nonprofits: <https://www.councilofnonprofits.org/>
- National Network to End Domestic Violence (NNEDV): <http://nnedv.org/>
- State and tribal domestic violence coalitions
- Local employment law attorneys

Even well-thought-out policies can have unintended negative consequences. The following measures will help you mitigate against inadvertently enacting a problematic policy:

- Utilize different types of feedback on the policy and its implementation. This can include questionnaires to staff who provide expert assistance and ongoing internal reviews following expert testimony or case consultation.
- Develop a preliminary policy that includes a mandatory review and assessment by your organization's board of directors and staff and volunteers. Such reviews and assessments should be more frequent in the beginning

⁷ State and federal law control to what extent an employer can limit the actions of employees outside work hours. For example, limitations may be permissible if the employee's off-duty activities impugn the reputation of the employer, or rely on resources and information that the employee has access to only through the employer. It is important for all community-based programs to consult with an attorney about the requirements and limitations of the law where the program is located.

⁸ We recommend including volunteers because many small organizations, particularly in rural or culturally-specific communities, use volunteers to provide advocacy and services.

stages of policy implementation. Consider an initial six-month review schedule or a review activated following the first request for expert assistance.

- Develop scenarios to test the likely impact of the policy. Try to thoroughly anticipate and review the unintended consequences of putting the policy into action.

SAMPLE POLICY OUTLINE AND CONSIDERATIONS: ORGANIZATIONS OFFERING EXPERT ASSISTANCE

This outline illustrates possible content that a community-based domestic violence organization might include in a policy on expert assistance.

INTRODUCTION

Experts can play an essential role in legal proceedings involving victims of domestic violence. The actions and behaviors of victims of domestic violence may be confusing to jurors, attorneys, and courts. Misunderstanding a victim's actions and behaviors can result in misinterpretation of evidence. Victims, courts, and attorneys rely on expert witness testimony in civil and criminal cases to explain the dynamics of domestic violence that may not otherwise be understood by jurors and judges.

Additional considerations and questions for INTRODUCTION section:

- Include a statement on how providing expert assistance aligns with the organization's mission, values, and principles.
- Include a statement that addresses the following: What problem, need or issue does this policy address?
- Other questions or topics to consider including in the introduction to the policy:
 - Who will be most impacted by this policy on expert assistance?
 - How will this policy directly affect the staff?
 - How will key partner agencies and funders be affected by this policy?
 - How does our current response address the underlying problem of the need for expert assistance?

LEGAL BACKGROUND

Decisions about whether an expert is deemed qualified to testify or whether the expert's testimony will be admitted as evidence are made by the judge in the case at issue. While every jurisdiction has statutes and case law about expert testimony, decisions about who can testify in court and under what circumstances are highly

case-specific. It is the responsibility of the lawyer who called for the expert testimony to make an argument to the judge that the expert is qualified to testify and that the expert's testimony will be relevant to the case being heard in court.

DEFINITIONS

The following definitions apply to this policy:

1. **Domestic Violence Expert Witness (Expert Witness):** Generally, a person can be considered an expert in domestic violence based on extensive experience working with victims and/or offenders of domestic violence, education, knowledge of scholarly articles, writing and contributing to publications, and experience providing training locally, nationally, and/or internationally. State and federal law and case law often provide further guidance on who may be qualified to be an expert witness. In addition, courts have discretion in determining whether someone will be permitted to testify as an expert in a case.
2. **General Testimony Expert Witness:** A general testimony expert provides testimony usually without meeting or interviewing any of the parties in the case. The expert does not provide testimony on facts of the case. This type of expert witness gives general information to the court on domestic violence and its effects.
3. **Case-Specific Expert Witness:** A case-specific expert testifies about the facts and party or parties involved in the case and may base their testimony on one or more of the following: their interview of the victim and/or other parties, review of all or some case documentation, review of evidence of abuse. Experts who provide this type of testimony typically have specialized training, education, and specific clinical and forensic qualifications.
4. **Victim:** The term victim is used to describe those persons who have been harmed and battered by perpetrators of domestic violence, regardless of their position in the court case (i.e., whether petitioner, respondent, complainant, defendant, etc.).
5. **Domestic violence and battering:** The terms "domestic violence" and "battering" often get used interchangeably. Battering is an ongoing, patterned use of intimidation, coercion, and violence, as well as other tactics of control, to establish and maintain a relationship of dominance over an intimate partner. Battering is a systematic way that abusers utilize various tactics to restrict an intimate partner's autonomy; an isolated use of force, without more, does not constitute battering.
6. **Counterintuitive victim behavior** includes actions, decisions, or statements made by victims that seem to be illogical. They include behaviors that are not what the average person or juror would "expect" from a victim. The term "counterintuitive behavior" is not a psychological term. It also does not

define a victim's behavior. Rather, it defines the public's perception of the victim's behavior and the disconnect between that perception and the victim's actual behavior.

Additional consideration for DEFINITIONS section: Consider adding other relevant local definitions.

SELECTION PROCESS FOR EXPERT ASSISTANCE PROVIDED BY OUR ORGANIZATION

Staff members and volunteers who want to provide expert assistance on behalf of the organization should state their desires and intentions in writing to the executive director and the chair of the board of directors. Staff members and volunteers who seek to testify as an expert witness shall undergo an internal interview process and fill out an application.⁹ Staff may not testify independently, separate from the organization or on their own time unless approved by the board of directors and/or executive director.¹⁰ Any employee who performs expert services must be deemed qualified under this process, regardless of whether those expert services include providing consultation (only) or testimony.

Additional considerations and questions for EXPERT WITNESS SELECTION PROCESS section:

- What questions and required information will be on the expert assistance internal application?
- What kind of professional education, degree, license, and/or significant training in the field of domestic violence will be required?
- What kind of experience working directly with victims of battering, their children, and/or with men who batter will be required? For how many years? In what capacity?
- Will the selection process require the potential expert to have a strong foundation of knowledge related to the research and study of battering and other forms of violence against women?

If the staff person has prior experience serving as an expert, what kinds of information about their past experiences are relevant to the selection process?

- Will you contact any of the attorneys involved in cases in which the person provided expert assistance in the past? If so, what kind of information will you seek?

⁹ This sample policy language does not include a sample application.

¹⁰ If you plan to include this kind of requirement in your policy, it is important to consult with an employment lawyer to confirm what your state and local laws say about the extent to which employers can control or otherwise regulate the activities of employees outside of work hours.

- How will the application and selection process determine whether the potential expert is able to convey the necessary courtroom demeanor and teach the material to the consulting attorney, judge, and/or a jury?
- How will the application and selection process determine whether the potential expert is prepared to act in ways that demonstrate cultural respect and cultural humility?
- Will your program develop specific criteria for determining who from the organization can testify? If so, will these criteria be made available to all staff within the organization?
- Can agency board members or volunteers become expert witnesses on behalf of the organization?
- Who will make the decision about who can testify as an expert witness?
- How will professional liability insurance be affected for the organization once expert witness services are provided?
- What will be the evaluation process for staff who provide expert witness services?
- What kind of training and supervision will be required for staff who provide expert assistance?

CASE SELECTION PROCESS — DECIDING WHEN TO PROVIDE EXPERT ASSISTANCE

Deciding which cases to provide expert assistance to requires careful examination. The organization will annually (or even semi-annually) evaluate its decision-making about which cases to provide expert assistance to.

Our organization will provide expert witness testimony or other expert assistance in the following situations:¹¹

The organization will only provide expert witness testimony outside of our service area in criminal domestic violence cases that involve adult intimate partners.

OR

The organization will provide expert witness services only in civil cases outside of our service area.

¹¹ This list of situations is not meant to be exhaustive. We encourage organizations to extensively discuss a range of situations types of cases for which they will provide expert witness services. This sample policy provides several possibilities for organizations to consider when making this decision.

OR

The organization will prioritize providing expert witness testimony within our service area by staff members who do not know the parties involved, and in all types of cases.

The organization will convene a committee of three staff members to aid in the selection process for which cases to provide expert assistance, including but not limited to:

- Staff member who received the subpoena or request for expert witness services
- An agency manager or supervisor
- An advocate for victims of domestic violence

When deciding whether to provide expert assistance, the internal expert assistance committee will consider the following in making its recommendation for the organization to accept or reject the request for assistance:

- Input and desire of the staff member to provide the expert assistance
- Victim's wishes about the case and/or use of expert testimony, if known¹²
- Whether the expert witness knows the victim or defendant in the case
- The organization's capacity and resources during the expected length of the case, including prep time and anticipated testimony
- Type of case and circumstances surrounding it
- Threshold of domestic violence evidence in the case

CULTURAL AND GEOGRAPHIC CONSIDERATIONS FOR PROVIDING EXPERT ASSISTANCE

Our organization serves different cultural communities. In the rural and small communities that we serve, considerations will be made regarding the impact of providing expert witness testimony in our service area. In close-knit communities, knowledge that a staff member of a domestic violence program testified in a case in which the victim was not supportive of that action could be detrimental to victims overall and to our agency. It is also possible that victims could hear about cases in which the agency didn't provide expert services despite the wishes of the victim.

¹² If your agency does not know about the victim's wishes, will you try to find it out? If so how? Agencies might consider thinking through what they will do in cases when their expert assistance is being requested by the prosecution to assist with the prosecution of victim's batterer and the victim does not want the case to go forward.

Our agency may consider coordinating with nearby community-based domestic violence organizations to provide expert witness services in neighboring communities, but not our own. We will also consider the appropriateness of the agency's qualified expert witnesses and any relevant cultural information known about the case.

Additional considerations and questions for CASE SELECTION PROCESS section:

- Does the threshold of domestic violence evidence presented make a difference? If a case doesn't meet the threshold, will the policy be to screen it out? How will that threshold be defined?
- Will the organization take cases when the victim is known to the organization or has received services or currently lives in the service area and could conceivably need services in the future?
- Will the expert have the power to decline to testify, even in cases that were approved for expert assistance?
- Will the organization provide expert assistance for victims who are incarcerated or in jail?
- Will the organization provide expert witness services for battered defendants?
- If a case is rejected for expert assistance, will the organization provide the requesting attorney with referrals to other sources of assistance?
- Will we consider offering expert testimony on behalf of unrepresented victims?

FOCUS, PURPOSE, AND CONTENT OF GENERAL EXPERT WITNESS TESTIMONY

Our organization has determined that testimony on domestic violence and its effects is a service our agency is willing to provide under certain circumstances, in certain cases and if our resources allow it. The expert testimony from our organization should focus on descriptions of the myths surrounding domestic violence, the dynamics of domestic violence, and common victim behaviors and responses. This testimony should be based upon the expert's own experiences with victims and observations of victims' behaviors.

Our organization will not provide expert witness testimony that requires an evaluation of a party involved in the case (such as the victim defendant), regardless of whether we have staff qualified to provide this type of testimony.

Additional considerations and questions for CONTENT OF GENERAL EXPERT WITNESS TESTIMONY section:

- Does restriction to general expert testimony mean that a staff member can never give a case-specific opinion on record in court, even if directly asked by a judge?
- What if the staff member testifies in a manner that is inconsistent with the organization's philosophy, principles, and/or preferred language?

FEES FOR EXPERT WITNESS SERVICES

The fee charged for expert witness services will be the salary plus benefit rate of the staff member plus an additional 10% for overhead costs.

When the staff member is conducting expert witness services within the agency's service area, the organization will not charge a fee for expert witness services.

Additional considerations and questions for FEE section:

- Will the agency consider expert assistance as a revenue producing service and always charge a fee regardless of where the testimony occurs?
- Is the fee negotiable? If negotiable, what are the terms?
- Who keeps the fee? How is it decided? Does the agency employee get any additional pay for providing this service because of their level of expertise?
- What are the ethical issues regarding victims "paying" for expert witness services if it is a private family law matter?
- Will the agency ever consider waiving the fee? Under what circumstances?

WRITTEN AGREEMENTS REGARDING EXPERT ASSISTANCE

Once our organization has determined that expert witness services will be provided, a draft agreement will be sent to the entity that the expert witness services will be provided for. The agreements in general will be between the organization and the attorney seeking the expert services.

The terms of the agreement may include, but not be limited to:

- Scope and purpose of the testimony
- Fee of the testimony
- Access to the file for review and timeline for such case file review
- Preparation time, format of prep meeting, and content prep with the attorney

Additional considerations and questions for PARTNER AGREEMENT section:

- How does the organization ensure in the agreement that the attorney is laying an adequate foundation for the testimony to make sense for the court? (Goes to future organization credibility.)
- How will the organization address the issue of an attorney attempting to “weight” his/or case by using an expert but organization concludes that the case does not require expert testimony? (Goes to rationing time and resources.)
- What happens if, after reviewing the case file, that further information from the attorney or from the victim/survivor is needed to determine whether the organization will provide expert assistance? Is testimony contingent on receiving the follow-up information?
- After reviewing the case file and speaking with the consulting attorney, if it is determined that there is someone more qualified to serve as the expert (based on experience and/or subject matter expertise) will the case be referred?

POLICY REVIEW AND EVALUATION

The organization will regularly review this policy. Initially, the implementation of this policy will be reviewed by the organization after six months and then after one year. After the first year, there will be an annual review of the implementation of this policy.

Additional consideration for POLICY REVIEW AND EVALUATION section: Consider bringing in victims of domestic violence and advisors from the community to discuss their experiences over the last year with the organization’s expert assistance services.

The following outline is for organizations that decide to not provide expert witness services through the organization but have staff who are interested in providing expert witness testimony on their own time, outside the purview of the agency.

SAMPLE POLICY OUTLINE AND CONSIDERATIONS: AGENCY STAFF PROVIDING EXPERT ASSISTANCE INDEPENDENT OF THE ORGANIZATION

Staff may not testify independently, separate from the organization or on their own time unless approved by the board of directors and/or executive director.¹³

Circumstances that may allow for a staff member to testify independently include, but are not limited to:

- The staff member's expertise was gained prior to employment with the organization. A staff member's expertise can be determined by, but not limited to, formal education and training, previously authored scholarly articles and/or publications, and experience training locally, nationally, or internationally on domestic violence.
- The staff member previously testified as an expert witness prior to becoming employed with the organization.

If a staff member is authorized to testify independently and separate from the organization, it will be done on personal time and the agency will hold no liability or responsibility for the expert witness testimony.

If the expert witness is working independently outside the agency, they are on their own time and the fee is paid directly to the person.

Additional considerations and questions:

- What do state and local laws say about the extent to which employers can control the activities of employees outside of work hours?
- What is the recourse if a staff member provides expert witness testimony independent of the organization without prior authorization?

¹³ As stated above, if you plan to include this kind of requirement in your policy, it is important to consult with an employment lawyer to confirm what your state and local laws say about the extent to which employers can control or otherwise regulate the activities of employees outside of work hours.

If you have any comments or questions or if you have developed a policy that you are willing to share, please contact the National Clearinghouse:

National Clearinghouse for the Defense of Battered Women
125 S. 9th Street, Suite 302, Philadelphia, PA 19107
215/351-0010
ncdbw@ncdbw.org
www.ncdbw.org