

## EXPERTS

### 12-2601. Definitions

In this article, unless the context otherwise requires:

1. "Claim" means a legal cause of action except for actions relating to health care under sections 12-561 through 12-563 of this title or under title 46, chapter 4 or an affirmative defense to which all of the following apply:
  - (a) The claim is asserted against a licensed professional in a complaint, answer, cross-claim, counterclaim or third party complaint.
  - (b) The claim is based on the licensed professional's alleged breach of contract, negligence, misconduct, errors or omissions in rendering professional services.
  - (c) Expert testimony is necessary to prove the licensed professional's standard of care or liability for the claim.
2. "Expert" means a person who is qualified by knowledge, skill, experience, training or education to express an opinion regarding a licensed professional's standard of care or liability for the claim.
3. "Licensed professional" means a person, corporation, professional corporation, partnership, limited liability company, limited liability partnership or other entity that is licensed by this state to practice a profession or occupation under title 20 or 32 or that is admitted to the state bar.

### 12-2602. Preliminary expert opinion testimony; certification

- A. If a claim against a licensed professional is asserted in a civil action, the claimant or the claimant's attorney shall certify in a written statement that is filed and served with the claim whether or not expert opinion testimony is necessary to prove the licensed professional's standard of care or liability for the claim.
- B. If the claimant or the claimant's attorney certifies pursuant to subsection A that expert opinion testimony is necessary, the claimant shall serve a preliminary expert opinion affidavit with the initial disclosures that are required by rule 26.1, Arizona rules of civil procedure. The claimant may provide affidavits from as many experts as the claimant deems necessary. The preliminary expert opinion affidavit shall contain at least the following information:
  1. The expert's qualifications to express an opinion on the licensed professional's standard of care or liability for the claim.
  2. The factual basis for each claim against a licensed professional.
  3. The licensed professional's acts, errors or omissions that the expert considers to be a violation of the applicable standard of care resulting in liability.
  4. The manner in which the licensed professional's acts, errors or omissions caused or contributed to the damages or other relief sought by the claimant.
- C. The court may extend the time for compliance with this section on application and good cause shown or by stipulation of the parties to the claim. If the court extends the time for compliance, the court may also adjust the timing and sequence of disclosures that are required from the licensed professional against whom the claim is asserted.
- D. If the claimant or the claimant's attorney certifies that expert testimony is not required for its claim and the licensed professional who is defending the claim disputes that certification in good faith, the licensed professional may apply by motion to the court for an order requiring the claimant to obtain and serve a

preliminary expert opinion affidavit under this section. In its motion, the licensed professional shall identify the following:

1. The claim for which it believes expert testimony is needed.
2. The prima facie elements of the claim.
3. The legal or factual basis for its contention that expert opinion testimony is required to establish the standard of care or liability for the claim.

E. After considering the motion and any response, the court shall determine whether the claimant shall comply with this section and, if the court deems that compliance is necessary, shall set a date and terms for compliance. The court shall stay all other proceedings and applicable time periods concerning the claim pending the court's ruling on the motion to compel compliance with this section.

F. The court, on its own motion or the motion of the licensed professional, shall dismiss the claim against the licensed professional without prejudice if the claimant fails to file and serve a preliminary expert opinion affidavit after the claimant or the claimant's attorney has certified that an affidavit is necessary or the court has ordered the claimant to file and serve an affidavit.

G. A claimant may supplement a claim or preliminary expert opinion affidavit with additional claims, evidence or expert opinions that are timely disclosed under the Arizona rules of civil procedure or pursuant to court order. An action under this chapter does not preclude a party from using a preliminary expert opinion affidavit for any purpose, including impeachment.

### 12-2603. Preliminary expert opinion testimony against health care professionals; certification; definitions

A. If a claim against a health care professional is asserted in a civil action, the claimant or the party designating a nonparty at fault or its attorney shall certify in a written statement that is filed and served with the claim or the designation of nonparty at fault whether or not expert opinion testimony is necessary to prove the health care professional's standard of care or liability for the claim.

B. If the claimant or the party designating a nonparty at fault or its attorney certifies pursuant to subsection H of this section that expert opinion testimony is necessary, the claimant shall serve a preliminary expert opinion affidavit with the initial disclosures that are required by rule 26.1, Arizona rules of civil procedure. If a party designates a nonparty at fault and certifies pursuant to subsection H of this section that expert opinion testimony is necessary, that party shall serve a preliminary expert opinion affidavit within sixty days after filing the designation.

The claimant or the party designating a nonparty at fault may provide affidavits from as many experts as the claimant or the party designating a nonparty at fault deems necessary. The preliminary expert opinion affidavit shall contain at least the following information:

1. The expert's qualifications to express an opinion on the health care professional's standard of care or liability for the claim.
2. The factual basis for each claim against a health care professional.
3. The health care professional's acts, errors or omissions that the expert considers to be a violation of the applicable standard of care resulting in liability.
4. The manner in which the health care professional's acts, errors or omissions caused or contributed to the damages or other relief sought by the claimant.

C. The court may extend the time for compliance with this section on application and good cause shown or by stipulation of the parties to the claim. If the court extends the time for compliance, the court may also adjust the timing and sequence of disclosures that are required from the health care professional against whom the claim is asserted or the designated nonparty at fault.

D. If the claimant or the party designating the nonparty at fault or its attorney certifies that expert testimony is not required for the claim or designation and the claimant, the health care professional or designated nonparty at fault disputes that certification in good faith, the claimant, the health care professional or the designated nonparty at fault may apply by motion to the court for an order requiring the claimant or the party designating the nonparty at fault to obtain and serve a preliminary expert opinion affidavit under this section. In the motion, the claimant, the health care professional or the designated nonparty at fault shall identify the following:

1. The claim for which it believes expert testimony is needed.
2. The prima facie elements of the claim.
3. The legal or factual basis for its contention that expert opinion testimony is required to establish the standard of care or liability for the claim.

E. After considering the motion and any response, the court shall determine whether the claimant or party designating the nonparty at fault shall comply with this section and, if the court deems that compliance is necessary, shall set a date and terms for compliance. The court shall stay all other proceedings and applicable time periods concerning the claim pending the court's ruling on the motion to compel compliance with this section.

F. The court, on its own motion or the motion of the health care professional or designated nonparty at fault, shall dismiss the claim against the health care professional or designated nonparty at fault without prejudice if the claimant or the party designating the nonparty at fault fails to file and serve a preliminary expert opinion affidavit after the claimant or designated nonparty at fault or its attorney has certified that an affidavit is necessary or the court has ordered the claimant or the party designating a nonparty at fault to file and serve an affidavit. Upon any allegation of insufficiency of the affidavit, the court shall allow any party a reasonable time to cure any affidavit, if necessary.

G. A claimant or a party designating a nonparty at fault may supplement a claim or preliminary expert opinion affidavit with additional claims, evidence or expert opinions that are timely disclosed under the Arizona rules of civil procedure or pursuant to court order. A preliminary expert opinion affidavit may be used for impeachment only upon a finding of the court that the facts upon which the affidavit were based have not substantially changed and that the facts were known to the expert at the time the affidavit was prepared.

H. For the purposes of this section:

1. "Claim" means a legal cause of action against a health care professional under sections 12-561 through 12-563 or under title 46, chapter 4 or an affirmative defense or designation of a nonparty at fault to which all of the following apply:
  - (a) The claim is asserted against a health care professional in a complaint, answer, cross-claim, counterclaim, third party complaint or designation of a nonparty at fault.

(b) The claim is based on the health care professional's alleged breach of contract, negligence, misconduct, errors or omissions in rendering professional services.

(c) Expert testimony is necessary to prove the health care professional's standard of care or liability for the claim.

2. "Expert" means a person who is qualified by knowledge, skill, experience, training or education to express an opinion regarding a licensed health care professional's standard of care or liability for the claim.

#### 12-2604. Expert witness qualifications; medical malpractice actions

A. In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and the person meets the following criteria:

1. If the party against whom or on whose behalf the testimony is offered is or claims to be a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty or claimed specialty as the party against whom or on whose behalf the testimony is offered. If the party against whom or on whose behalf the testimony is offered is or claims to be a specialist who is board certified, the expert witness shall be a specialist who is board certified in that specialty or claimed specialty.

2. During the year immediately preceding the occurrence giving rise to the lawsuit, devoted a majority of the person's professional time to either or both of the following:

(a) The active clinical practice of the same health profession as the defendant and, if the defendant is or claims to be a specialist, in the same specialty or claimed specialty.

(b) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession as the defendant and, if the defendant is or claims to be a specialist, in an accredited health professional school or accredited residency or clinical research program in the same specialty or claimed specialty.

3. If the defendant is a general practitioner, the witness has devoted a majority of the witness's professional time in the year preceding the occurrence giving rise to the lawsuit to either or both of the following:

(a) Active clinical practice as a general practitioner.

(b) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession as the defendant.

B. If the defendant is a health care institution that employs a health professional against whom or on whose behalf the testimony is offered, the provisions of subsection A apply as if the health professional were the party or defendant against whom or on whose behalf the testimony is offered.

C. This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth under this section.

D. An expert witness in a medical malpractice case shall not be permitted to testify if the fee of the witness is in any way contingent on the outcome of the case.

12-2605. Evidence of admissions; civil proceedings; unanticipated outcomes; medical care

In any civil action that is brought against a health care provider as defined in section 12-561 or in any arbitration proceeding that relates to the civil action, any statement, affirmation, gesture or conduct expressing apology, responsibility, liability, sympathy, commiseration, condolence, compassion or a general sense of benevolence that was made by a health care provider or an employee of a health care provider to the patient, a relative of the patient, the patient's survivors or a health care decision maker for the patient and that relates to the discomfort, pain, suffering, injury or death of the patient as the result of the unanticipated outcome of medical care is inadmissible as evidence of an admission of liability or as evidence of an admission against interest.