Excerpt ASA Administrative Procedures October 2009

11.8 Expert Witness Testimony Program

11.8.1 Jurisdiction

11.8.1.1 The Committee on Expert Witness Testimony Review (Committee) may consider a Complaint against a member of ASA brought by any other ASA member concerning expert testimony given on the record (e.g., by sworn statement, affidavit or testimony at a deposition hearing or trial) on or after October 16, 2003, in a civil or criminal judicial proceeding concluded by settlement or final judgment that is not subject to further appeal. A Complaint may be brought against an expert witness called by any party to the proceeding, regardless of whether or not the proceeding results in judgment for or against a defendant anesthesiologist.

11.8.1.2 Expert testimony shall be deemed responsible if it is truthful, appears to be based upon a thorough and objective view of the patient's medical history, and evaluates the treating physician's performance in light of generally-accepted standards at the time of the incident, as reflected in the relevant medical and scientific literature.

11.8.2 Contents of the Complaint

11.8.2.1 The Complaint shall be in writing and include the following:

11.8.2.1.1 The name, mailing address, telephone and facsimile and e-mail addresses of the Complainant and, to the extent known, of the Respondent.

11.8.2.1.2 A statement of the jurisdictional facts, including the name, court or agency and docket or identifying number of the proceeding, the date of the testimony complained of, the manner in which and the date on which the court proceeding became final and not subject to further appeal or review.

11.8.2.1.3 An index of relevant documents from the proceeding, including (1) the Respondent's testimony and all exhibits referred to upon direct or cross-examination; (2) any supporting or opposing testimony (with relevant exhibits) provided by other expert witnesses or the treating physician; and (3) all motions and rulings regarding such testimony.

11.8.2.1.4 Separately tabbed, legible copies of all indexed items.

11.8.2.1.5 A narrative statement of the grounds upon which the Complainant deems the testimony to be in violation of the Guidelines for Expert Witness Qualifications and Testimony ("Guidelines"), including excerpts from any medical or scientific literature that the Complainant believes are relevant to evaluating the expert witness' testimony.

11.8.2.1.6 A Complaint failing to meet the above requirements shall be deemed incomplete and no further action shall be taken on it, except that notice shall be given to the Complainant with a reasonable opportunity to cure its defects. Such notification may be accomplished by ASA's General Counsel or the General Counsel's designee.

11.8.3 Consideration by the Committee on Expert Witness Testimony

11.8.3.1 The chair of the Committee may designate one or more of its members or ASA staff to serve as its Investigator(s). The Investigator(s), with approval of the chair, may call upon other ASA members, staff or resources as may be necessary to fairly evaluate the Complaint. Such actions shall be in close consultation with legal counsel. The Investigator(s) shall review the Complaint to determine whether it adequately alleges a violation of the Guidelines. The Investigator(s) may request additional information from the Complainant and/or recommend that the Committee dismiss the Complaint as insufficient on its face. Upon receipt of a sufficient Complaint, the Investigator(s) shall provide a copy of the Complaint to the Respondent and afford the Respondent an opportunity to respond in writing within thirty (30) days. The Response shall include but not be limited to the types of evidence and arguments as set forth in subsection *11.8.2.* above.

11.8.3.2 The Investigator(s) shall review the Complaint and Response, if any, to determine if there is a substantial question that the Guidelines have been violated. The Investigator(s) will present their findings to the Committee. The Committee shall determine if there is a substantial question whether the Respondent failed to abide by the Guidelines, thus warranting a hearing. Due consideration shall be given to any response received in a timely manner from a Respondent.

11.8.3.3 If the Committee determines that a hearing before it is not warranted, it shall so notify the Complainant and Respondent in writing, and its decision shall be final.

11.8.3.4 If the Committee determines that a hearing before it is warranted, it shall so notify the Complainant and Respondent in writing. The Committee shall provide the Respondent thirty (30) days in which to submit any further written response and/or to request an oral evidentiary hearing.

11.8.3.5 If the Respondent does not request an oral evidentiary hearing, the Committee shall decide the matter on the basis of the complaint record and any written submissions. The Committee shall provide at least 30 days' notice of the date, time and location of the hearing. The hearing shall be conducted on the record by the chair of the Committee, or the chair's designee, sitting with at least two other members of the Committee. The Investigator(s) shall not be on the hearing panel nor shall any member of the Committee with a conflict of interest. The chair shall appoint a Committee member who was an Investigator in the matter to present the facts and evidence indicating that the Respondent has violated the Guidelines. The Investigator shall be represented by the Society's legal counsel. The Respondent shall be entitled to representation by counsel at Respondent's expense.

11.8.3.6 The hearing panel, acting on behalf of the Committee, shall issue a written decision whether or not the Respondent failed to abide by the Guidelines. If the hearing panel determines that the Complaint is not valid, it shall notify the Complainant and Respondent, and its decision will be final.

11.8.3.7 If the hearing panel determines that the Complaint is valid, it shall, on behalf of the Committee, recommend the sanction it deems appropriate against the Respondent, shall prepare written findings of fact, and shall submit its findings of fact to the

Respondent and provide 30 days for the Respondent to submit specific written objections to such findings of fact and to request an appeal to the Judicial Council.

11.8.3.8 Actions contrary to the interests of any ASA member shall require the vote of a majority of all the members of the hearing panel.

11.8.3.9 If a timely appeal is requested with specific written objections to the findings of fact, the Committee shall submit a copy of the record, its findings of fact, and any such written objections to the Judicial Council with a proposed resolution recommending a sanction.

11.8.3.10 11If no timely appeal is requested with specific written objections to the findings of fact, the Committee's findings of fact shall be final. The findings of fact and a resolution recommending a sanction shall be submitted to the Board of Directors. The Board of Directors shall exercise final authority in the disposition of all cases in which a sanction is recommended against the member.

11.8.4 Appeal Proceedings Before the Judicial Council

11.8.4.1 The Judicial Council shall determine whether or not the Committee erred in finding a violation of the Guidelines based on consideration of the relevant evidence, the findings of fact and the record transmitted to it.

11.8.4.2 The Judicial Council shall conduct hearings and render decisions in accordance with the terms of the ASA Bylaws.

11.8.4.3 If the Judicial Council determines that the appeal is not valid and the Committee did not err in finding a violation of the Guidelines, it shall so advise the Committee, the Complainant and the Respondent, and its decision will be final. In such cases, the Judicial Council shall affirm the original written findings of fact and shall affirm or modify the Committee's resolution for sanction and shall submit them to the Board of Directors for consideration in accordance with the ASA Bylaws.

11.8.4.4 If the Judicial Council determines that the appeal is valid, it shall so notify the Committee and the Complainant and Respondent. In such cases, it shall either dismiss the Complaint or modify the written findings of fact, and its decision will be final. If the Judicial Council does not dismiss the Complaint, it shall affirm or modify the recommended sanction and submit the findings and resolution for sanction to the Board of Directors, in accordance with the ASA Bylaws.

11.8.4.5 Actions contrary to the interests of any ASA member shall require the vote of a majority of the members of the Judicial Council.

11.8.5 Proceedings Before the Board of Directors

11.8.5.1 Prior to a required meeting of the Board of Directors being called to consider a resolution for sanction submitted by the Committee or the Judicial Council, the Speaker shall notify the Respondent of the place and time of such meeting and of Respondent's opportunity under the Bylaws to present arguments against the resolution for sanction. Further debate shall be allowed in accordance with the rules of the Board of Directors.

11.8.5.2 The Board of Directors shall exercise final authority with respect to cases coming before it, including dismissal of the Complaint or imposing a sanction different from that recommended by the Committee or the Judicial Council. Such further decisions of the Board, taken by secret ballot, shall be final. A three-fourths (3/4) majority of those present and voting shall be required to pass a resolution of sanction against an ASA member. A simple majority vote shall be required for all other actions (e.g., dismissal of complaint).

11.8.6 Sanctions

11.8.6.1 Any sanction recommended to the Board of Directors shall either be censure, suspension, or expulsion, in accordance with the Bylaws.

11.8.6.2 All actions resulting in suspension or expulsion will be reported to the National Practitioner Data Bank (NPDB) in accordance with NPDB regulations.

11.8.7 Confidentiality

The Complaint record and all proceedings shall remain confidential, except that the final decision of the Board of Directors imposing a sanction on a member, including the Judicial Council findings upon which it is based, shall be made public on the Society's website. Subject to legal review, a summary of the reasons for imposed sanctions on named ASA members will appear in the ASA *NEWSLETTER*. (305-2; 2008)