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**Legal Nurse**  
*Consulting*



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AALNC

AMERICAN ASSOCIATION OF  
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AMERICAN ASSOCIATION OF  
LEGAL NURSE CONSULTANTS

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## PURPOSE

The purpose of The Journal is to promote legal nurse consulting within the medicallegal community; to provide novice and experienced legal nurse consultants (LNCs) with a quality professional publication; and to teach and inform LNCs about clinical practice, current legal issues, and professional development.

## MANUSCRIPT SUBMISSION

The Journal accepts original articles, case studies, letters, and research. Query letters are welcomed but not required. Material must be original and never published before. A manuscript should be submitted with the understanding that it is not being sent to any other journal simultaneously. Manuscripts should be addressed to [JLNC@aalnc.org](mailto:JLNC@aalnc.org). Please see the next page for Information for Authors before submitting.

## MANUSCRIPT REVIEW PROCESS

We send all submissions blinded to peer reviewers and return their blinded suggestions to the author. The final version may have minor editing for form and authors will have final approval before publication. Acceptance is based on the quality of the material and its importance to the audience.

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## ARTICLE SUBMISSION

*The Journal of Legal Nurse Consulting* (JLNC), a refereed publication, is the official journal of the American Association of Legal Nurse Consultants (AALNC). We invite interested nurses and allied professionals to submit article queries or manuscripts that educate and inform our readership about current practice methods, professional development, and the promotion of legal nurse consulting within the medical-legal community. Manuscript submissions are peer-reviewed by professional LNCs with diverse professional backgrounds. The JLNC follows the ethical guidelines of COPE, the Committee on Publication Ethics, which may be reviewed at: <http://publicationethics.org/resources/code-conduct>.

We particularly encourage first-time authors to submit manuscripts. The editor will provide writing and conceptual assistance as needed. Please follow this checklist for articles submitted for consideration.

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- Put title and page number in a header on each page (using the Header feature in Word)
- Place author name, contact information, and article title on a separate title page, so author name can be blinded for peer review
- Text: Use APA style (Publication Manual of the American Psychological Association, 6th edition) (<https://owl.english.purdue.edu/owl/resource/560/01/>)
- Legal citations: Use The Bluebook: A Uniform System of Citation (15th ed.), Cambridge, MA: The Harvard Law Review Association
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- Include a 100-word abstract and keywords on the first page
- Submit your article as an email attachment, with document title articlename.doc, e.g., wheelchairs.doc

## INSTRUCTIONS FOR ART, FIGURES, TABLES, LINKS

- All photos, figures, and artwork should be in JPG or PDF format (JPG preferred for photos). Line art should have a minimum resolution of 1000 dpi, halftone art (photos) a minimum of 300 dpi, and combination art (line/tone) a minimum of 500 dpi.
- Each table, figure, photo, or art should be submitted as a separate file attachment, labeled to match its reference in text, with credits if needed (e.g., Table 1, Common nursing diagnoses in SCI; Figure 3, Time to endpoints by intervention, American Cancer Society, 2003)

## INSTRUCTIONS FOR PERMISSIONS

The author must accompany the submission with written release from:

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Acceptance will be based on the importance of the material for the audience and the quality of the material, and cannot be guaranteed. All accepted manuscripts are subject to editing, which may involve only minor changes of grammar, punctuation, paragraphing, etc. However, some editing may involve condensing or restructuring the narrative. Authors will be notified of extensive editing. Authors will approve the final revision for submission.

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**Varsha Desai**  
BSN, RN,  
CNLCP, LNCC

President, AALNC

# A Message from the President

Dear AALNC Members,

I am often asked the question, “What tools, resources, or materials do you use as an LNC?”

Since becoming involved with AALNC, first at the chapter level and now as member of the AALNC Board of Directors, I have learned about the many benefits and resources AALNC offers to members and non-members – and how much time and effort member volunteers contribute to provide new and experienced LNCs with various educational resources and products.

I wanted to share a few of the resources for members and nonmembers that can enhance your LNC knowledge and practice, available for free and purchase from AALNC.

## *Journal of Legal Nurse Consulting*

Currently, the *AALNC Journal* is available to members and nonmembers in digital format (PDF). The Journal publishes quarterly themed issues, available for free download at the Journal link on the website, [www.aalnc.org](http://www.aalnc.org). The Journal is not just a resource for LNCs but can be used to educate attorney clients on subjects within their own specialties.

- What makes the *Journal* a GREAT learning and resource tool are the peer-reviewed articles written by authors who are active and current in their respective fields. These authors provide contact information and can be prospective experts. More resources for research can be found in their citations.
- You can use the *Journal* as a marketing tool by sending copies of relevant topics to prospective attorney clients with an introduction letter. Relevant topics in litigation include long term care/ nursing homes, pressure ulcers, obstetrics and many more. An index of past *Journal* issues is available on the website.

*I am often asked the question, “What tools, resources, or materials do you use as an LNC?” My advice is to take the time and check out these and other resources through AALNC.*

## AALNC Website

- **President’s Blog** The President’s Blog has been revamped to include blog topics from LNC leaders and experts in various areas of LNC practice. Our first Summer Series Blog kicked off in July with a piece by Kari Williamson, *Top 5 Traits of Great Legal Nurse Consultant*. The

*continued on page 6*

# September 2015 Editor's Note

**O**ur issue this quarter focuses on various aspects of expert witnessing. We have articles on three less-commonly-used specialties, vetting experts, an expert nurse round table on the challenges of testifying, Daubert, cross examination, and a cautionary tale of what happened when an expert witness went too far.

Dr. Thomas Schwenk, a physician who was the sole defendant in a malpractice action alleging failure to diagnose, wrote a very evocative first-person opinion piece in the Journal of the American Medical Association on the experience (Schwenk, 2014). The JAMA does not give permission for reprints; the link is below. I called Dr. Schwenk as I was struck by the grace and vulnerability he described. He graciously answered my questions about what happened that brought him into the courtroom.

A middle-aged man in a high-stress job, whose risk profile for cardiac disease was very low (3%) by Framingham study criteria, saw Dr. Schwenk in August. Three months later he had a period of two or three weeks of not feeling well, stayed up all one night at home with chest pain, and was found dead in the morning, leaving a pregnant young wife.

*What if there isn't a single truth for every situation?  
How do we work with that ambiguity in a zero-sum,  
adversarial arena?*

At the time Dr. Schwenk had been chief of family practice medicine at a large academic medical center for more than twenty-five years. Their risk management team, always willing to settle cases if appropriate, fought his case hard, and won.

His account takes you into his thoughts as he sits in the courtroom, listening to the attorneys and other witnesses. He described how medical students are told, explicitly, "You can never make a mistake." He writes that the opening statement by plaintiff's attorney was "just the beginning of what I discover will be one of the most painful experiences of the next four days- listening repeatedly to my name linked to incompetent medical care." He is disconcerted by how courts permit varying criteria for what constitutes an expert, and how their statements, once in the record, become accepted as truth, regardless of qualifications. He watches and listens, but isn't sure if he is seeing and hearing what his attorney is. In the end, he is almost physically ill as he waits for the jury to return their verdict: "In the question of whether Thomas Schwenk MD was professionally negligent in one or more of the ways claimed by the Plaintiff, our answer is No."

*continued on page 6*



**Wendie Howland**  
MN, RN-BC, CRRN,  
CNLCP, LNCC

*Editor, JLNC*

*continued from page 4*

blog is free and can be found under the Publications tab of the AALNC website. Our next blog topic in August will be about leadership by Mary Sussex.

- **Webinar Series** As a member, you have the option of attending *four* pre-selected webinars per year. Past topics have included marketing, researching literature and screening potential medical malpractice cases. Webinars are an easy way to keep up with obtaining continuing nursing credits even if you can't attend live. Sign up and listen later at your convenience.

### AALNC Online Store

- **Principles & Practice 3rd edition** The 2-volume edition covers more topics for the new and experienced LNC. Many new topic areas are covered including: Critical Care,

Neonatal Nursing, Obstetrical Nursing, Anesthesia Care, Administrative Health Law, and Medicare Set Aside Arrangements. It also includes expanded areas from previous editions such as: Long Term Care, Developmental Disability, Life Care Planning, and Independent Practice as an LNC.

- **AALNC Evidence Based Practice Reference Card** Introducing a new resource created by the AALNC Products & Services Committee. This laminated, three-hole punched product is the first in a series of reference cards presented by the Products & Services Committee. The Evidence-Based Practice Reference Card is a great resource as a quick guide to Evidence-Based Practice including evidence-based research resource and where to find it, the grading of

evidence, standard of care, statutes, and even how to cite evidence-based practice work.

My advice is to take the time and check out these and other resources through AALNC.

And of course, one of the best resources for educations, tools and networking, the AALNC Education and Networking Forum from April 21-23, 2016 in Charlotte, NC. Mark your calendar!

Best,



Varsha Desai BSN, RN, CNLCP, LNCC  
President, AALNC

## FROM THE EDITOR

*continued from page 5*

Many physicians wrote to him after his article appeared, physicians who experienced recurrent PTSD symptoms, tachycardia, diaphoresis, when it brought back memories of their errors; people who were never the same afterwards, who quit medicine entirely, felt destroyed, were destroyed. Brian Goldman, an ER physician, says in a powerful TED talk that medicine's culture of denial (and shame) keeps doctors from ever talking about mistakes, or using them to learn and improve. He wants this to stop, so this kind of collateral damage can stop, and we can learn

from mistakes rather than be destroyed by them.

I don't have a tidy coda to wrap this up. Perhaps in our profession, all our roles permit is to be impartial, to look at all the evidence, to find (or be) good experts. What if there isn't a single truth for every situation? How do we work with that ambiguity in a zero-sum, adversarial arena? What are your thoughts?



Wendie A. Howland  
[whowland@howlandhealthconsulting.com](mailto:whowland@howlandhealthconsulting.com)

## REFERENCES

- Goldman B. (2011) Doctors make mistakes. Can we talk about that? TED. <http://tinyurl.com/qgmqv9s>
- Schwenk TL.(2014) The moment of truth. JAMA. 2014;311(6):573-574. doi:10.1001/jama.2013.286177



## LOOKING FOR EXPERTS?

Every so often the LNCExchange contains some unique information passed from one LNC to another related to the listserv topic of the day. I recommend LNCs this link to read a “white paper” on finding and researching experts. Its 28 pages hold an enormous amount of information on the nuts and bolts and pitfalls of finding experts, vetting experts and impeaching experts. This should give members a good start in understanding how to conduct a thorough and accurate background check when offering the service of locating experts and/or background checking experts.

[www.ExpertWitnessWhitePaper.com](http://www.ExpertWitnessWhitePaper.com)

*Finding and Researching Experts and Their Testimony – May 2009 – Second Edition* Michael Brennan, Miller Canfield David Dilenschneider, LexisNexis Myles Levin, Daubert Tracker Jim Robinson, JurisPro Inc.

**Marjorie Berg Pugatch, RN, MA, EMT-B, LNCC**  
Long Island NY

## WITHDRAWN ARTICLE

Dear Editor,

In light of recent news of Dr. Joseph Citron's (author of DUI/DWI: Hospital Laboratory Testing Lacks Forensic Reliability in the Winter 2009 edition of JLNC) recent legal issues involving perjury in DUI cases, I would ask that JLNC publically withdraw its support of this article.

[http://lancasteronline.com/news/local/doctor-pleads-no-contest-to-perjury-charges/article\\_6507a172-bf67-11e3-aaf4-001a4bcf6878.html](http://lancasteronline.com/news/local/doctor-pleads-no-contest-to-perjury-charges/article_6507a172-bf67-11e3-aaf4-001a4bcf6878.html)

<http://www.therecordherald.com/article/20140318/News/140319756>

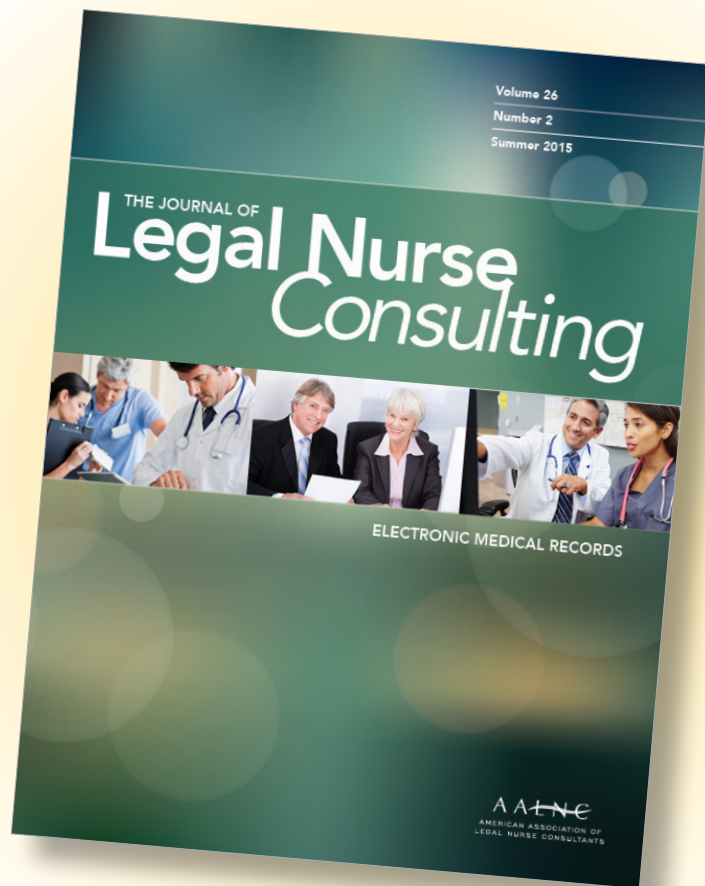
Thank you,

**David Burrows, Ph.D.**

Forensic Toxicologist

<http://www.linkedin.com/in/drburrows>

**Editor's reply:** Dr. Citron has pleaded no contest to charges that he falsified his credentials while testifying for the defense in numerous DUI/DWI cases in multiple jurisdictions. The JLNC appreciates this notification and Dr. Citron's article has been removed from the issue in question.



## KUDOS

I forwarded the link for the Summer 2014 issue (JLNC XXV.2, Elders) to my facility's Chief Nurse, who's my direct boss. This is WONDERFUL! This particular issue is chock-full of useful articles – legal issues of DNR, patient elopement, swallowing function of the elderly, plus an excellent article on falls and fall prevention. I cannot thank you enough for sharing this information! Much appreciated!

**Marijean Stephenson, RN, BSN, BS, CRRN, CBIS**

Patient Care Manager

San Juan Regional Rehabilitation Hospital  
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# An Interview With an Actuary

Kathleen C. Ashton, Ph.D., R.N., ACNS-BC and Mindy Steichen, F.C.A.S, M.A.A.A.

**Keywords:** actuary roles, actuary interview, actuary / LNC collaboration, actuary, F.C.A.S., M.A.A.A., Casualty Actuarial Society, American Academy of Actuaries

*An actuary works to analyze the financial consequences of risk within various professions, measuring and managing risk and uncertainty, and then uses the information to advise and inform those who make strategic decisions. Mindy Steichen, F.C.A.S, M.A.A.A., is a consulting actuary with Milliman, Inc. Ms. Steichen obtained a baccalaureate degree in mathematics from Drew University in Madison, NJ, and a master's degree in actuarial science from the University of Wisconsin, Madison. She has worked in the field for over fourteen years. In this interview, she explains the role of an actuary, shares insight into the ways an actuary can influence decision-making, and provides answers to some questions a legal nurse consultant might ask concerning the profession.*

One of nursing's strengths is being able to translate what we do for the public when someone asks us about our work. Yet how well do we understand the role of other individuals who are involved in healthcare? And how many individuals really know what an actuary is? Many people think a nurse practitioner is a nurse who is just beginning practice, or "practicing." And many people believe an actuary does something with death, as in mortuary. Both assumptions are far afield from reality.

Many times an actuary works behind the scenes and we may not be aware of the role this individual plays. Mindy Steichen, a consulting actuary, agreed to an interview in order to provide legal nurse consultants with information on what being an actuary entails. What follows are her responses to some questions concerning the actuary role.

**JLNC: What does an actuary do?**

MS: In general terms, an actuary builds and uses mathematical based models to help determine, price, and manage risk, mainly in the insurance and business worlds. Some day-to-day duties of an actuary may include research, written and verbal communications, on-the-job professional development, technical actuarial work, and volunteering within the profession.

**JLNC: What do the initials behind an actuary's name mean?**

MS: The initials (in my case F.C.A.S and M.A.A.A.) indicate membership in two actuarial organizations. F.C.A.S. stands for Fellow of the Casualty Actuarial Society, the organization overseeing casualty actuaries in the United States. M.A.A.A. stands for Member of the American Academy of Actuaries, which oversees all actuaries in the United States. The Fellowship designation is the highest credential an actuary can achieve.

**JLNC: What background is needed to become an actuary?**

MS: Actuaries come from many different backgrounds. Today, many colleges and universities have large actuarial science departments and students can graduate with a major in actuarial science. Other students obtain math, risk management, or business degrees instead. Actuarial science careers also draw those who switch to the field after graduating and starting work in other areas, such as engineering or teaching.

More important perhaps than the field of study is a rigorous series of exams that a candidate must pass in order to become a credentialed actuary. There are nine exams in the casualty track, each with an historical pass rate that is usually lower than 50% and sometimes as low as 30%. The pass rate is set by the professional organization overseeing the exam and is determined based on the fitness of the candidates for each individual exam. Many students take the first of these exams while still in their baccalaureate program.

**JLNC: What are the different areas or specialties in the field?**

MS: The field of actuarial science is divided into four main specialties as follows:

*Property and Casualty* These actuaries work with lines of business dealing with property or liability losses. Some examples are personal lines, such as homeowners and auto insurance and commercial lines such as workers' compensation, medical professional liability, general liability and financial products.

*Healthcare* Actuaries in this area work with health insurers and employer health plans as well as long-term care and Medicare programs.

*Employee Benefits / Pensions* These actuaries work with defined contribution and defined benefit plans as well as employee benefit and compensation packages.

*Life Insurance* Actuaries in this area work with life insurance companies and financial services products. They determine the amount of funds needed to be kept in reserve to cover claims, and make other recommendations to insurance firms.

**JLNC: In what areas have you worked?**

MS: One can work as an actuary for an insurance company or other financial or government entity that requires an actuary, or for a consulting firm. Most actuaries work in only one of the four fields. I have spent my entire career at a consulting firm, working only in the property and casualty area.

I work with many different areas and lines of business, including professional liability, workers' compensation, general liability, and aviation insurance. Additionally, my clients include individual hospitals and hospital systems that self-insure their liabilities, large insurance companies, and government entities and pools.

There are about 20,000 actuaries across all specialties in the United States. Many work for large insurance companies that may employ hundreds of actuaries. Other entities such as hospitals or government offices will hire a consultant for their actuarial services, either because they don't have enough work to employ an actuary full-time or they need an independent opinion.

**JLNC: What is a day like in the world of an actuary?**

MS: Since I work for a consulting firm, my days are always different. I am usually working for several different clients at the same time, often including insurance companies, self-insured hospital groups, and other self-insured entities. My job is to provide needed actuarial results to the client and also make sure they understand our work and how to use it in their business. Other aspects of being a consulting

actuary include traveling to meetings with clients, volunteer work for our industry organizations, and attending and presenting at conferences and industry events.

**JLNC: What do you enjoy the most about your career?**

MS: Besides working with my clients, the most interesting aspects of my career have been the interaction with young students interested in the field. I enjoy attending college, high school, or young professional events where it is common to find young people excited about math and help introduce them to actuarial science.

Perhaps the most rewarding aspect of my job is presenting to company management or Boards of Directors about our work. It is extremely satisfying to help these clients to understand the work actuaries do and how it affects their business.

**JLNC: How do actuaries and nurses or nurse practitioners interface?**

MS: On a day-to-day basis there is not much interaction between nurses and actuaries. The interactions occur more at the corporate level. However, the two professions do have some areas of common interest.

**JLNC: What are those areas of common interest for actuaries and nurses?**

MS: The main area of common interest for nurses and actuaries is the area of medical professional liability (MPL) insurance and claims (or, more commonly, the subcategory of nurses' professional liability (NPL) insurance). It has become more common to name nurses or other non-physician health care providers in MPL suits. Actuaries do work in NPL helping entities calculate how much money to hold in reserve to pay the final dollar amounts on all claims for a line of

business at a point in time. They also work to help develop NPL premium rates and other industry information.

Actuaries also work in the area of workers' compensation, and this can affect nurses in their day-to-day work. Both actuaries and nurses are interested in helping their client/employer (usually hospitals) mitigate risk and help prevent both NPL and workers' compensation injury claims. Specific areas of common interest include quality improvement and both patient and employee safety.

**JLNC: What is the difference between an actuarial report and an economist's report in legal matters?**

MS: The data used, focus, and scope are very different. The actuarial report uses historical data to predict future results. The economist's report is trending past and current data to the future.

An actuarial reserve report is an internal report whose intended audience is usually the hospital's risk manager, attorney, or chief financial officer (CFO). The report is usually not released to the public or anyone beyond the intended audience because it will contain client-specific data and information. The content of the actuarial report usually focuses on a specific group of claims and not individual claim detail.

An economist's report is usually intended for a much broader audience. It can help a court determine award amounts and provisions. This report is usually prepared based on an individual claim or injury, and, more commonly, is requested by an attorney for use in a legal matter. An economist's report may be used in court to help determine the financial implications of a specific case or injury.

**JLNC: What is the role of an actuary in the area of life care planning?**

MS: Actuaries are not usually involved in the initial development of life care

or long term care plans. If the financial cost of a life care plan is required, usually an actuary from the life care area would work on this calculation since one of the most important components would be the life expectancy of the patient.

**JLNC: Did I ask you anything that surprised you?**

MS: The difference between the actuarial and economist reports was something I had not thought much about in the past and it is easy to see how this could be confusing. The differences hinge on the way the different reports are used.

**JLNC: What are the gender differences in the field of actuarial science?**

MS: The actuarial science industry is still a male-dominated field with female actuaries making up around thirty percent of the industry. But, this number has steadily been increasing from lows of only three to four percent in the early twentieth century. Undergraduate programs in statistics, mathematics, and actuarial science are seeing more female students, with many now split almost fifty-fifty between female and male students.

**JLNC:** We hope the information gleaned from this interview will increase awareness of the role of an actuary as it relates to healthcare. A legal nurse consultant may come across an economist's report and occasionally an actuarial report. This article may shed some light on the differences between the two documents and assist the legal nurse consultant to understand them a little better. The more we understand about those involved in our profession and the roles they play, the better we can serve our clients.

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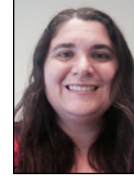
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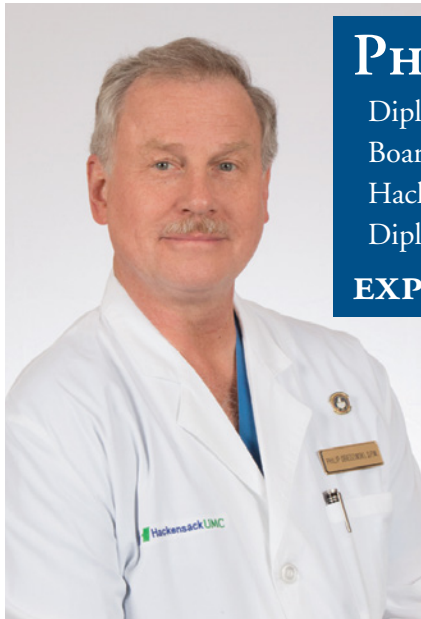
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# Finding the Best Pediatric Experts for Your Hospital-Based Pediatric Cases

Randi Colclough RN, BSN, CPN and Riva Kamat MD, FAAP

**Keywords:** pediatric nurse expert, pediatric nurse certifications, pediatric expert, pediatric hospitalist, American Academy of Pediatrics, FAAP, CPN, Certified Pediatric Nurse, pediatrician, PALS, NICU

*Pediatric malpractice cases are more infrequent than adult cases but tend to be more complex and catastrophic. Legal nurses need to know how to find the correct experts for pediatric medical malpractice cases; they need to be aware of multiple types of pediatric nurse experts and pediatric physician experts. This article will assist the LNC in identifying experts for inpatient pediatric cases.*

It's Friday afternoon and your attorney client hands you a case for review. She needs you to locate a pediatric expert for a case. Here is what you need to know to get started.

There are many types of pediatric cases. Some are hospital-based and some are office-based. Do you need a nurse or physician? What is the setting of the

case? Is it an office setting/outpatient facility or an inpatient hospital? In an outpatient setting, the pediatric nurse and physician will see the patients. For a hospitalized child, you may need to find a pediatric floor nurse and pediatric hospitalist. For the purposes of this article, we will be focusing on the inpatient hospital-based pediatric cases.

If the case involves a pediatric nursing deviation of Standard of Care (SOC), one of the most important expert qualifications is practice as a pediatric nurse clinician in a tertiary care setting. Is this a large children's hospital or academic setting where all levels of care are provided for children? Why is this important? An acute tertiary setting provides a clinician an increased

exposure to a variety of sick pediatric patients. A clinician in a large metropolitan hospital would be exposed to a diverse pediatric population with a wide variety of diagnoses.

Community hospitals do not have the resources to care for very sick children, so most critical cases are transferred to a tertiary care setting with a pediatric intensive care unit (PICU). For example, a sick newborn infant comes in to a community hospital with a fever and rash, and his mother reports the baby has not been eating well and is very lethargic. Any infant under one month of age with a fever requires a full septic workup. This is done to rule out any possibility of meningitis or infection. The workup would include blood work, intravenous fluids, intravenous antibiotics and a spinal tap. The medical team would probably have to refer this case to a higher level of care, preferably at a children's hospital, because an infant with this presentation can become very ill and need specialized care very rapidly. A child requiring specialty care, such as infectious disease, pediatric surgery, or pediatric gastroenterology, is best served by a children's hospital offering these and other sub-specialties.

## NURSES

The pediatric nurse is a registered nurse who specializes in the care of infants, children, and adolescents. This nurse is responsible for bedside hospital nursing and may care for children who have chronic needs such as children with feeding tubes, ventricular shunts, or tracheostomies. Practicing clinical pediatric nurses who work in a hospital setting know how to care for hospitalized children. They give medication, monitor correct dosages of that medication, take and monitor vital signs and provide physical exams. In addition, they draw blood, interpret lab results, start and maintain IVs. Hospital-based nurses provide ongoing evaluations of the patient throughout the day for

## *There are two certifications that make a nurse expert more qualified as a pediatric specialist: PALS (Pediatric Advanced Life Support, and CPN (Certified Pediatric Nurse).*

any changes in condition or status. They bring resources to the bedside if a patient's status changes by notifying appropriate clinicians.

It is important to look for a pediatric nurse with proficiency in hospital-based nursing standards of care. This would likely be someone with an academic appointment, affiliated with an academic center providing education to nurses, medical students, residents, NPs, and therapists. Finding a nurse with a BSN (Bachelor of Science in Nursing) is important, since this is becoming a requirement for nurses in many hospitals.

## CREDENTIALS

There are two certifications that make a nurse expert more qualified as a pediatric specialist: PALS (Pediatric Advanced Life Support, <http://www.heart.org/>) and CPN (Certified Pediatric Nurse). PALS is a two-day course designed by the American Academy of Pediatrics (AAP) and the American Heart Association (AHA) for use by health care providers. PALS training includes pediatric-specific Basic and Advanced Life Support. PALS also covers evaluation and treatment of respiratory emergencies, cardiac emergencies, and assessment for all degrees of shock. The CPN exam, from the Pediatric Nursing Certification Board (<http://www.pncb.org/ptistore/control/exams/pn/index>), validates knowledge and expertise of pediatric nurses beyond basic RN licensure. Eligi-

ble RNs must have a minimum of 1800 hours of pediatric nursing experience.

One common misconception is that pediatric nurses are qualified to review neonatal cases. Pediatric and neonatal nursing are two distinct fields of nursing. A pediatric nurse is not a newborn intensive care unit (NICU) nurse. These fields of practice are vastly different, so the standards of care are different.

Neonatal nursing is a subspecialty of nursing that works with newborn infants born with a variety of problems such as prematurity, birth defects, infection, cardiac malformations, birth injuries, and surgical problems. The neonatal period is defined as the first month of life; however, newborns hospitalized in a NICU are often sick for months. The NICU is a closed unit that only allows newborns from birth until discharge. A former NICU newborn who becomes ill after discharge home would be readmitted as a pediatric patient.

## PEDIATRICIANS

An outpatient pediatrician with a very sick child will send the child to the emergency room for further studies. For example, if the outpatient pediatrician is seeing a 3-year-old boy for a fever of 101°F and severe right-sided abdominal pain, the child will be referred directly to the emergency room. If a child is seen on an outpatient basis for uncomplicated indirect hyperbilirubinemia, the outpatient pediatrician would send the child

## For a pediatric physician expert, board certification is critical. Fellow of the American Academy of Pediatrics (FAAP) is the standard certification.

for admission to the hospital for phototherapy. The outpatient pediatrician may relinquish his care to a hospital-based physician, a pediatric hospitalist.

Pediatric hospitalists assume care only for patients in the hospital. In this example, a pediatric hospitalist would admit this infant for phototherapy and follow the patient until discharge. Hospitalists may be involved with teaching residents and medical students. In many instances they hold academic appointments, give lectures, and conduct research.

### CREDENTIALS

For a pediatric physician expert, board certification is critical. Fellow of the American Academy of Pediatrics (FAAP) is the standard certification. Pediatricians must go through four years of medical school, three years of residency, then pass a pediatric board exam. The AAP Recertification, by the American Board of Pediatrics, is also vital to maintain certification. Many hospitalist programs have pediatric hospital medicine fellowship programs, though at the time of this writing there is no board certificate for pediatric hospitalists. A current Pediatric Advanced Life Support certificate (PALS) is also valuable.

As when searching for any expert, look for evidence of:

**Competence:** Competence comes with practice and experience. The legal nurse should ask, "Is this case within the scope of practice for this expert?" One of the best pieces of advice an expert

can follow is, "Stay in your sandbox," do not opine on cases that are outside your scope of knowledge and skill set.

As an example, consider birth injury. Birth injuries do not usually fall under the expertise of a pediatrician. These cases would best benefit from an obstetric, gynecologic, or neonatal physician expert.

**Communication skills:** Does the expert answer your phone calls, emails, or letters? How does the expert sound on the phone: friendly and knowledgeable, or arrogant and condescending? Remember, the jury may have to listen to this expert at trial. The expert needs to be persuasive and convincing to a jury.

**Availability:** Ask your expert about availability during the next few weeks or months. Most people know if they are going to be free to do the work or not. Is the expert available to travel, or do other work commitments take precedence?

**Reliability:** Will the expert show up for depositions or for trial, and produce reports on a deadline?

**Publishing and presenting at meetings:** A good expert publishes in journals and will present at local and national professional meetings.

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# Choosing the Right Dental Expert Witness for a Dental Malpractice Case

Lee M. Whitesides DMD, MMSc.

**Keywords:** Dental expert, Dental implant, Dentistry, Dentist, Dental specialties, Dental accreditation, Oral, Maxillofacial

*Choosing a dental expert for a case can be a difficult process. The field of dentistry is populated with generalists and specialists with considerable overlaps in patient care, especially when dental implants are involved. By knowing what types of dental professionals are available the CLNC is able to better choose the appropriate dental professional for their client. When choosing a dental professional as an expert the CLNC must consider the potential expert's qualification, certification, publications, and experience.*

**D**entistry is defined as the evaluation, diagnosis, treatment, prevention and/or treatment of diseases, disorders and/or conditions of the oral cavity, maxillofacial area and/or the adjacent associated structures and their impact on the human body (ADA, n.d.). This American Dental Association (ADA) definition, although accurate and exhaustive, may not provide Legal Nurse Consultants (LNC) with the information necessary to choose the correct dentist to evaluate a case.

Finding the right dental expert can be a complicated process. Dentistry, like medicine, is divided into many specialties with considerable overlaps in patient care. Securing the right dental specialist for your client's case requires knowing how to best use his or her knowledge and experience to advocate for your client. The right dental expert will save your client time and money, and provide the legal team with the best possible chance of winning.

## DENTAL SUBSPECIALTIES

The first step in choosing the right dental expert for your client is to know what types of dental professionals are available.

The vast majority of dental professionals are general dentists. There are nine ADA recognized specialties in dentistry. (Table 1). General dentists are permitted to practice comprehensive dentistry while specialist are devoted to performing only those services/procedures germane to their specialty. There is con-

siderable overlap of services rendered by dental specialist, especially in the field of dental implants.

The educational path for dentistry is similar to that of medicine. After completing required undergraduate curriculum courses (typically earning a degree), the individual enters a 4-year dental school curriculum. Upon successfully completing the dental school curriculum, satisfying department requirements, and passing national boards parts one and two, the individual is awarded either a Doctor of Dental Surgery (DDS) or Doctor of Medical Dentistry (DMD).

Degree in hand, the new dentist must pass the ADA Commission on Dental Accreditation (CODA) license exam to become eligible to sit for a clinical regional board exam. Regional testing agencies (Table 2) develop and administer the clinical exam. To obtain licensure in most states one simply must pass the appropriate clinical regional board exam. Some states impose additional requirements to obtain a dental license. For example, Delaware requires its own clinical exam and postgraduate education or practical experience. In addition to an earned DDS/DMD, the State of New York requires a clinically-based postdoctoral general practice or specialty residency program of at least a year. California, Connecticut, and Minnesota offer licensure to dentists who have completed an accredited postgraduate education program of at least a year versus sitting for a regional clinical board exam.

Once state licensure requirements are satisfied, the dentist may practice as a general dentist or enter into a residency program for one of the nine recognized specialties. Some dentists elect to seek additional training in general dentistry residency programs without other specialization. These programs are known as general practice residencies (GPR) or advanced education in general dentistry (AEGD). The GPR and AEGD pro-

Table 1

Dental Specialty	National Board Website
Dental Public Health	<a href="http://www.aaphd.org">www.aaphd.org</a>
Endodontics	<a href="http://www.aae.org">www.aae.org</a>
Oral & Maxillofacial Pathology	<a href="http://www.abomp.org">www.abomp.org</a>
Oral & Maxillofacial Radiology	<a href="http://www.aaomr.org">www.aaomr.org</a>
Oral & Maxillofacial Surgery	<a href="http://www.aaoms.org">www.aaoms.org</a>
Orthodontics & Dentofacial Orthopedics	<a href="http://www.americanboardortho.com">www.americanboardortho.com</a>
Pediatric Dentistry	<a href="http://www.abpd.org">www.abpd.org</a>
Periodontics	<a href="http://www.perio.org">www.perio.org</a>
Prosthodontics	<a href="http://www.abpros.org">www.abpros.org</a>

Table 2

ADA Clinical Testing Agencies	Website
Council of Interstate Testing Agencies	<a href="http://www.citaexam.com">www.citaexam.com</a>
Central Regional Dental Testing Services	<a href="http://www.crds.org">www.crds.org</a>
Northeast Regional Board of Dental Examiners	<a href="http://www.nerb.org">www.nerb.org</a>
Southern Regional Testing Agency, Inc.	<a href="http://www.srta.org">www.srta.org</a>
Western Regional Examining Board	<a href="http://www.werb.org">www.werb.org</a>

Table 3

Dental Implant Organization	Website
American Academy of Implant Dentistry	<a href="http://www.aaid-implant.org">www.aaid-implant.org</a>
American Academy of Osseointegration	<a href="http://www.osseo.org">www.osseo.org</a>
International Collage of Oral Implantologist	<a href="http://www.icoi.org">www.icoi.org</a>

grams are typically hospital- or dental school-based.

Upon completing a specialty residency training program, the dentist may be referred to as a specialist. While each of the nine dental specialties has a governing board, board certification is not a requirement for specialist practice. Each state has different continuing education requirements for dentists to maintain a professional dental license.

## DENTAL IMPLANTS

To those unfamiliar with dentistry the field of dental implantology is often confusing. The line between general dentist or specialist is often blurred depending on the skill of the dental professional,

training, and the individual patient's case complexity. This makes choosing the correct dental expert for your client's dental implant case considerably more difficult than one may suspect.

Dental implants are titanium root form structures which are implanted into the patient's bone (surgical phase). After a suitable time for healing during which the bone and the implant chemically and mechanically bond, in a process known as osseointegration, the implant is restored with an abutment and crown (restorative phase).

The surgical implant placement can be done by an oral surgeon, periodontist, general dentist, or prosthodontist. The restorative phase of the implant process

is performed by the general dentist or prosthodontist. Generally, more complex cases are done by specialist. Some highly trained general dentists provide quality comprehensive care with complex treatment plans.

Dental education in dental implants is quite varied. Most dental schools provide students with some basic knowledge and how implants should be employed in patient care. Postgraduate training in oral surgery, periodontics, prosthodontics, GPR, and AEGD programs provide varying levels of dental implant training and instruction. Dentists who have completed their formal education and wish to expand their knowledge of dental implants have a plethora of dental implant training courses of varying degrees of difficulty available. There are three dental implant organizations recognized as leaders in dental implant training and continuing education (Table 3).

## EXPERT SELECTION

Many factors must be considered in choosing a dental professional as an expert. These factors include, but are not limited to: qualification, certification, publication, and experience (Abdel-Fattah, 1994 & Hawkins 2005).

Initially, consider the potential expert's qualifications. A detailed review of the curriculum vitae (CV) will be essential.

Plan on examining and verifying the potential expert's undergraduate and dental school degree as well as verifying an active, unrestricted dental license. Additional consideration should be focused on the dental professional's experience and continuing education relevant to the client's case.

Board certification of the potential expert witness is recommended. Although passing a specialty board is not necessary for the specialist to practice, it is seen as a minimum level of competency within a given specialty.

*Board certification of the potential expert witness is recommended. Although passing a specialty board is not necessary for the specialist to practice, it is seen as a minimum level of competency within a given specialty.*

Failure of board certification may make the expert witness appear less qualified for the judge and jury. Lack of board certification will be easily discovered and exploited by opposing counsel.

Publications and presentations by your potential expert relating to the type of case are important. Publications represent an elevated level of knowledge and degree of understanding of a particular topic for a patient's condition. Publications in peer-reviewed journals are preferred over non-peer-review periodicals. Presentations to fellow dental professionals on a topic related to the case demonstrate to the court that your potential expert is not only a leader in the field but also demonstrates opinions relevant to the profession.

Experience as an expert witness is preferred. Acting as an expert witness requires a special skill many dentists may not possess. The expert must be knowledgeable and intelligent while presenting as humble and likable. A strong expert witness is able to educate the judge and jury on the clinical details of the case in terms all will understand. The effective expert is an excellent communicator who speaks to the judge and jury while explaining standard of care as it relates to the case (Abdel-Fattah, 1994; Hawkins 2005).

Lastly, when selecting a potential dental expert witness, spend time interviewing the potential expert witness to ascertain if the dentist is a good fit for the case and if any conflicts of interest are present. Qualification, certification, publication,

and experience all are important, but if in your opinion the potential expert is not up to performing in the role, move on to consider another. The initial interview should also be the time when expected services and fees are discussed.

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## OTHER RESOURCES

1. <http://www.aaid-implant.org>
2. <http://www.ada.org/en/education-careers/careers-in-dentistry/dental-specialties/specialty-definitions>
3. <http://www.icoi.org>
4. <http://www.osseo.org>



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# Frontline Nurses: Ethical and Legal Considerations of Disaster Preparedness.

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**Keywords:** disasters, disaster law, disaster ethics, disaster nurse volunteers

*Historically, nurses have responded quickly to public health emergencies. Registered nurses are consistently reliable responders to disaster incidents (ANA, 2015). The 2013 Boston Marathon bombing, Hurricane Katrina, and Superstorm Sandy brought to light how any one of us, at any time, may be called upon to assist those who fall victim to public health disaster incidents. Disaster incidents are worldwide phenomena that affect thousands each year. In the face of a disaster, a nurse's decision to act or not to act becomes imminent (WHO, 2009). Given the unique nature of disaster threat, helping nurses understand basic ethical and legal issues regarding disaster management will ensure a well-informed and well-prepared nursing workforce. Understanding these concepts can help prepare legal nurse consultants if they are involved with litigation concerning disaster preparedness.*

*This article presents a general overview of nurses' roles in disasters and examines the ethical and legal implications of nurses serving in disaster incidents with a strong focus on disaster assistance at the community level. Specifically, it addresses:*

*1) a brief history of disaster preparedness, 2) ethical considerations in disaster nursing, 2) legal considerations, 3) agency support for nurse volunteers. 4) benefits of volunteerism.*

## INTRODUCTION

Disaster incidents are generally divided in two categories: natural and man-made. Natural disasters include hurricanes, tornadoes, hailstorms, cyclones, blizzards, droughts, floods, mudslides, avalanches, earthquakes, epidemics, lightning-induced forest fires, tsunamis, thunderstorms, lightning, and extreme heat and cold (DHHS, 2010). Man-made incidents include explosions, bombings, fires, civil unrest, terrorism, nuclear attacks, and chemical, biological, or radiological incidents. They may also include transportation incidents, structural collapse, airplane crashes, radiological accidents and water supply contamination (DHHS, 2010). In 2011, there were 81 such disasters in the United States, with an average of 34 disasters each year since 1953 (Hall, 2011).

The disaster cycle is generally divided into four phases: preparedness, response, mitigation, and recovery. Nurses serve in all four phases of the disaster cycle, each phase with implications for practice. Therefore, becoming aware of medical, ethical, and legal implications is crucial. Nurses who choose to volunteer in a disaster incident are better able to keep themselves and patients safe while keeping these principles in mind.

## HISTORY OF DISASTER PREPAREDNESS

A disaster is defined as a situation where normal means of people's support and dignity have failed due to a natural or manmade catastrophe (Wynd, 2006). The amount of destruction, morbidity, mortality, and displacement depends on the magnitude of the incident. Property damage due to catastrophe in the United States (US) has been doubling about every seven years over the past forty years (WHO, 2009). The second most-costly incident in the history of the US was Superstorm Sandy, with an estimated



cost of \$44 billion (FEMA, 2015). The cost in terms of human suffering is immeasurable, and the coordination of efforts to respond to such incidents rests largely with government agencies.

The federal government has provided disaster relief in one form or another since the early 19th century. The Congressional Act of 1803, providing assistance to a New Hampshire town following an extensive fire, is considered the first piece of disaster legislation in US history. Over the next century, ad hoc legislation was passed more than 100 times in response to hurricanes, earthquakes, floods and other natural disasters. Laws unique to each disaster authorized financial assistance to victims and both personnel and equipment to assist in recovery and cleanup (FEMA, 2015).

In 1950, Congress passed the Disaster Relief Act, the nation's first comprehensive federal disaster relief law. Once the president declared a locale overwhelmed by natural catastrophe, federal aid could be provided in the form of equipment, supplies, facilities, personnel and other resources. The act also stipulated assistance could be distributed through the Red Cross. The Housing and Home Finance Administrator (HHFA) is charged with coordinating federal relief efforts (Hogue & Bea, 2007).

The Federal Emergency Management Agency (FEMA), part of the Depart-

ment of Homeland Security, has the responsibility of coordinating the federal government's response to natural and manmade disasters. FEMA is charged with providing both immediate and long-term assistance to local and state governments as well as individuals. Throughout its thirty-year history, FEMA has been synonymous with the word disaster (FEMA, 2015).

## ETHICS: NURSING IN AN EXTREME DISASTER

The American Nurses Association (ANA, 2015) *Code of Ethics for Nurses with Interpretative Statements* (the Code) articulates the ethical standards to be used by nurses to guide "ethical analysis and decision-making" (ANA, 2015) and retains the nine provisions of the Code from 2001. It discusses these foundational provisions within a contemporary social context and updates a glossary of terminology. The ANA clearly states that regardless of circumstances, nurse performance is to adhere to the Code that explicates the ethical commitment of the nursing profession to society (ANA, 2015).

According to The Center for Health Policy at Columbia University School of Nursing (2008), although the ethical provisions guiding nursing actions remain the same, the specific applications of the ANA ethical provisions are influenced by the realities of nursing engagement (ANA, 2008). For example, an *extreme disaster* may cause resource limitations and/or environmental barriers. Ethical principles dictating optimal care delivery remain unchanged, yet responders may adjust care protocols when an extreme disaster is declared.

An *extreme disaster* is defined by system, institutional, or governmental authorities working as an "incident command structure" (ICS) (ANA, 2008, p.12). The ICS makes the *extreme disaster incident declaration* when available manpower, resources, and/or logistics

## When care demand may far exceed ability to meet commonly accepted care standards, nurses will base judgments and performance on principles of nursing knowledge, skill, and the Code of Ethics.

are insufficient and actual or potential excessive casualties and/or injury are anticipated (ANA, 2008).

During an extreme disaster, the ICS may issue a directive to provide care delivery in a utilitarian care framework, which seeks to reduce the number of casualties and injuries by delivering “the greatest care for the greatest number” (ANA, 2008, p. 14). This delivery management philosophy alters care objectives from what care is best for each victim to what care is sufficient to treat as many victims as possible (ANA, 2008). The utilitarian plan references the ANA Code of Ethics for Nurses. The time line for the utilitarian model is an ICS decision.

The nurse’s role in an evacuation shelter continues to adhere to both the ANA Scope of Practice (2010) and the ANA Code of Ethics for Nurses (2015). The ANA Scope of Practice recognizes that the patient(s) assigned can be an individual, family, group, community, or population (ANA, 2015). As circumstances allow, nurses will strive to protect patient rights, values, and dignity; honor patient cultural and spiritual beliefs; and maintain confidentiality in communication and documentation. During instances of system or technology failure, nurses will base judgments and performance on principles of nursing knowledge, skill, and the Code (World Health Organization and International Council of Nurses, 2009).

The first provision of the Code (2015) addresses a patient’s right to be shown

respect and offered optimum feasible care. In addition, the nine provisions collectively emphasize the four core principles of modern bioethics (Beauchamp & Childress, 2013): autonomy, beneficence, nonmaleficence, and justice. A discussion of each of these four principles follows.

*Autonomy* refers to a patient’s right to “self-rule ...,” to be “free from controlling influences ...,” and to make “meaningful choices ...” (Beauchamp & Childress, 2013, p.101). Patient autonomy is the underlying principle of informed consent. Thus, during a disaster, a competent adult patient has the right to receive adequate information to decide whether to accept or refuse care in a disaster shelter. If a patient is not competent or non-communicative, and a power of attorney, legal guardian, or next of kin is absent, the patient receives the optimum feasible level of care.

*Beneficence* addresses the intent to “do good.” Good patient care is interpreted as care that will benefit the patient. A “good” level of service equates with the highest level of care feasible. In disaster situations, assessment of care need and access to healthcare personnel, equipment, and supportive resources contribute to determining the maximum feasible level of care. Throughout disaster service the maximum level of care rendered may vary. However, at all times, the highest standard of care that is feasible to administer is the ethical expectation.

*Nonmaleficence* is the obligation “... to abstain from causing harm” (Beauchamp & Childress, 2013, p.150). In

a disaster situation, the nurse is not to intentionally place a patient at risk or deliberately cause patient harm. The conscious intent to cause patient harm and/or risk is contrary to ethical healthcare practice and may result in ethical and/or legal repercussions.

*Justice* refers to “fair, equitable, and appropriate distribution” (Beauchamp & Childress, 2013, p. 250). Disaster care does not discriminate. Gender, race, religion, age, and/or financial status do not determine access. In the US, disaster care is given on a first-come, first-served basis. Once care has begun for a presenting patient, “care and attention” for that particular patient will not be diverted unless the patient is transferred or referred (ANA, 2008, p. 10). Patient care is to be delivered equitably. The rules of triage apply in a disaster situation.

### OTHER ETHICAL RULES WITHIN THE ANA CODE OF ETHICS FOR NURSES (2001): DISASTER APPLICATION

*Patient privacy and confidentiality* are both ethical and legal imperatives. In addition, the nurse must initiate *environmental controls*. For example, attention to patient temperature management, water quality, and crowding are within the ethical scope of nursing. *Professional collaboration* is also an ongoing ethical expectation.

*Patient safety* is paramount in all service situations. At no time during a disaster are nurses required to place themselves or their patients in an unsafe situation. Finally, during a disaster, the nurse is accountable for direct care rendered.

In some disasters, care demand may far exceed ability to meet commonly accepted care standards. Existing or emerging resource scarcity can limit the scope of care delivery. Environmental conditions may present barriers to quality care delivery. Disaster contingency protocols

and policies for these situations are developed at the local level in cooperation with the Department of Health and Human Services using disaster standards from FEMA guidelines (US Homeland Security, 2008, p. 5).

The United Nations Development Program reports that by 2050, forty-six percent of the world's population will live in areas vulnerable to natural floods, earthquakes, and severe storms (Hassmiller & Stanley, 2012, pp. 509-510). For nurses to have a key role in preparing for a public health emergency, it is critical that they know how to respond competently. Professional collaboration is key. Participating in drills, manpower readiness planning, shelter readiness programs, evacuation route mapping, identifying vulnerable populations, and evacuation strategies and tactics for both the well and the infirm are some of the topics addressed in disaster preparation programs. The legal nurse consultant may be called upon to render an opinion on the effectiveness of these guidelines and protocols in an actual disaster situation.

## LEGAL CONSIDERATIONS IN DISASTERS

Nurse volunteers who engage in disaster preparedness have many legal protections. Emergency management law in the US is rooted in all three levels of government—federal, state, and local. Immunities allow protection for public health emergency care workers under certain circumstances. The National Fire Protection Agency and post-9/11 federal law have created new standards that apply to all emergency managers. The availability of federal funds for emergency management is contingent on having defined criteria for state and local emergency management performance (US Legal, 2014).

The Good Samaritan Rule refers to someone who renders aid on a voluntary basis in an emergency to an

injured person. The intent is to diminish an individual's reluctance to help others in distress by removing fear of legal consequences. Usually, a volunteer who comes to the aid of an injured or ill person who is a stranger is protected by this law. In instances involving an unconscious person, an aid-giver may help on the basis of implied consent. However, if the victim is conscious and responsive, the aid-giver should ask permission to help.

Some states offer immunity to Good Samaritans. However, acts of negligence could result in a claim of negligent care if the injuries or illness were made worse by the volunteer (US Legal, 2014). The circumstances for successful invocation of the Good Samaritan doctrine are (1) the care that was rendered was performed as the result of an emergency, (2) the initial emergency or injury was not caused by the person invoking the defense, and (3) the care was not given in a grossly negligent or reckless manner, i.e., by exceeding scope of practice, education, or experience. Statutes typically don't exempt a Good Samaritan who acts in a willful and wanton or reckless manner in providing the care, advice, or assistance (FEMA, 2014).

### The Volunteer Protection Act (VPA)

The VPA also provides certain protections to volunteers, nonprofit organizations, and governmental entities in litigation based on the activities of volunteers. Like the Good Samaritan Act, it generally eliminates the liability of an individual volunteer, if the individual was acting within the scope of his or her responsibility to the eligible organization and was not grossly negligent or intentionally trying to cause harm. The act provides protection to the individual volunteer only; it does not protect the liability of nonprofit organizations or government agencies (Legal Match, 2014).

Protection for volunteers does not cover damages caused by motor vehicles, violence, hate crimes, sexual offenses, and actions while under the influence of substances such as drugs or alcohol. It also does not protect those who violate the civil rights of others. This act provides immunity against claims that the volunteer caused harm by his or her "simple" or "ordinary" negligence. A volunteer may still be liable for any injury caused by gross negligence, willful or criminal misconduct, or conscious and flagrant indifference to the victim's rights or safety. Some states enact legislation that requires a condition of a volunteer's immunity under the act, and requires nonprofit organizations to provide a financial source of recovery for potential victims who are harmed by its volunteers.

There are exceptions to the VPA. If the laws of a state limit volunteer liability subject to one or more of the following conditions, it is not construed as inconsistent with this section:

- State laws requiring a nonprofit organization or governmental entity to adhere to risk management procedures and mandatory volunteer training
- State laws that make an organization or entity liable for the acts or omissions of its volunteers in the same manner an employer is liable for the acts or omissions of its employees
- State laws that set limitations of liability inapplicable if the civil action was brought by an officer of a state or local government pursuant to state or local law
- State laws that have limitation of liability only if the nonprofit organization or governmental entity provides a financially secure source of recovery for individuals who suffer harm as a result of a volunteer's actions.

Separate standards for different types of liability exposure may be specified (Congressional Record, 1997).

## Model State Emergency Health Powers Act of 2005

This act was intended to guide states in how to deal with bioterrorism (Watkins, 2006). The Emergency Health Powers Act provides protection from liability for volunteers and employees of the state, counties, and municipalities. It addresses protection in events such as deaths, injuries, and property loss or damage occurring during a public health emergency or during training and preparation exercises. This act does not include cases of gross negligence, willful misconduct, or a crime or fraud (Gostin & Hodge, 2003). The topics addressed in this act include:

- + property management
- + data surveillance
- + public communications
- + exchanging health information
- + tracking prescriptions
- + protecting individuals in examinations, vaccinations, quarantine, and isolation

Because the power to act to preserve public health is reserved primarily for states, this act is designed for state, not federal, regulation. It provides individual rights and freedoms on a state-by-state basis (Gostin, et al., 2002).

## Public Readiness and Emergency Preparedness (PREP) Act

The PREP Act authorizes the Secretary of Health and Human Services to issue a declaration that provides immunity from tort liability for claims of loss, death, physical, mental, or emotional injury, illness, disability, or fear thereof that are related to administration of covered countermeasures (except willful misconduct). If willful misconduct is related in any way to administration or use of countermeasures to diseases, threats, and conditions determined by the Secretary to constitute a present, or credible risk of a future public health emergency, the acting agency represen-

## DISASTER PREPARATION FOR NURSE VOLUNTEERS (FREE PROGRAMS)

- *ARC Introduction to Disaster*  
[http://www.redcross.org/flash/course01\\_v01/](http://www.redcross.org/flash/course01_v01/)
- *Community Emergency Response Teams*  
<https://www.fema.gov/community-emergency-response-teams>
- *FEMA Independent Study Program: IS-22 Are you Ready? An In-depth Guide to Citizen Preparedness*  
<http://training.fema.gov/EMIWeb/IS/is22.asp>
- *Introduction to the Incident Command System for Healthcare/Hospitals Command System (HICS)*  
<https://training.fema.gov/is/courseoverview.aspx?code=is-100.hcb>
- *Introduction to Mental Health Preparedness for Disasters*  
<http://sph.unc.edu/nciph/mental-health-prep/>
- *Medical Reserve Corp*  
<http://www.medicalreservecorps.gov/volunteerFldr/AboutVolunteering>
- *Psychological First Aid: Field Operations Guide (MRC)*  
[http://www.medicalreservecorps.gov/File/MRC\\_Resources/MRC\\_PFA.doc](http://www.medicalreservecorps.gov/File/MRC_Resources/MRC_PFA.doc)
- *Psychological First Aid: Helping Others in Times of Stress*  
[http://www.redcross.org/flash/course01\\_v01/](http://www.redcross.org/flash/course01_v01/)
- *Ready.Gov*  
<http://www.ready.gov//business>

tatives are not protected from liability. The immunity applies to entities and individuals involved in developing, manufacturing, testing, distributing, administering, and using such countermeasures. The Secretary's declaration includes, among other things,

- + countermeasures covered by the declaration
- + category of diseases, health conditions, or health threats for which administration and use of the countermeasures are recommended
- + effective time period of the declaration
- + population of individuals receiving the countermeasure
- + limitations, if any, on the geographic area for which immunity is in effect
- + limitations, if any, on the means of distribution of the countermeasure

- + any additional persons identified by the Secretary as qualified to prescribe, dispense, or administer the countermeasures

The Act also authorizes a fund in the United States Treasury to provide compensation for injuries directly caused by administration or use of the countermeasures covered by the Secretary's declaration (PREP, 2014). This is an important area for legal nurse consulting.

## NURSE VOLUNTEER OPPORTUNITIES

Volunteering can be one of the most rewarding nursing experiences. Volunteers make a difference in our communities every day by contributing their time, energy, and skills. The U.S. Department of Health and Human Services (MRC, 2008), the Agency



for Healthcare Research and Quality (AHRQ, 2008), and the Centers for Disease Control and Prevention (CDC, 2008) are continually improving emergency preparedness through their research efforts.

Most state and local public health emergency response plans encourage the participation of significant numbers of medical and public health volunteers to fill disaster victims' medical needs and provide necessary expertise should an emergency occur (Spain, Clements, De Raneri & Holt, 2012).

There are three major organizations that address health-related disaster relief efforts staffed by nurses: the Department of Health (DOH) Medical Reserve Corps (MRC), the Emergency System for Advance Registration of Volunteer Health Professionals (ESAR-VHP), and the American Red Cross. The ESAR-VHP maintains a registry of those willing to volunteer, categorized by current level of nursing employment. Legal scopes of duty are clearly outlined in federal and state laws.

Although the nurse's role during a disaster depends largely on the nurse's experience, specialty training, and interests, there are core skills needed to function in the context of disaster services (Stanley, et al., 2008). The federal government has played a major role in determining core skills for emergency preparedness. In 2007, Wayne Blanchard of FEMA's Emergency Management Higher Education Project led a group of researchers to develop core principles (Beauchamp & Childress, 2013).

The American Nurses Association states, "Nursing is the protection, promotion, and optimization of health and abilities, prevention of illness and injury, facilitation of healing, and alleviation of suffering through diagnosis, treatment of human response, and advocacy in the care of individuals, families, groups, communities, and populations (ANA,

2015)." The ANA's foundational document, *Nursing: Scope and Standards of Practice* (ANA, 2010), specifies sixteen standards of nursing processes and performance. Nurses should expect to practice within the full extent of their licensures, consistent with the rules and regulations of the State Boards of Nursing. Nurses who volunteer in disasters can also expect to apply principles of case management, episodic care, first aid, and psychological support (Spain, Clements, De Raneri & Holt, 2012).

Common roles are giving service in shelters and participating in mass immunization programs in response to biological attacks or infectious disease incidents. Shelters are buildings used when hospitals are no longer able to support needed medical care and patients must be transported to other areas for treatment. They may also be set up in an individual home to protect a family unit. Shelters generally either provide medical care to evacuation victims, or general sheltering. Mass immunization administration is coordinated through efforts by DHHS MRC. In the case of incidents involving a biologic public health disaster, emergency medication must be provided to the public in a timely manner. The federal government mandates that each jurisdiction in the United States develop a program for mass medication distribution of medication in a timely fashion (Deringer, 2011).

## AGENCIES FOR TRAINING AND CREDENTIALING

Credentialing is one means of protecting the public by ensuring the nurse volunteer meets basic standards. Most credentialing is mobilized through community partnerships. The assumption is that the more educated the workforce, the more likely they are to provide safe, effective, and efficient care.

The ESAR-VHP maintains a data bank of nurses who may not have specific disaster management training but who

may be able to serve in a large-scale emergency. The MRC and the American Red Cross (ARC) actively seek to prepare nurses who desire to serve during disasters. To ensure nurse and other volunteers' competence, several agencies offer programs for interdisciplinary teams (FEMA, 2010). To enhance the nation's capacity-building efforts and to provide a well-trained, well-functioning team of disaster response nurses, the DOH and ARC workforce preparation programs are free of charge.

Many of these programs are offered either on a local level or online. There are no required core competencies for MRC volunteers; however MRC units are encouraged to provide members with basic understanding of disaster management principals and volunteer responsibilities (MRC, 2014). Programs sponsored by the Department of Health often include information about how to protect yourself and others in disaster incidents, psychological first aid, incident management systems, and how to function in a mass immunization (e.g. prophylaxis operation).

Following completion the training courses, participants are considered part of a FEMA-approved citizen reserve corps, the emergency response team for the nation (MRC, 2014).

The American Red Cross (ARC) is a nonprofit organization that often works in collaboration with the DOH and provides a wide range of disaster management programs and humanitarian relief efforts nationally and internationally. As one of the nation's premier humanitarian organizations, the American Red Cross is dedicated to helping people in need throughout the United States and, in association with other Red Cross networks, throughout the world. This organization depends on the many generous contributions of time, blood, and money from the American public to support lifesaving services and programs (ARC, 2014).

## Disaster nursing service is one way professionals can act on their commitment to serving our society and communities in times of need.

### BENEFITS OF SERVING IN PUBLIC HEALTH DISASTERS

#### Professional Satisfaction

Disaster nursing service is one way professionals can act on their commitment to serving our society and communities in times of need. In the ANA's Nursing's Social Policy Statement: The Essence of the Profession, nursing is recognized as having a social contract with society that acknowledges the profession's willingness to act responsibly and in a manner mindful of the "public trust" (ANA, 2010).

#### Immunization Benefits

Disaster nurses who serve during an exposure emergency may require immunization protection. A benefit provided by many states includes the offer of protective immunizations to designated family members and significant others at the time one is called to service. This gesture is a reward for service and mitigates the disaster nurse's concerns of family members/significant others being vulnerable during the exposure emergency. This benefit is provided by both the American Red Cross and DOH programs for volunteers.

#### Work Release: Time, Salary, Work Compensation Coverage, & Return to Work

The ANA recommends an employer release policy for RNs who: 1) declare their commitment to a state/federal or other organized response team, 2) are educated and prepared in disaster nursing, and 3) are willing to serve during a designated disaster. The ANA document entitled *Work release during*

*a disaster - Guidelines for employers* specifies generally-accepted employer and employee responsibilities (ANA, 2015). This document is available through the website: <http://www.nursingworld.org/MainMenuCategories/Policy-Advocacy/Positions-and-Resolutions/ANAPositionStatements/Position-Statements-Alphabetically/Work-Release-During-a-Disaster-Guidelines-for-Employers.html>.

Generally policies require the requesting the RN to notify an employer of disaster nursing status, either upon hire or when disaster nursing education/preparation and commitment to a disaster service organization begins. The nurse must have the employer and employee agreement in writing. A "Work Release Policy for Disaster Nursing" is offered at the discretion of the employer and each element of the agreement is at the discretion of the employer.

### CONCLUSION

Preparedness should include consideration of potential legal and ethical nursing issues. Ethical considerations should be based on the spirit of ethical judgment that guides all nursing interventions. Nurses who are aware of basic legal principles and who seek training through disaster preparedness organizations protect themselves and the public. Nurses must act responsibly in all nursing venues, especially when dealing with victims of disasters.

**Disclaimer:** The content of this article offers select legal and ethical implications pertinent to disaster incidents. The information does not represent any

determination or policy of the Journal of Legal Nurse Consulting. This compilation is not intended to be exhaustive of all relevant legal authority and ethical scenarios that may be contextual. While every effort has been made to verify the accuracy of the brief summary of each legal authority presented, this resource is for informational purposes only and is not intended as a substitute for professional, legal, or other advice. Always seek the advice of an attorney or other qualified professional with any questions you may have regarding a legal matter.

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# My Expert is Better than Your Expert: Tips for LNC Expert Witness Location

Sarah M. Kaminski, RN, LNC

**Keywords:** expert medical witness, expert nursing witness, vetting expert witnesses

*Attorneys depend on others to help them locate expert witnesses for their cases. LNC's are most qualified to locate experts because they are familiar with the medical field and standards of care, and have interacted with all types of medical professionals in their clinical practice. Locating experts is a valuable service to offer attorneys, and is a profitable way for the LNC to develop his or her business. This article gives helpful tips for any LNC who desires to become more adept at locating the best experts for his attorneys' cases.*

## PURPOSE OF EXPERTS

One of the most valuable services a legal-nurse consultant can provide for attorney clients is locating expert witnesses.

Most medical liability cases are decided based on testimony of physician expert witnesses because the facts are complex, and the jury require an explanation from an expert to understand them. The jury considers the expert's opinions in light of

the facts of the case, and decides which expert or experts have set forth the standard of care that should have been practiced by the defendant physician.

An expert needs to answer two critical questions in his testimony:

1. Did the defendant physician follow the standard of care? The standard of care is what a physician with the same

or similar experience and expertise would do in the same or similar circumstances.

2. If the defendant physician failed to follow the standard of care, did that failure (negligence) cause harm or injury to the patient?

Finding the most appropriate expert is crucial to the outcome of medi-

cal-malpractice cases. According to The American Bar Association, “The outcome of trial often hinges upon the likeability, credibility, and communication skills of one or more star expert witnesses” (ABA Section of Litigation, 2012).

This is what is often referred to as the “Battle of the Experts.”

## A BIT OF HISTORY

The first recorded medical-malpractice case took place in England in 1374. A surgeon attempted to repair the traumatically injured hand of the plaintiff. She claimed he guaranteed to repair her injury for a reasonable fee, but her hand remained deformed after the surgery. The suit was dismissed due to an error in the complaint, but this case resulted in the judge setting principles that are still followed today: a physician should be held liable if a patient is injured as a result of negligence, but “if a physician exercised all due care, he would not be held liable even if he did not obtain a cure” (Bonezzi Switzer Polito & Hupp, n.d.).

In the first medical-malpractice case in the United States (1700s), the plaintiff claimed the surgeon operated on his wife in an unskillful and cruel way, causing her death. He claimed the surgeon said he would perform the surgery skillfully and safely. This case and the 1374 case both involved breach of contract, not medical negligence. (Bonezzi Switzer Polito & Hupp, n.d.).

In a 1769 case in England, the court set a standard that said a physician could only be held liable for medical malpractice if another physician testified the defendant had breached the standard of care. This served as the basis for how medical malpractice law was eventually developed in state courts in the United States. (Bonezzi Switzer Polito & Hupp, n.d.).

## STATE RULES

We still hear today of the locality rule, which originated in England in the late

1700s, and in the United States in the late 1800s. It stated an expert could only testify in a case if the defendant was from the same locality as the expert. Currently, a small number of states still adhere to this rule, which ends up defining the standard for medical care geographically, and allows for expert testimony to be barred if the expert is not from the same locality as the defendant. In some cases, this can protect physician communities whose practice is not consistent with national standards of care. Most physicians and attorneys alike believe this is an outdated rule, and should be dropped because physician practice should be measured by national standards of care. (Ginsberg, 2013).

According to a 2013 article written by Marc Ginsberg of The John Marshall School of Law, the following six states still adhere to the locality rule: Idaho, Tennessee, New York, Virginia, Arizona, and Washington. Each state has variations in application of the rule, so the LNC needs to research the particulars of the rule in each of these states (Ginsberg, 2013).

## DAUBERT AND FRYE

Though the admissibility of trial testimony is decided by a judge, LNCs will do a better job of locating appropriate experts if they are aware of the Daubert and Frye standards.

Daubert is a standard used by judges in federal courts to determine whether an expert’s testimony is relevant and reliable, and, therefore, admissible. The judge uses specific criteria to determine “whether an expert’s scientific testimony is based on reasoning or methodology that is scientifically valid and can properly be applied to the facts at issue.” (Legal Information Institute, n.d.)

The Frye standard holds that the court “must determine whether or not the method by which that evidence was obtained was generally accepted by

experts in the particular field in which it belongs.” The Daubert Standard supersedes the Frye standard except in a few states that still hold to the Frye Standard (Legal Information Institute, n.d.) The primary difference between the two standards is that Frye relies on general acceptance of the expert’s methods and techniques that led to his opinions. Daubert measures the reliability of an expert’s opinions scientifically.

Being aware of Daubert is important as we locate experts because we need to find experts who are able to provide opinions that are scientifically valid. This is especially critical when locating experts for the plaintiff, since the burden of proof is on the plaintiff. We also do not want to find experts who will say anything in deposition or trial testimony. It will potentially hurt our attorney’s case.

## TYPE OF EXPERT NEEDED

As much as is possible, it is important to match the credentials, experience, and expertise of potential experts with the credentials, experience, and expertise of the defendant physician. It is also helpful to look at the practice location of the defendant. For example, if the defendant practices in a small hospital or rural setting, it is usually not necessary to retain an expert from a large, well-known medical center. In the eyes of the jury, this may seem to be an unfair advantage to the defendant, and may create sympathy for the defendant, which takes away from the jury’s ability to objectively consider the facts of the case. It may also be more costly for the attorney than the case warrants. This is ultimately an attorney decision, yet the LNC who is aware of these details will do a better job of recommending appropriate experts for her attorney’s cases.

In cases involving nurse negligence, nurses are generally the ones who testify, though you may also need a physician to opine about causation. There are

some instances where a physician may be allowed to testify regarding nursing issues. In a July 2013 ruling by an Ohio court, a physician was allowed to testify “what the medically appropriate interactions should be between frontline nursing staff and a physician, and what the medical standards require of those interactions” (Expert Witness Guru, n.d.)

The facts of the case and location both have a bearing on whether a physician may testify to nursing standards of care.

## SPECIALTY EXPERTS

LNCs who consult on multiple cases will find at times that they need experts other than medical clinicians. For example, I worked on a case of a man in a nursing home facility who was left unattended, fell from his geri chair, became disconnected from his ventilator, and died. One of the issues we looked at was the fact that the internal alarms on the ventilators were not loud enough to be heard by the staff unless they were within a certain distance from the patient’s room. Rather than buying the correct external alarms (which functioned as amplifiers for the internal alarms), the facility took external alarms from old ventilators, left the old Velcro on them, and jury-rigged them to the new ventilators. They consistently had problems with the external alarms staying attached, or, if they fell off, staff failed to reattach them in a timely manner. We hired a ventilator expert, and an alarms expert who helped my attorney settle that case for a good amount.

I was reviewing a case for a business attorney where a large sum of money was at stake because a will was being contested. I reviewed medical records to help the attorney decide whether the deceased was competent at the time he had signed the will. There were too many complexities to sort through for my realm of expertise, and the attorney hired a forensic psychiatrist to review.

Another one of my attorneys hired a hospital construction and plumbing expert to review cases where patients were being exposed to a mycobacterium species coming from the hospital’s water system.

LNCs who assist with accident cases often need to find accident reconstruction experts.

There are myriad other possible types of experts you may need to locate, depending on the types of cases you are reviewing. In my experience, I have located experts with the following expertise: life care-planning, Medicare set-asides, corporate compliance, respiratory therapy, physical therapy, esthetics, mold and environmental issues, ERISA, and more.

Finding specialty experts is not exactly the same as finding medical experts. Many of these specialties have society websites, and that is a good place to start. Also, many of them advertise, or have their own or company web sites. Reading articles on the issues at stake in your case and then looking up the authors is a good way to find appropriate specialty experts. I encourage you to always use your creativity for locating the right expert. This process is challenging, educational, and rewarding.

## KEEP IN MIND

There are several important questions to keep in mind when searching for and considering potential experts:

1. Do they advertise? In general, I recommend avoiding clinical experts who advertise, though there are cases where you may not have that option. Or, there are times when you may find an expert by doing your own research, and then find that they also advertise. This happened to me recently, but the expert was involved in a thriving full-time clinical practice, and had the exact credentials needed for my case, and my attorney retained him. There are some

specialties of experts that would be very difficult to find if they did not advertise, e.g., a handwriting expert, a hospital construction expert, or an expert on medical equipment alarms.

2. What percentage of the cases this expert reviews are plaintiff and what percentage are defense? For most types of cases, it is ideal to find an expert who reviews an equal percentage of plaintiff and defense cases. Otherwise, he may appear biased toward one side or the other, which can hurt the credibility of his testimony. For instance, if an expert testifies in 90% of plaintiff cases, he may appear to not be objective in his reviews, and may even be labeled as a “hired gun” or a “professional witness.”
3. Is the expert clinically active in the specific area that involves the issues in your case? If so, what percentage of time does the expert spend in a clinical role vs. time reviewing cases and testifying?
4. How many years has the expert been in practice? I generally do not recommend experts who been in practice less than 5 years, but prefer someone who has been practicing at least 8-10 years. This may vary depending on the specialty, whether the expert completed a fellowship, and practice location.
5. Is the expert a good teacher who can do a good job of making the critical medical issues understandable to the jury? A friend of mine who is an internal medicine physician gave his expert testimony to the jury, and delayed his departure because he wanted to hear the testimony of the next expert who was a renowned cardiac surgeon. He ended up being very disappointed because though the surgeon was brilliant, he did a poor job of explaining the issues in terms a jury could understand or relate to, and his testimony was more detrimental than helpful to his side of the case.

## WHERE TO FIND EXPERTS

There are numerous resources to use for locating potential experts. Finding just the right expert can often feel like detective work, and can be challenging and fun! Word of mouth is always a good place to start. We all have friends who have developed expert portfolios, and might be willing to share, and we also know medical professionals who work in hospitals, offices, and clinics. We can start by asking those in our professional network for recommendations.

A great place to spend hours searching for experts is the internet: The following is a list of many potential sources, though not comprehensive:

1. Medical school or hospital websites
2. Physician practice websites
3. Physician and nursing professional society websites
4. Fellowship programs in a specialty area
5. Schools of Nursing faculty
6. Bar Association sites that have online directories of experts
7. Publication services-often have a cost attached, such as Elsevier Full Text Journals database
8. Online medical conference brochures
9. Expert witness directories such as JurisPro Expert Witness Directory, which is a free national online directory of experts in a multitude of categories
10. Verdict reports, though few are free
11. The Joint Commission website has a directory of nearly 18,000 health-care organizations
12. Website for US News and World Reports annual ranking of hospitals, and also Best Doctors
13. LinkedIn

14. AALNC's LNC Locator or other professional nursing organization's member locator, such as AANLCP

### 15. LNCEXchange

In addition to word of mouth and internet searching, I keep hard copies of medical and nursing publications and conference brochures to see who is writing and speaking on specific topics.

## VETTING POTENTIAL EXPERTS

It is important to vet an expert before recommending one to an attorney. Some LNCs do this in more detail than others. At a minimum, the LNC needs to check all the places where a physician or nurse has been licensed to see if the license has expired, or is up to date, and in good standing. Often a physician will let his license lapse in a state where he is no longer practicing, and there is no problem with this. If there are any disciplines or orders against a physician's or nurse's license, it is good to know what they are, and in most cases, it is wise to recommend that physician or nurse not be used as an expert.

The LNC also needs to check the American Board of Medical Specialties site to verify board certification. I always do an internet search on the expert to see if I can find testimony from other cases, and also to see if they have ever been named in a lawsuit. It is also a good idea to ask potential experts these questions, too, since the information is not always available on the internet. Searching for patient reviews is not necessarily a completely accurate assessment of a physician, but if there are several negative reviews, it is probably not a good idea to recommend that expert.

A few years ago, I gave the name of an expert I had used from a well-known medical center to a friend of mine who passed the name along to her attorney-client. Several months later the attorney contacted me to say he was

unable to use that expert because he was arrested for embezzling money from his employer. This was a sad situation because the expert was an excellent clinician and researcher, yet his reputation was tainted as a result of his criminal act. It was wise that this attorney vetted the expert before retaining him. When giving an expert's name to another LNC, it is expected that they and their attorney will vet that expert.

There are also fee-for-service resources that help with vetting experts such as: LexisNexis® Expert Research On-Demand, WestlawNext search technology called WestSearch, and TASAMed Expert Profile 360.

## SANCTIONING OF EXPERTS

LNCs who locate experts should be aware that in the past several years, testimony by experts has been scrutinized by their credentialing boards and specialty societies.

In the 1980s, the American Association of Neurological Surgeons (AANS) established standards of conduct as well as sanctions for improper expert testimony. The legality of this professional oversight has been challenged in the courts and affirmed. The Seventh US Court of Appeals ruled in 2001 in favor of the AANS suspending a surgeon for improper testimony.

In April 2005, the Association of Orthopaedic Surgeons (AAOS) adopted standards of professionalism for orthopaedic expert witness testimony. In 2012, a California orthopaedic surgeon won a lawsuit against the AAOS after they had suspended him for two years stating he had violated standards for orthopaedic expert witness testimony. The investigation and subsequent suspension of Dr. Graboff were due to a complaint filed with the AAOS by the defendant physician in the case. Dr. Steven Graboff, had turned in a "draft" report to the plaintiff's attorney who had

retained him. Without Dr. Graboff's knowledge or consent, the attorney removed the word "draft" from the report, and used the preliminary report to settle his case. The AAOS appealed, but Dr. Graboff won the appeal. He also sued the law firm and won. (Bal, 2009; American Academy of Orthopaedic Surgeons / American Association of Orthopaedic Surgeons, 2012)

I have observed in my practice of locating experts that neurosurgeons are some of the most difficult types of expert to retain for plaintiff cases. Often, if they are willing to review and testify on plaintiff cases, their rates are disproportionately high compared to other experts. I have to wonder if this is in some part due to fear of being sanctioned.

## TIPS TO REMEMBER

Remember it is important for you to develop a system for organizing and keeping track of your experts. This will make it more efficient the next time the need for a similar expert comes along. A system can be as simple as creating electronic file folders for different expert specialties, and saving CVs and fee schedules in them.

Remember that anything you put in writing or send to an expert can be discoverable. This can be difficult for behind-the-scenes LNCs to remember since our work is considered protected as attorney work product except when we are corresponding with an expert.

Remember that you are a valuable asset in helping attorneys prepare expert affidavits and reviewing the affidavits with experts before they are signed, notarized, and filed.

Remember, when you locate experts you are providing an invaluable service for your attorneys, and you should be compensated accordingly. Most expert witness location companies charge several hundred dollars just for providing the names of experts to an attorney. I believe

LNCs do a better job than most companies that provide experts, and LNCs make a strong statement about the value of their service by charging a reasonable fee for expert witness location.

Remember that locating experts is serious business. Experts represent a significant portion of the high cost of litigating cases. If you can help find the best experts for your attorneys' cases, it can develop into a long-term professional relationship for you with that attorney.

Remember that, "Trying a lawsuit is much more than letting the facts speak for themselves. Regardless of the size of the case, every trial involves real people with a real story. Expert witnesses can play an important role in telling the story" (Shaughnessy, 2010).

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# Nurse Experts: Are YOU Prepared for Cross-Examination?

Lori Combs BS, RN, LNC

**Keywords:** Expert, Testifying, Cross-examination, Nurse expert witness, Cross examination, Nurse expert, Impeach, Treatise, Opposing counsel

*For many Legal Nurse Consultants (LNCs), the thought of testifying at trial is extremely intimidating. No matter how effectively your attorney has prepared you for the cross-examination, the thought of the unknown can be terrifying. Even seasoned testifying expert know that extensive preparation is required to ensure you're well-versed with the case and prepared for cross-examination.*

**A**ttorneys use LNC expert witnesses to provide the jury with knowledge needed to arrive at the truth. Expert witnesses are individuals with a certain skill set or specialized knowledge to assist the jury

in understanding certain evidence and/or in determining a material fact. Legal Nurse Consultants' advanced knowledge makes them excellent expert witnesses to explain difficult nursing issues or deviations in nursing standards of care.

No matter how well prepared you are to testify as an expert, cross-examination by opposing counsel (OC) can be intimidating. There are many tricks and techniques the opposing side will use to try to discredit you and "poke you full of

## Opposing counsel has a strategy of how to discredit you: attacking potential weaknesses, like poor qualifications, lack of expertise, incomplete analysis, biases, and inaccurate work.

holes,” but if you can prepare yourself by thinking how they will cross-examine you, you might remain one step ahead and hold your ground.

Being aware of the basis for your testimony, OC has the opportunity to prepare an “attack.” You can rest assured the OC has a strategy of how to discredit you by attacking any potential weaknesses. Some of these are poor qualifications, lack of expertise, incomplete analysis of the case issues, expert biases, and inaccurate work (Park, n.d.). According to Jim McElhaney (2011), a litigation columnist at the American Bar Association Journal, there are eight tactics to cross-examine a witness, either expert or lay, to implement this strategy.

1. Opposing counsel may attempt to make the witness an OC witness. They will try to get the LNC to speak on their client’s behalf instead of head-on in an attack. This occurs when the OC switches the questioning around so that you, as the LNC witness, will be talking about their client in a manner that is more beneficial to their issues. For example, a plaintiff OC may ask you about the lifelong physical and emotional issues the plaintiff may experience due to injury, rather than why a nurse may have deviated from the standard of care. This form of questioning makes you a de facto OC witness, as you end up speaking for the plaintiff.
2. The OC may attack the field of Legal Nurse Consulting itself. This means you could expect questions such as:

- What exactly is a Legal Nurse Consultant?
- How do you become a LNC?
- How much training does it take to be a LNC?
- Do you have to complete state-backed tests to be an LNC?
- How did you obtain your certification? Is it accredited? By what entity?

These are some of the challenging questions the LNC must not only be prepared to answer to defend your position, but to educate as well.

3. OC may question the expert witnesses’ qualifications to be an expert. Guarantee that the OC will have done homework to investigate you, your qualifications as an expert, your previous testifying history, prior cases you have testified on, previous depositions, and any social media outlets you may participate in to determine if there is any way to impeach you and your testimony (Park, n.d.). Opposing counsel will be looking for information in your curriculum vitae such as experience, accomplishments, training, and awards to discredit you. The OC may find a higher level of achievement you did not reach in these areas. Be prepared for such questioning as to why you have not achieved these higher levels or when you will be preparing to do so. Be sure you know your CV and any publications or presentations you have made inside and out. Also, ensure that OC has the most current version of your CV.

4. The next tactic is trying to expose a witness’s bias. The OC may question you about your fees for appearing as an expert. The attorney may accuse you of being a biased witness because you charge a fee for being an expert. Just be aware that if you do engage a great deal of time as an LNC expert witness, be prepared to answer to the questions of having your knowledge be “for sale.” According to David Myerberg MD, JD (Personal Communication, June 23, 2015), an appropriate answer to any such questioning from opposing counsel is to state you are not being paid for your testimony, you are being paid for your time.
5. The OC may attempt to attack the facts you present. This tactic is particularly useful against the expert witness that has not done any investigation of the facts personally, but who relied solely on the reports of others. Be prepared for the OC to attack your explanation of the facts. This may not discredit you, but they will try to infer that since you did not gather these facts on your own, your explanation is not any more reliable than the facts you are explaining. It is imperative as the expert LNC you absolutely know the facts of the case and have the dates of the case down cold. The opposing counsel may most certainly “attack and run with” any mistake you may make.
6. Varying the hypothetical is an interesting tactic. This means that the OC will twist the facts around to see if they can trip you up on previous statements. The attorney may also think facts were left out and try to get you to include them, and/or try to get you to ignore facts already included. One thing to watch for here as an expert witness is that attorney does not add any unfactual information.

An experienced attorney is an effective wordsmith and will phrase questions

carefully. Therefore, you must likewise phrase your answers carefully. Listen very carefully, take your time to answer, and only answer the question posed to you. Ask for clarification if needed and request that compound questions be separated. Questioning can range from short yes-or-no questions, to open-ended questions, compound questions, and leading questions. Be careful with open-ended questions that you do not answer more than you need to, but be alert that it could be a good time to teach the jury.

In relation to the use of leading questions on cross-examination, the Federal Rules of Evidence state, "The Federal Rules of Evidence and the rules of evidence of all states, permit leading questions on cross-examination (Fed. Rules Evid. Rule 611(c); 28 U.S.C.A.). Simultaneously, the right to use leading questions is almost wholly denied [sic] the direct examiner. This is the

This tactic implies that if the LNC expert's opinions differ from those of other LNCs, they may be wrong. To prepare for this tactic, it is commonly suggested that no expert witness state that any written work is authoritative.

8. The last technique is to attack the expert witness head-on. This is the most dangerous and challenging technique of cross-examination. The LNC should not be intimidated here because the specialized knowledge an LNC expert brings to the stand can endure head-on attacks. If and when this occurs, do not allow your ego to intrude. Hold your ground, but cautiously, and never lose your temper or show arrogance. Furthermore, do not lose your credibility by arguing or quibbling over minute issues while on the stand (Expert Pages, n.d.).

*An experienced attorney is an effective wordsmith and will phrase questions carefully. Therefore, you must likewise phrase your answers carefully.*

fundamental distinguishing factor of cross-examination. (emphasis added) It is the critical advantage given [sic] the cross-examiner that must always be pressed" (Dodd, 2012, pg. 14 para. 1). A leading question will not suggest the answer; it will declare the answer within the question (Dodd, 2012).

7. The opposing attorney may try to impeach with a treatise. This means attacking with written works by a recognized authority that disagree with the LNC expert's opinion.

## CONCLUSION

There are many challenges in LNC expert witness work. The challenge of remaining professional and calm on the witness stand is more easily met with time and practice. Not knowing what techniques opposing counsel will throw at you is nerve-racking, to say the least, and preparation can be your best defense in these situations. Be prepared for opposing counsel's cross-examination tactics, and be seen as the expert LNC that you are.

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# Nurse Expert Witnesses and the Daubert Standard

Tyler Wilkinson, JD

**Keywords:** Daubert, Expert Witness, Nurse, Qualifications, Reliability, Testimony, Relevance, Evidence, Federal Rules of Evidence, Speculation.

*Nurses are often called as expert witnesses to testify on specialized topics, such as the delivery of health care services, standards applicable to nurses and patient observations, within their area of expertise. Expert testimony from nurses, however, is subject to the Daubert standard, which seeks to keep speculation, guesswork and junk science posing as expert testimony away from the jury. Nurse expert witnesses should be familiar with the Daubert standard and how it has been applied to testimony from nurses. This article provides an overview of the Daubert standard, how it is applied and what nurse expert witnesses can do to make sure that their testimony survives a Daubert challenge.*

**P**icture this: you are a nurse retained to consult and offer expert testimony in a medical negligence case. You review the documents, draft a report, and sit through a deposition. After all that, but before trial, the attorney who retained you calls and requests that you appear at a Daubert hearing before the court. The

hearing will be a piece of cake, he tells you, and there is no need to prepare.

You take the stand at the hearing. Opposing counsel grills you on your qualifications and experience. The judge even joins in, and questions you on the manner in which you came to your conclusions. After an hour of question-

ing, the judge rules that she will not allow you to testify at trial based on the “Daubert standard.” You leave the hearing disappointed, but also clueless about what the “Daubert standard” is and why you are not allowed to testify at trial.

The Daubert standard is a flexible analysis courts use to determine whether an

expert witness is qualified to speak on a scientific or specialized topic, whether the proposed testimony is legally and scientifically reliable and whether the proposed testimony will be helpful to the jury. The standard was designed to keep speculation, guesswork and junk science posing as expert testimony away from the jury. Over the years, the Daubert standard has been applied to exclude “expert” witnesses from testifying on matters on which they are not qualified and from providing conclusions that are not scientifically reliable. The Daubert standard applies to expert testimony, including testimony provided by nurses and other professionals with specialized knowledge in health care.

This article provides an overview of the Daubert standard and some practical steps nurse expert witnesses can take to make sure they survive a challenge under the Daubert standard. Part I overviews the development of the Daubert standard and how the standard is applied. Part II analyzes how the Daubert standard is applied to proposed testimony from nursing expert witnesses. Part III provides practical advice and steps nurse expert witnesses can take to successfully respond to a Daubert challenge.

## OVERVIEW OF THE DAUBERT STANDARD FOR EXPERT WITNESSES

### The Development of the Daubert Standard

Both state and federal courts have historically allowed expert witnesses, or witnesses with specialized knowledge, education, training or experience, to explain complicated issues to the jury. The rules of evidence give expert witnesses special privileges not afforded to lay witnesses, such as the ability

to testify about matters outside their personal knowledge, the ability to rely on hearsay, and the ability to testify in the form of an opinion, in order to help them explain complicated issues to the jury. The jury often affords an expert witness’s testimony additional weight because of the witness’s designation as an “expert” and because of the purported authority of the testimony.

This evidentiary leeway and authority create the potential for abuse. One frequently-cited concern is that expert witness testimony is based on “junk science,” or unreliable, un-replicable and un-reviewable analysis posing as actual science. A jury of lay people cannot always distinguish junk science from true scientific analysis while hearing an expert testify in real time at trial.

Another concern is that experts will testify outside of their area of expertise and that such testimony is no better than a guess. Finally, there is always a concern that an expert will assert an opinion based solely on his or her experience, but without underlying facts or analysis to support the testimony. This *ipse dixit* (“because I said so”) testimony sounds authoritative but is actually speculation. These potential abuses are difficult for opposing parties to reveal through cross-examination alone.

The Daubert standard evolved to address these potential abuses. The Daubert standard is based on four United States Supreme Court decisions: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>1</sup> *General Electric, Co. v. Joiner*,<sup>2</sup> *Kumho Tire, Co. v. Carmichael*,<sup>3</sup> and *Weisgram v. Marley Co.*<sup>4</sup> In *Daubert*, the Supreme Court held that a trial judge is obligated to act as a “gatekeeper” between expert witnesses and the jury and to ensure that “any and all scientific testi-

mony or evidence is not only relevant, but reliable.”<sup>5</sup> The Court built on this foundation in *Joiner*, *Kumho Tire* and *Weisgram* to create a flexible standard by which trial courts review expert testimony, before a jury hears it, to ensure that it is reliable, relevant to the issues in trial and advanced by a qualified witness.

In 2000, the Supreme Court amended the Federal Rules of Evidence to reflect the Daubert standard. Federal Rule of Evidence 702, Testimony by Expert Witnesses, now provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

As of this writing, the majority of states and all federal courts have adopted the Daubert standard for evaluating and admitting expert testimony.<sup>6</sup>

### The Daubert Standard in Practice

The courts have refined the Daubert standard in the past twenty years to create a three-part analysis to decide whether expert testimony should be allowed to go to the jury:

1. 509 U.S. 579, 113 S.Ct. 2786 (1993).
2. 522 U.S. 136, 118 S.Ct. 512 (1997).
3. 526 U.S. 137, 119 S.Ct. 1167 (1999).
4. 528 U.S. 440, 120 S.Ct. 1011 (2000).

5. *Daubert*, 509 U.S. at 589.

6. See Martin S. Kaufman, *Atl. Legal Found., The Status of Daubert in State Courts* (2006). Thirty states had adopted the Daubert standard or had deemed the Daubert standard consistent with their approach as of 2006. Additional states have adopted the standard since that writing.

1. Is the proffered expert witness qualified by knowledge, skill, experience, training or education to render the testimony in question?
2. Is the expert's testimony reliable? In other words, is the expert's proffered testimony based on sufficient facts and data and the product of reliable principles and methods? Expert testimony must be based on more than a witness's subjective belief or unsupported speculation. The courts have created a list of factors to help determine whether the proposed testimony is reliable or not.<sup>7</sup>
3. Is the expert's testimony relevant? "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful."<sup>8</sup> To be relevant, the expert evidence or testimony must assist the trier of fact to understand the evidence or to determine a fact at issue.<sup>9</sup>

The burden is on the person offering the expert testimony to show that the expert is qualified, that the testimony is reliable and that the testimony is relevant.<sup>10</sup> A trial court may conduct this Daubert analysis by reviewing written submissions from the parties, by conducting a hearing on the witness' qualifications and proposed testimony or by some combination of both.

It is important to note that even after Daubert, rejection of expert testimony is the exception rather than the rule.<sup>11</sup>

## NURSE EXPERT TESTIMONY AND THE DAUBERT STANDARD

Expert testimony from nurses is subject to the Daubert standard. This Section provides examples of how courts and lawyers review a nurse expert witness' qualifications, testimony reliability and testimony relevance.

### Is the Nurse Qualified by Skill, Knowledge, Education, Training, and Experience to Offer the Testimony?

The first question for the court is whether the nurse expert witness is qualified to offer the testimony or opinions at issue. This question can be summarized as whether the nurse expert witness is testifying within the reasonable limits of his or her experience. It is fair to say that most nurses have the requisite training and experience to testify on issues within their regular job activities. In addition to the applicable standards and methods related to a nurse's delivery of health care, courts have found nurses qualified to testify on issues relating to nurse staffing,<sup>12</sup> the administration of anesthesia

during surgery,<sup>13</sup> life care planning for permanently injured patients,<sup>14</sup> medical coding and billing practices,<sup>15</sup> and sexual assault investigations<sup>16</sup> because those nurses had specific knowledge, training and experience in those areas.

The analysis in *Holt v. Wesley Medical Center, LLC* shows that courts are willing to find nurse expert witnesses qualified if they can tie their testimony to their background and experience. In *Holt*, the plaintiff brought a medical malpractice claim against a medical center after her baby suffered permanent brain damage.<sup>17</sup> Plaintiff retained Nurse Lundstrom, a nurse practitioner, to testify as an expert witness on the issue of nurse understaffing.<sup>18</sup> The defendants challenged Nurse Lundstrom's qualifications and argued that she was a neonatal nurse and had never worked on a labor and delivery floor or taught obstetrical nursing.<sup>19</sup> The court rejected defendants' challenge to her qualifications and found that Nurse Lundstrom's education, experience and training qualified her to testify about nurse understaffing:

*As a head nurse, charge nurse and staff nurse at Children's Mercy Hospital from 1973-1979, she made nursing assignments. Nurse Lundstrom also made assignments at the newborn intensive unit at*

7. The Advisory Committee Notes on the 2000 Amendment to Fed. R. Evid. 702 outline five of the factors:

Courts both before and after Daubert have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

- (1) Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.
- (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.
- (3) Whether the expert has adequately accounted for obvious alternative explanations.
- (4) Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting.
- (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. (citations omitted) (internal quotation marks omitted).

8. Daubert, 509 U.S. at 591.

9. *Id.*

10. *Id.* at 592 n.10.

11. Fed. R. Evid. 702 (Dec. 1, 2000) (advisory committee notes).

12. *Holt v. Wesley Med. Ctr.*, No.00-1318-JAR, 2004 U.S. Dist. LEXIS 13814 (D. Kan. July 19, 2004).

13. *Carolan v. Hill*, 553 N.W.2d 882 (Iowa, 1996).

14. *Deramus v. Saia Motor Freight Line*, No. 2:08-cv-23-MRF, 2009 U.S. Dist. LEXIS 50550 (M.D. Ala. June 15, 2009).

15. *United States v. Halifax Hosp. Med. Ctr.*, 2014 U.S. Dist. LEXIS 1950 (M.D. Fla. Jan. 8, 2014).

16. *Gregory v. State*, 56 S.W.3d 164 (Tex. Ct. App. 2001); see also *People v. Ramirez*, 155 P.3d 371 (Colo. 2007).

17. *Holt*, 2004 U.S. Dist. LEXIS 13814, at \*3.

18. *Id.* at \*4-6.

Wesley from 1979-1989. Additionally, she has attended seminars on leadership and management, which included discussions of nurse staffing. Before rendering her opinion, Nurse Lundstrom consulted the Perinatal Guidelines and the Association of Women's Health, Obstetric and Neonatal Nurses publication on electronic fetal monitoring, in addition to the various nursing policies of Wesley .... The fact that Nurse Lundstrom works in the neonatal unit, rather than on the labor and delivery floor, does not preclude her from testifying about the standard of nursing care on an obstetrical nursing unit.<sup>20</sup>

In other words, the court looked to Nurse Lundstrom's related employment, her training opportunities and her overall experience to conclude that she was qualified to testify on the issue of nurse understaffing in a labor and delivery unit.

Courts are unlikely, however, to find that nurses are qualified to testify on the issue of medical causation of an injury. For example, in *Vaughn v. Mississippi Baptist Medical Center*, the Mississippi Supreme Court explicitly held that nurses cannot testify as to medical causation because doing so is outside the scope of a nurse's licensure and practice.<sup>21</sup> Courts in other states take a similar approach.<sup>22</sup>

Likewise, courts are very unlikely to allow a nurse to testify about the standard of care applicable to physicians. Again, the rationale is that most nurses do not have the skill, knowledge,

experience, training or education on the standard of care for a physician. But, as one federal court pointed out, this rationale could be overcome:

*It may be possible that a nurse could obtain the 'knowledge, skill, experience, training, or education' required to qualify as an expert on the standard of care required of a doctor treating a patient ... " One can imagine a nurse who specializes in a field (for example cardiology), reads the relevant literature, and works closely with doctors to treat patients on a regular basis. Over time, the nurse might become as qualified to opine on the standard of care her supervising physician must meet as that physician himself."<sup>23</sup>*

The bottom line is that courts take a holistic view of an expert witness's background to determine whether they are qualified and experienced to testify on the proffered topic.

### **Is the Nurse's Testimony Reliable?**

Assuming that the court finds that the nurse expert witness is qualified, the next question is whether his or her proffered testimony and conclusions are legally reliable. Here, courts will review whether the nurse's conclusions are based on objective facts and data, tied to applicable standards and developed through the use of a rational reasoning process.

Consider the clinical decision-making process for a nurse. The nurse examines a patient and observes physical signs and symptoms. The nurse's clinical response to this data is guided by the

existing protocols, standing orders or evidence-based recommendations. The nurse follows these guidelines to the appropriate clinical response based on the observed signs and symptoms. If the nurse was called to testify about his clinical decision-making, he could point to the objective data underlying his decision, the method by which he determined his clinical response and show that he reliably applied the data to the guidelines to come to a rational clinical response.

One can see where a nurse's testimony may be unreliable when compared to the example above. If the nurse did not actually examine the patient or review pertinent medical records, then it might be argued that the nurse's testimony was not based on sufficient facts or data. If the nurse did not follow applicable guidelines to determine the clinical response, then the result may not be based on reliable methods or principles. If the nurse used the appropriate guideline, but applied it incorrectly, then he may not have reliably applied the guidelines to reach the appropriate clinical response. These are all points where the decision-making process can become flawed and legally unreliable.

The reliability of a nurse expert witness's testimony was at issue in *People v. Ramirez*. There, a victim of sexual assault underwent a physical examination by a physician that did not show any signs of sexual assault.<sup>24</sup> The victim was later examined by a certified pediatric nurse practitioner. The nurse, Burns, performed a sexual assault examination, which had four possible findings: (1) "normal," which was the most common

19. Id. at \*13.

20. Id. at \*13.

21. 20 So. 3d 645 (Miss. 2009).

22. See *Richberger v. West Clinic, P.C.*, 152 S.W.3d 505 (Tenn. Ct. App. 2004); *Colwell v. Holy Family Hosp.*, 15 P.3d 210 (Wash. Ct. App. 2001); *Long v. Methodist Hosp. of Ind., Inc.*, 699 N.E.2d 1164 (Ind. Ct. App. 1998); *Phillips v. Alamed Co., Inc.*, 588 So. 2d 463 (Ala. 1991); *Elswick v. Nichols*, 144 F.Supp.2d 758 (E.D. Ky. 2001).

23. *Hamilton v. Pike County*, 2012 U.S. Dist. LEXIS 178522, \*9-10 (E.D. Ky. Dec. 17, 2012) (emphasis added). Many jurisdictions have substantive legal rules, however, that preclude a non-physician expert witness from providing expert testimony on the standard of care applicable to physicians.

*The Daubert standard is a flexible analysis courts use to determine whether an expert witness is qualified to speak on a scientific or specialized topic, whether the proposed testimony is legally and scientifically reliable, and whether the proposed testimony will be helpful to the jury.*

finding; (2) “non-specific;” (3) “suspicious,” which meant that the physical markers could have been caused by sexual assault; and (4) “definitive,” which was an uncommon finding.<sup>25</sup> Nurse Burns followed a replicable process for conducting the sexual assault examination and concluded that the findings were “suspicious” for sexual assault. Nurse Burns testified that the previous physical examination did not rule out sexual assault and explained to the jury that a normal physical examination would not necessarily rule out sexual abuse.<sup>26</sup>

The criminal defendant was convicted of sexual assault and challenged the nurse’s testimony as unreliable under the Daubert standard.<sup>27</sup> The defendant argued that Nurse Burns’ testimony was speculative and not based on any applicable standards. The Colorado Supreme Court reviewed Nurse Burns’ testimony and concluded that it was reliable:

*Here, Burns’ testimony was based on her examination of [the victim] for signs of sexual abuse. There is no question that a medical examination is a reliable “scientific principle.” The only question is whether the four-point scale used by Burns to explain her findings is based on*

*reasonably reliable scientific principles. We find that it is. One would expect to find “normal” and “definitive” at the polar ends of a scale measuring signs of sexual abuse. ... At a pre-trial hearing, Burns testified that a healing laceration in the anus is a “suspicious” finding, and she found such a laceration here. ... We conclude from this testimony that each category of the four-point scale was itself based on reasonably reliable scientific principles sufficient to satisfy [the Daubert standard].<sup>28</sup>*

In other words, the court found that Nurse Burns had objective data and followed a reliable process to come to her conclusion that the victim’s examination was suspicious for sexual assault. The Court also explained why Nurse Burns’ testimony was not based on speculation. “[T]estimony is not speculative simply because an expert’s testimony is in the form of an opinion or stated with less than certainty. Nor is testimony speculative simply because the descriptive term ‘suspicious’ is used to identify a category of findings.”<sup>29</sup> The Court concluded that “[a]lthough she could not say for certain that [the victim] had been sexually assaulted, Burns’ testimony was not based on subjective

belief, unsupported speculation, or a bare assertion based on her expertise. Rather, Burns’ testimony was based on her physical examination of [the victim] for signs of sexual assault.”<sup>30</sup>

In summary, courts look to an expert witness’s decision-making process to determine whether it is legally reliable or based on unsupported assertions. It is important to note that courts only review whether the expert witness’s decision-making methodology is reliable, not whether the expert witness is ultimately correct. As the Supreme Court wrote in Daubert, “[t]he focus, of course, must be solely on the principles and methodology, not on the conclusions that [expert witnesses] generate.”<sup>31</sup>

### **Is the Nurse’s Testimony Relevant?**

Federal Rule of Evidence 702 expressly incorporates a relevance standard and asks whether the proffered testimony will “help the trier of fact to understand the evidence or to determine a fact in issue.” The Supreme Court recognized in its Daubert decision that expert testimony could be from a qualified witness and be legally reliable but still unhelpful:

*The study of the phases of the moon, for example, may provide scientific ‘knowledge’ about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent credible grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. Rule 702’s ‘helpfulness’ standard requires a valid scientific connection to the*

24. 155 P.3d 371, 373.

25. Id. at 373-74.

26. Id. at 380-81.

27. Id. at 374.

28. Id. at 380-81.

29. Id. at 381.

30. Id.

31. Daubert, 509 U.S. 579, 594-95.



*pertinent inquiry as a precondition to admissibility.*<sup>32</sup>

Moreover, expert testimony is not “helpful” if the jury can determine the fact at issue without assistance from an expert witness. For example, a jury can likely conclude that a nurse who incorrectly records a prescribed medication dosage made a mistake without expert assistance. Testimony that does little more than tell the jury what result to reach is unhelpful and, for that reason, is likely inadmissible.<sup>33</sup>

## HOW TO RESPOND TO A DAUBERT CHALLENGE

We have overviewed the Daubert standard and provided examples of how the standard is applied to expert testimony from nurses. Recall that the nurse practitioner at the outset of this article walked into a Daubert hearing without understanding the analysis or how she could have been better prepared for the hearing. Here is what the nurse expert witness needed to think about in anticipation of a Daubert challenge:

- Highlight any relevant experience, training or education in your curriculum vitae and submit it to the attorney who retained you. Expert witnesses are typically required to submit a copy of their curriculum vitae to the court and the opposing parties as part of expert witness disclosures. A nurse expert witness can help defeat a Daubert challenge to his or her qualifications by including and highlighting pertinent experience, training or education related to the proffered testimony and in his or her curriculum vitae before disclosing it. A clear curriculum vitae allows the court to look and see a connection between the expert’s

qualifications and the testimony he or she intends to provide.

- Review and base expert testimony on applicable standards, including pertinent procedures, standing orders, evidence-based best practices and other guidelines. Courts analyze whether an expert’s testimony is based on reliable methodologies or based on an expert’s “because I said so” testimony. The delivery of health care is largely controlled by standards, guidelines and standing orders. A nurse expert witness can strengthen his or her testimony by finding applicable guidelines and then explicitly relying on them in his or her testimony.
- Provide a thorough analysis that ties the underlying facts and data to the applicable guidelines and the expert witness’s conclusions. In other words, the nurse expert witness should explain his or her reasoning. To help the court, the nurse expert witness should identify all pertinent facts and data underlying his or her analysis, the guidelines he or she relied upon and how he or she applied the facts to the guidelines. This clarity will help the court see why the proffered testimony and conclusions are legally reliable.
- Testify on matters within areas of the nurse expert witness’s expertise and experience. The most common attack on nurse expert witnesses is that they are not qualified to testify on the subjects for which they are offered. As noted above, a nurse expert witness is not qualified to testify on the standard of care applicable to physicians. A court may be suspicious of a nurse expert witness’s overall testimony if the nurse expert witness is offered to testify on topics clearly

outside his or her expertise. The nurse expert witness should work with the attorney who retained him or her to clearly delineate his or her subject-areas of expertise and stick within those areas.

- Prepare for a Daubert hearing by focusing on relevant qualifications and the methodology by which she came to her conclusions. In addition, the nurse expert witness should ask the attorney who retained her to provide mock questioning for the Daubert hearing.

The nurse expert witness is perhaps best served by remembering her purpose in the lawsuit. An expert witness is called to help the jury understand complicated issues. The delivery of health care is an incredibly complicated area for the common juror; the nurse expert witness’s role is to help the juror understand that area so that he or she can make an informed decision on the merits of the case. The nurse expert witness should make sure she understands show her testimony and conclusions are relevant and how they will help the jury decide the issues before it. With this understanding in mind, the nurse expert witness can respond to and overcome a Daubert challenge. 🍷



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32. *Id.* at 591-92.

33. See, e.g., *U.S. Gypsum Co. v. Lafarge N. Am., Inc.*, 670 F.Supp.2d 768, 775 (N.D. Ill. 2009).



# Serving as a Nurse Expert Witness: A Virtual Roundtable Discussion

Curated by Elizabeth Zorn, RN, BSN, LNCC

**Keywords:** testifying, expert witness, expert witness mistakes

*Attorneys often hire clinical nurses to render opinions about nursing standard of care in medical malpractice cases. Although legal credentials and training are not necessary to serve as an expert, it is helpful for new nurse experts to be familiar with the “dos, don’ts and pitfalls” of expert witness testimony.*

**A**ALNC sent out a questionnaire asking nurse experts about challenges, perils, and tips for success as an expert witness. The 27 respondents have considerable clinical experience. Their number of years in RN practice ranged from 16 years to 49 years; the average was 33 years. Their experience testifying at trial or deposi-

tion varied greatly, ranging from one to 500 times; the average was 53 times.

**JLNC:** What are the biggest challenges in serving as an expert witness during the workup of a case, including preparation for testimony?

Responses to this question emphasized communication issues with the hiring

attorney; time management; managing disorganized, incomplete and/or voluminous records; identification and analysis of the key issues; and report writing.

- Clear communication with the attorney regarding case issues; being in sync with attorney, knowing what the attorney needs and expects.

- Attorneys don't always know the extent to which nursing experts can assist and thus may limit the nurse's involvement in the case. Educating the attorney about what is possible to provide opinions on, vs. what the attorney might like to hear.
- Ensuring sufficient expertise in the relevant clinical area.
- Feeling comfortable with the pay scale, ensuring that it's fair and appropriate for the services being rendered.
- Creating a balance between my clinical hours and time spent on cases, to avoid overextending myself. Conversely, there are often unpredictable long spans of "down time" during discovery. There are also times when I'm asked to give an opinion or prepare a report quickly. Clearing your calendar for trial can be difficult when working as a full time clinician, when in fact many cases end up settling prior to trial.
- Trying to make sure you have all the facts and have thought about them from every angle, while making sure you're not wasting the attorney's resources by spending too much time...it's a balancing act.
- Failure of the attorney to provide complete information and/or updated records; need for recurrent review of key issues throughout the life of the case.
- The electronic medical record can be daunting as it has redundancies and can be challenging to arrange chronologically (Ed. note: See JLNC issue on EMR, June 2015)
- Sometimes the records are not organized when you receive them so you have to spend a lot of time getting them in an order necessary for proper review
- Developing a report that is as inclusive as possible but doesn't add extra information that could cause confusion. Distilling the tremendous volume of information I've reviewed

into a cohesive summary and statement of opinions; sorting out conflicting case facts and getting the right research to support my opinion.

- Narrowing down the deviations using only the minimum standards of care expected in the circumstances leading to the bad outcome.
- Communicating and navigating the relevant technical and knowledge issues. In a complex case, it is sometimes hard to keep the facts straight without notes. If you make notes, they are generally discoverable.
- Making sure the hiring attorney presents your opinions appropriately. If you are hired to write an expert report, do not allow your attorney(s) to alter it without your consent. If you have questions regarding the content, discuss with the attorney. Maintain only one working draft that is revised until completion.

#### **JLNC: How much time did the hiring attorney spend preparing you for testimony?**

Responses to this question ranged from zero to six hours or more!

- Attorneys often feel this is unnecessary, but as the expert you must demand it. Don't wait until the day before. Ask for prep time a week or more before to give yourself plenty of time to review anything that comes up during your prep time.
- Ideally a few hours, but not always the case; 1-2 hours depending on the complexity of the case. On the day of the deposition I meet with the attorney an hour ahead to make sure there are no new issues that need discussion.
- Varies. I had an attorney spend no time with me for prep; I also had the best prep in the form of a 4-hour question-and-answer period with a great attorney who was very enthusiastic about his case and about me testifying.

- At first, only a half hour but I learned that wasn't enough. The last deposition I met the attorney in person for an hour.
- 1/2 hour to an hour, usually just going over my work but not necessarily prepping me.

#### **JLNC: How can you address the biggest challenges in testifying at trial or deposition?**

The experts emphasized noted challenges related to processing questions, formulating answers, and the adversarial tactics of opposing counsel on cross examination.

- Control your nerves during cross-examination, especially when challenged or your answer is cut off.
- Attorneys can be obnoxious, condescending and difficult. Anticipating opposing counsel's strategies will help you overcome your shyness, fear, and defensiveness when badgered. For example, plan to be challenged on your experience.
- Video depositions are nerve-wracking: Am I twisting my hair or scratching my nose?
- Remain calm. Opposing attorneys actually harassed me for 6 hours of deposition. At one point I just had to ask the deposing attorney if he had difficulty understanding my answer, since he asked the same question 5 times. During a break, my retaining attorney told me to not let opposing counsel get to me.
- Stay focused under intense cross-examination; keep focused so you know what the attorney is really asking you. In deposition you have to listen very carefully to opposing counsel's questions to avoid opening up a Pandora's box of more questioning.
- Be careful of questions containing double negatives; have the ability to think critically to anticipate and process questions.

- Keeping testimony answers short and on point; learn how to answer questions effectively without oversharing. Don't sway from your predetermined opinions regarding the case. But do give yourself wiggle room.
- Remain unbiased. Become proficient at explaining medical facts, technical issues, nursing knowledge, and nursing practice to non-medical questioners.
- It's a challenge to me to remember everything I have read.
- Prepare. I hate having to talk and think spur of the moment, and then read the depo transcript later and thinking, "I should have said ..."
- You will be defending your opinions in an adversarial proceeding. Keep your cross examination responses brief and don't fall into word games, like "What if ..." or "gotcha" traps.
- Know your report inside and out, all of the players, when everything happened, what you reviewed and did not review. Prepare like you would to give your master's thesis in front of a panel of professors.
- Know the case weaknesses and how to defend them. Review your notes on these, go over your findings with the attorney, and rehearse your responses to anticipated questions so you are comfortable.
- I have reviewed / analyzed many depositions, and some have been simply awful, but others have been very impressive. One critical care nurse expert's deposition was the best I have seen. This expert was exceptionally well prepared; answered ONLY the questions she was qualified to answer; never fell into the trap of "what if," and it was obvious from the questioning that the deposing attorney was frustrated that he could not trip her up!
- Bring several copies of your CV.
- Ask the retaining attorney if generally, he or she wishes you to keep your answers short, brief, and to the point or if you should expound.
- Be well rested. Eat protein before testifying but skip the coffee.
- Arrive early and assess the physical environment.
- Answer yes / no, when appropriate. Listen carefully to any instructions or questions posed to you before you answer. If you don't understand the question, ask for clarification.
- Think about what question, exactly, is being asked. Always pause a few seconds before answering to allow the attorney to object. Always answer only the question asked – don't offer additional information. If no question was asked, remain quiet.
- However, sometimes it's good to expound on questions that opposing counsel intends to be one word answers, in order to educate or explain a point to the jury. Look at the jury when you answer; speak to them as if they were your patients.
- Take a breath between the end of the question and your answer. This oxygenates your brain and gives you a pause to think about your response.
- Be confident in your opinion. Back it up with evidence, but be careful with "authoritative resources." "Well-respected source" is a useful phrase.
- Anticipate challenges to your expert credentials. Don't take things personally. Attorneys will try to rattle you. Don't get rattled. Keep in mind you are just performing your job and you are getting paid for the time it takes to answer the same question over and over if that's what they choose to do.
- Maintain a professional appearance. Be aware of any tendency to slump, fidget, fiddle with hair or clothing, and the like. A microphone can pick up rattling jewelry. If your grandmother always told you to sit up straight and wear less jewelry, now is the time to remember her advice.
- Remain calm. Stay focused. Don't get nervous; you are not on trial.
- Keep a sense of humor. Don't be boring. Exception: If you are asked the same question over and over in deposition, give the exact same answer every time.
- Never testify outside your realm of expertise.
- As nurses we are used to working long stressful shifts, often with limited food or biological breaks. During a long deposition it's important to stay mentally sharp and focused. Maintain your assertiveness to practice self-care. Asking for breaks is important.

### **JLNC: What are some general tips to ensure successful testimony?**

The most common response to this question was adequate preparation, as above. Our experts also mentioned effective interpretation and response to questions; suggestions for appearance and demeanor, and other practical pearls of wisdom.

- Talk to the hiring attorney about what to expect; enquire about the opposing attorneys' style. Bring any other concerns you have to your retaining attorney for discussion and direction.
- Being sure to bring all documents and materials used for defending your report or position.
- Prepare thoroughly. You don't need to memorize everything but be able to find sections of the chart or depositions you wish to refer to. Know the medical record inside out; you must know your facts, materials, and opinions cold. Be familiar with the relevant depositions associated with the case.

### **JLNC: What are some perils of expert witness testimony?**

Responses to this question again highlighted the difficulties inherent in lack of adequate preparation and

handling the adversarial nature of cross-examination.

- Not being adequately prepared.
- Letting an attorney talk you into testifying beyond your scope of knowledge.
- Failing to bring required documents and materials as stated in Deposition Notice.
- Hostile opposing counsel who may question your credentials, attempting to get you to argue or respond in a non-professional manner. Other attempts to discredit, fluster, or confuse you.
- Getting trapped on cross-examination by attempts to pin you down to every opinion.
- Overly-friendly opposing counsel. Opposing counsel is never your friend.
- Contradictory testimony in current or prior cases. You have your opinion; keep it and don't let them talk you out of it. They will then turn on you and say you said it once one way, and now are saying something different. This can negatively impact your credibility.
- Responding to confusing or long run-on sentences and questions. Remember to ask for clarification even if you have to ask several times. If unsure then do not answer the question.
- Saying something that can be misinterpreted by opposing counsel.
- Trying to help too much/offer explanations usually gets you trapped. Giving lengthy answers to questions and elaborating too much, instead of just answering simply with the facts, can lead to an endless line of questioning.
- If you have many, many years of nursing experience, it is easy to let the deposing attorney pull you into multiple "scenarios," because at some time or another in a long career, you have probably been in that situation. It is critical not to allow this to happen. Stay focused on the case for which you have been retained, and answer

questions only related to this case or standards of care as they pertain to it.

- Letting your ego interfere with your objectivity.
- Becoming an advocate for your side rather than for the truth.
- Appearing nervous or unsure.
- Lacking experience in the particular clinical issues of the case; not supporting your opinion; citing "authoritative literature" that is out of date.

### **JLNC: What are your suggestions for navigating these perils of testimony?**

- Be sure the case has merit before agreeing to serve as an expert. Don't let the retaining attorney sway your opinions. Make your own decisions based upon the evidence;
- Give yourself enough time to prepare. I usually prepare at least 20 hours for 4 hours of deposition testimony.
- Really, it's just experience. I often go over the case with a colleague and ask her to grill me on specific points so I'm better prepared.
- Get specialized training as an expert witness.
- Always double check your literature sources to ensure they are current. Use national standards.
- Maintain a good relationship with your attorney so you are on the same page and can anticipate what questions the other side will be asking.
- Explain medical terms to the jury - always look at the jury when testifying.
- Each attorney has a different style of questioning. Must respond to that type of style and remain focused and unbiased.
- Only answer the question asked of you. Don't elaborate. If asked the same question in different ways to try to get you to change your opinion just keep offering the same answer.
- Be confident and consistent, stick to your guns. But never be persuaded to

offer opinions that are outside your area of expertise.

- Stay cool, calm, and dignified. If someone gets you flustered, angry or upset, ask for a break.
- Give the hiring attorney an outline of your education, experience and opinions so (s)he will be better prepared for your direct testimony.
- Arrive early, and confer with your hiring attorney.
- Don't aggressively market your testifying business.

### **JLNC: What is the biggest mistake you've made as an expert witness and what did you learn from this?**

- One of my first ever depositions I basically stated that my expert opinion was a guesstimate!
- Not fully educating the jury about the case. It is important to educate as well as provide an opinion.
- Information was not given to me that should have been, putting me on the spot when testifying. I don't ever want to be in that situation again when testifying.
- Answering a question incorrectly. Later in the depo I was asked a similar question and the attorney reminded me I had said something different earlier. I had to testify I misspoke previously.
- I was asked, "This is speculation, isn't it?" and I answered too fast, "Everything is speculation." That's the day I learned that "speculation" is a big red-flag no-no.
- Easy to become argumentative - I now take my time, and answer with a courteous tone.
- Becoming defensive.
- Saying more than what is asked.
- Not giving myself enough wiggle room with my answers.
- My first case, I brought to deposition a visual graph depicting vital signs

and events taken from the medical record to explain my opinions. Opposing counsel made a copy of it during the deposition. At trial, it was enlarged and put up on a screen during the case and used as an exhibit. I didn't intend for that to happen and I don't think my attorney was too happy either. Always confer with the hiring attorney about bringing demonstrative exhibits to deposition or trial.

- ✦ Trying to be too friendly and relaxing towards the end of the trial/ deposition and having the opposing attorney gain an advantage.
- ✦ Agreeing with the attorney and discovering I was opposing my own opinion. Always be cautious with questions like "I'm sure you'd agree that...."
- ✦ Allowing opposing attorney to use the fact that I didn't know a date of birth to cast doubt on my knowledge of other dates in the case. I now have dates readily available when testifying.
- ✦ Accepted a case without setting a clear timeline of when work products were due, and when the depositions or other proceedings would likely occur.
- ✦ Once I was questioned by an attorney who literally made faces at me. He really rattled me. He also said very personal things to me: he insulted my education, and compared my salary to a doctor's. The only point in doing this was to make me mad, and he succeeded. As a result, I began to cut my answers short because I just wanted the deposition to be over. I did not do my best for my attorney client. I apologized afterwards for allowing the other attorney to get to me. It has never happened again even though I've been questioned by that attorney a couple of times since. I now go into the deposition calm and cool, and I stay that way no matter what. When he makes faces, I smile.
- ✦ I used to take notes but no longer do that. It prolongs the deposition

testimony. For the same reason, I do not highlight or mark on any of the case materials.

- ✦ Answering questions by opposing counsel starting with "What if...." I've learned how to stop that line of questioning by stating that I can't give an opinion regarding situations about which I have no knowledge. I can only give my opinions about the case at hand.
- ✦ I gave the attorney a report on the night before trial, believing it was protected by the work product doctrine. However, he was required under the rules to produce it and was angry about it. Fortunately, the report was consistent with my testimony, and did not negatively affect the case. But it taught me to always question the attorney verbally (not by email) in a timely manner to make sure he agrees to a written report.
- ✦ Not knowing my report as well as I should.
- ✦ I forgot to tell an attorney about a change in my methodology that had occurred since my original report was written. I had to explain that on the witness stand – it was not a good thing for the case.
- ✦ Allowing the attorney to convince me it was not necessary to prepare me prior to testimony.
- ✦ The second case I ever had, the attorney talked me into wearing scrubs to the trial. Never allow anyone to talk to you into anything that makes you feel uncomfortable.
- ✦ I took a plaintiff case that I was not sure had merit. I was talked into it by the attorney. Big mistake.
- ✦ Assuming the retaining attorney would defend me and my opinions. When pressed against the wall, the retaining attorney will defend himself/herself, not you. Be prepared to defend your own opinions.
- ✦ Not having a good handle on the facts of the case. I learned that I

need to prepare ahead of time and review key documents.

- ✦ I once referred to the ER as 'organized chaos.' At break my attorney pointed out that chaos wasn't a flattering word to the general public. I learned from this to stay away from medical jargon/ slang and to choose words that would be well received by the jury.
- ✦ With my first deposition I had a detailed list of the deviations that I had worked from and my attorney let me bring it to the deposition. It opened up a huge line of questioning that lasted over 9 hours! Never again! I stick to the basic deviations, explain my opinions based on my clinical experience, and minimize authoritative reference materials.
- ✦ Charging on the high end for my services. I get more repeat business with lower prices. Lawyers don't want to pay you more per hour than they get.

Many thanks to all who took the time to share your experiences and opinions. We will continue to solicit feedback from legal nurses on a range of issues pertinent to our practice. Thank you to Julianna Clifton at AALNC for compiling the data.

## REFERENCES

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# Could Your Expert Witness Cost Your Attorney \$1 Million?

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**Keywords:** Expert Witness, Motion in Limine, Sanctions, Limits in Testimony, Mistrial, Curative Instruction

*This article summarizes events surrounding a case where an attorney was held in contempt for allowing an expert witness to insert disallowed information into testimony at trial.*

In 2012 a medical malpractice case, *Sutch v. Roxborough Memorial Hospital, Roxborough Emergency Physician Associates, and Jeffery Geller, MD*, was heard in Philadelphia Common Plea Court. This case has sent an earthquake through the legal community in Philadelphia. The case arises from allegations by the plaintiff's mother that the hospital and physicians failed to alert

the patient or her family of a suspicious lung nodule found on a chest x-ray when the patient was in the emergency room.

The patient was hospitalized overnight and that during the admission workup a chest x-ray found a 2.3cm nodule in the left lung. The suit alleges that none of the physicians involved in the patient's care made the patient or the family aware of

the nodule or informed them to seek further care. The suit reports that 20 months later she was diagnosed with what was now an 8cm nodule and Stage IV lung cancer, and she died 6 months later.

Before jury selection the Court held a hearing on pretrial issues. Among those was a Plaintiff motion *in limine*<sup>1</sup> to prevent any witness from offering

any testimony regarding the patient's smoking history. The Pennsylvania Superior Court in *Sutch v. Roxborough Memorial Hospital*, No. 3246 EDA 2012 (Pa. Super. Ct. Nov 4, 2013) quotes from the trial court judge's order dated 5/16/12 that anyone who offers testimony in the case is prevented from "presenting any evidence, testimony, and/or argument regarding the decedent's smoking history."

Fifteen days later defense attorney Raynor, representing Dr. Geller, the ER physician, called a physician expert in emergency medicine to the stand. Under direct examination Raynor asked the expert about what the risk factors for cardiac disease (not cancer) could be and the expert testified that the decedent had a 50-year smoking history. The plaintiff's attorney objected and the judge excused the jury to question the physician expert. Under questioning by the judge the expert testified that he could not remember if Raynor had told him about the judge's order regarding the decedent's smoking history.

The plaintiffs moved for a mistrial because of the expert's testimony, but the judge decided to read a "curative instruction" to the jury to disregard the expert's testimony regarding the smoking history. The judge's instruction to the jury as quoted in the Superior Court decision states:

... before I started this trial, I Ordered and the parties agreed that no party was allowed to discuss any potential reason for the cause of the decedent's lung cancer. I instructed all counsel to advise their witnesses of the court's Order before taking the stand. Last Thursday afternoon Dr. Geller (one of the defendants) and REPA (one of the defendants) violated the court's Order through testimo-

ny introduced from Dr. Kelly (the expert witness). You are instructed to disregard that portion of Dr. Kelly's testimony because it is irrelevant and misleading.

Four days later the jury awarded the plaintiff \$190,000. The Plaintiff timely filed post-trial Motions including that they were entitled a new trial based on the trial court's error by denying the Plaintiff's Motion for a mistrial due to the expert's testimony of the decedent's past smoking history. The trial court judge agreed with the Plaintiff's Motion and declared a mistrial.

The mistrial was appealed and the Pennsylvania Superior Court ruled for a new trial as a result of the expert's testimony. At the retrial the new jury awarded the Plaintiff \$2 million ... and that is where the earthquake started to rumble.

The judge in the retrial, Judge Panepinto, sanctioned Attorney Raynor \$946,197 to compensate the plaintiff for the cost of the mistrial ([http://articles.philly.com/2015-02-20/business/59309358\\_1\\_testimony-court-order-new-evidence](http://articles.philly.com/2015-02-20/business/59309358_1_testimony-court-order-new-evidence), 2/19/15, accessed 2/25/15) because of the testimony of the medical expert about the decedent's smoking history which had been banned by the judge. Judge Panepinto's ruling stated that the Raynor "intentionally elicited banned testimony from an expert witness and sabotaged the case" by failing to "properly instruct an expert witness about a ban on any reference to smoking by the decedent whose family was suing for failure to diagnose lung cancer" ([http://www.abajournal.com/news/article/judge\\_who\\_sanctioned\\_lawyer\\_1m\\_says\\_she\\_sabotaged\\_the\\_case\\_by\\_eliciting\\_ban](http://www.abajournal.com/news/article/judge_who_sanctioned_lawyer_1m_says_she_sabotaged_the_case_by_eliciting_ban), accessed 2/9/15).

To enforce the sanction, Judge Panepinto placed a lien on Attorney Raynor's

personal assets and the assets of the law firm [http://www.nytimes.com/aponline/2015/02/05/us/ap-us-lawyers-million-dollar-fine.html?\\_r=0](http://www.nytimes.com/aponline/2015/02/05/us/ap-us-lawyers-million-dollar-fine.html?_r=0) which the attorney appealed. Because two witnesses now came forward, Superior Court lifted the lien and ordered a hearing, during which a "trial technician" and a "claims examiner" both testified that they heard Attorney Raynor outside the courtroom tell the physician expert about the judge's order banning any mention of the decedent's smoking history.

After the hearing Judge Panepinto ruled on 4/28/15 regarding the testimony of these two individuals that "their account also lacks credibility because no one came forward for the 2012 trial." [http://articles.philly.com/2015-04-29/business/61620659\\_1\\_nancy-raynor-panepinto-sanctions-case](http://articles.philly.com/2015-04-29/business/61620659_1_nancy-raynor-panepinto-sanctions-case) 4/29/15, accessed 4/29/15.

This judgment is presently under appeal (as of June 25, 2015). 🍷



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1. motion in limine (lim-in-nay) n. Latin for "threshold," a motion made at the start of a trial requesting that the judge rule that certain evidence may not be introduced in trial. <http://dictionary.law.com/Default.aspx?selected=1291>



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## **Looking Ahead...**

**XXVI.4, December 2015** — ACA and LNC

**XXVII.1, March 2016** — Research in LNC

**XXVII.2, June 2016** — LNC Written Work Products

**XXVII.3, September 2016** — Infection

**XXVII.4, December 2016** — Forensics in LNC

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