Serving as a Nurse Expert Witness: A Virtual Roundtable Discussion

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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.

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 deposition 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 clinical, 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 overshar- ing. 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.

**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.

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 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 kept saying things like, “Your methodology is wrong.” 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