ABSTRACT: Expert witness opinions and testimony are necessary in medical malpractice cases to teach and explain the underlying clinical issues to the attorney client, lay jury, and/or judge. As such, these cases rise and fall on expert testimony. This article offers an overview of expert witnessing and will explore what is an expert witness, what is the role of an expert witness, what are the necessary qualifications, how experts are located, what is the general course of expert witness work, and what are some resources for expert witnesses. (J Radiol Nurs 2015;34:8-12.)

KEYWORDS: Expert witness; Nurse expert; Expert testimony; Radiology nursing; Radiology nurse expert.

INTRODUCTION
Medical malpractice cases rise and fall on expert witness testimony. Because of the complexity of these cases and their underlying clinical issues, expert witness testimony is necessary to teach and explain those matters to the average lay jury and/or judge.

WHAT IS AN EXPERT WITNESS?
An expert witness is defined as one who, “by virtue of special knowledge, skill, training, or experience, is qualified to provide testimony to aid the fact finder in matters that exceed the common knowledge of ordinary people” (Sisko, 2010, p. 664). Therefore, because medical malpractice cases involve issues of which the average layperson does not have knowledge, both the plaintiff (the person bringing the lawsuit) and the defendant (the person or entity being sued) use expert witnesses to explain their case to the finder of fact (i.e., jury, judge, arbitrator).

In a medical malpractice case in which a nurse’s actions are being examined, nurse expert witnesses with similar education, training, and experience as the nurse in question will be retained by both plaintiff and defense attorneys to review the case. Nurse experts are licensed registered nurses who have developed a knowledge base and expertise in a particular clinical specialty. These individuals have practiced for a significant amount of time in that clinical specialty, typically 8 to 10 years at a minimum. These nurses use their expertise to review, analyze, and opine (offer their opinion) whether other nurses practicing in that specialty have met the standard of care.

As with any expert witness, nurse experts must opine within their scope of expertise and experience, both within their profession and their specialty nursing practice. In other words, a radiology nurse could not opine whether a radiologist or a labor and delivery nurse complied with the applicable standard of care.
Regardless of which side the expert witness was retained by, he or she is expected to be unbiased and offer opinions based on established and recognized standards of care (American Association of Legal Nurse Consultants [AALNC, in press-a]). Sometimes those opinions are favorable to the retaining attorney; sometimes they are not.

WHAT IS THE ROLE OF THE NURSE EXPERT WITNESS?

The role of the nurse expert is unvaried regardless of which side hired the expert. The primary role of the nurse expert witness is to analyze the actions of the defendant in the context of the standards of care that were applicable at the time of the incident in question. The standard of care is legally defined as the “degree of care that a reasonably prudent person in that profession should exercise under the same or similar circumstances” (Sisko, 2010, p. 678). The expert must identify the relevant standards of care and compare the defendant’s actions to them.

There are many sources used in concert to identify the relevant standard(s) to which the defendant must be held. For example, the expert may use the clinical practice guidelines promulgated by the Association for Radiologic and Imaging Nursing (ARIN) as one resource. Other resources may include the Journal of Radiology Nursing, nursing textbooks, the defendant facility’s policies and procedures, and so on. The expert then applies those standards to the case at hand to identify any areas in which the defendant nurse deviated from, or adhered to, the standard of care.

For instance, in a case alleging acute compartment syndrome from a contrast media extravasation into the volar aspect of the right wrist in 2009, one standard of care resource that may be used by the nurse expert is the American College of Radiology manual on contrast media (ACR, 2013). However, because the content regarding extravasation of contrast media was last updated in 2013 (version 9), the nurse expert would need to locate version 6 of the manual to identify the standards in effect in 2009 regarding suitable intravenous access sites and angiocatheter size for intravenous contrast media administration.

WHAT ARE THE NECESSARY QUALIFICATIONS TO SERVE AS AN EXPERT WITNESS?

Each state has specific statutory requirements that a clinician must meet to be qualified to serve as an expert witness. Such state law may proffer specifications regarding current and/or prior active clinical practice in the specialty relative to the date of incident in question. For example, Connecticut General Statute §52-184c states that expert witnesses in actions alleging negligence of a health care provider must have “active involvement in the practice or teaching of medicine within the 5-year period before the incident giving rise to the claim.” It is the attorney’s responsibility to secure an expert witness who meets these statutory requirements.

In addition, basic qualifications for nurse expert witnesses include having an active, unrestricted registered nurse license with no prior disciplinary actions. Holding at least a bachelor’s degree in nursing is also preferred. Most attorneys require nurse experts to have a minimum of 5 years’ experience in the applicable clinical specialty, but at least 8 to 10 years is typically preferred. Ideally, the nurse expert is also board certified in his or her nursing specialty (e.g., Certified Radiology Nurse).

No legal or legal nursing education is required to serve as an expert witness. It is the nurse’s nursing education, training, and experience that make him or her qualified to offer expert opinions. In fact, some attorneys will not use an expert with legal education and/or credentials listed on his or her curriculum vitae as it may expose the witness to questions on cross-examination that infer a biased opinion.

In addition to the statutory, educational, and experiential requirements, there are also personal characteristics that make an expert witness more credible and valuable. Expert witnesses must have exceptional communication skills. They must be articulate and must confidently and credibly present the facts to the jury and judge. Because most jurors are laypeople with no medical or clinical knowledge, nurse expert witnesses must possess strong teaching skills and be able to easily explain complex medical topics and opinions to the jury in an understandable way.

Expert witnesses must be able to remain poised and calm under pressure, specifically when being questioned by the opposing attorney. Whether at deposition or trial, expert witnesses may be subject to aggressive cross-examination, which requires great focus and stamina. Nurse expert witnesses must maintain their composure and refrain from raising their voice or showing their frustration. Maintaining professional conduct and appearance at all times adds to the expert’s credibility in the eyes of the jury.

Serving as an expert witness also requires an in-depth and complete understanding of all pertinent medical records and other case-related material as well as an overall understanding of the case and case theory. Thus, the expert witness must be detail oriented and very thorough. Nurse experts are often able to identify a small detail in the medical record that may turn out to be a key piece of evidence. For example, the nurse expert witness reviewing a case alleging a fall during a computed tomography-guided steroid injection may find one tiny checkbox indicating that the safety belt was, in fact, placed on the patient.
HOW ARE EXPERT WITNESSES LOCATED?
Attorneys locate expert witnesses through many different sources. To ensure the credibility of their experts, attorneys typically seek clinicians who are recognized leaders in their specialty practice. Therefore, attorneys may identify and approach the following as potential expert witnesses:

- Authors and/or editors who have published/edited peer-reviewed literature on the topic at hand (e.g., *Journal of Radiology Nursing* or *Journal of Legal Nurse Consulting* authors/editors)
- Board members of the national or local professional association for the specialty practice in question (e.g., ARIN and/or New England Chapter of ARIN Board members)
- Members of the specialty practice’s certification board (e.g., Radiologic Nursing Certification Board members)
- Speakers who have lectured on the topic at hand (e.g., presenters at ARIN’s Annual Meeting and other pertinent educational programs)
- Nurses listed under the applicable specialty nursing practice in the American Association of Legal Nurse Consultant’s LNC Locator.

WHAT IS THE GENERAL COURSE OF EXPERT WITNESS WORK?
On being contacted by an attorney regarding potential expert work, the expert must first screen for any conflict of interest. For example, if the expert personally knows either party (the defendant or the plaintiff) or if the defendant hospital is the expert’s current or recent past employer, the expert may have a conflict. Any actual or potential conflict(s) should be discussed with the attorney seeking to hire the nurse expert.

As noted previously, the expert should also ensure that he or she has the necessary educational and experiential background to opine on the particular case. In other words, the expert should ensure that he or she would be reviewing the actions of a similar health care provider and opining both within the profession (e.g., nursing) and the specialty nursing practice (e.g., radiology nursing).

The attorney will also request the expert’s fees for reviewing the case and, if the review is favorable, for offering opinion testimony at deposition or trial. It is unethical for expert witnesses to work on a contingency fee basis (i.e., they are only paid if the case ends favorably for the retaining party). Experts are paid for their time, not their opinions.

Before reviewing the pertinent records in the case, it is imperative for the nurse expert to avoid offering opinions based solely on the attorney’s reiteration of the case. The expert must develop opinions based on the facts as presented on review of the medical records and other case-related material.

The records and other material sent to the expert witness for review will vary depending on what stage the case is in (i.e., presuit or in suit; if in suit, the phase of litigation). Ultimately, the expert will typically receive and review the medical records; the complaint (a legal document that outlines the plaintiff’s allegations against the defendant); deposition transcripts of the plaintiff, defendant, witnesses (e.g., family, nursing staff, technologists, physicians), and other experts; and the disclosures of other experts. If the expert needs additional medical records to fully formulate his or her opinions, those records should be requested from the retaining attorney.

It is important for the nurse expert to clarify with the attorney on being retained whether any written work products are being requested of the expert. If the expert’s review is favorable and the expert is subsequently disclosed as an expert, any written communication between the retaining law firm and the expert becomes discoverable to the opposing side. This includes any written work product, chronology, report, notes, e-mails, and so on. Therefore, many attorneys prefer the expert to verbally share his or her opinions and not write a report unless specifically requested.

If the expert’s opinions are favorable to the retaining attorney, the expert will be disclosed at the appropriate time in the case. The expert disclosure document outlines the expert’s opinions and is filed with court and sent to the opposing attorney.

In states that hold expert discovery, the expert witness will likely be deposed. A deposition is a formal question and answer session recorded by a stenographer and, on occasion, by a videographer as well. It is an opportunity for the opposing attorney to question the nurse expert to explore his or her opinions about the case and the basis for those opinions. The expert answers these questions under oath. If the case continues to trial, the nurse expert will offer his or her opinions there as well.

In states that do not hold expert discovery, the nurse expert will first testify at trial. Depending on the parties’ agreement, the trial may either be a jury trial (where the jury decides matters of fact and the judge decides matters of law) or a bench trial (where there is no jury and the judge decides both matters of fact and of law). If the expert was deposed in the case, it is imperative to thoroughly review his or her own deposition transcript before testifying at trial to ensure consistent testimony.

In addition to deposition and trial, there are several other settings at which a nurse expert may be asked to testify. If the parties are attempting settlement via arbitration, the expert may be asked to testify at this
proceedings. Regardless of the setting, the nurse expert witness’ testimony is under oath, and he or she must offer standard of care opinions that are scientifically based, generally accepted, and supported by the medical literature.

WHAT RESOURCES ARE AVAILABLE FOR EXPERT WITNESSES?
Numerous resources exist for nurses who wish to learn more about the role of the nurse expert witness. These include the following:

- “The nurse expert witness: Guidelines for Practice” (AALNC, in press-a) is a resource offered by AALNC and provides more in-depth guidelines, explanations, and tips for those interested in expert witnessing.
- The American College of Radiology’s “Practice guideline on the physician expert witness in radiology and radiation oncology” may also be of interest to radiology nurses drawn to expert witnessing (ACR, 2012).
- “Liability lessons for legal nurse consultants” (Dickinson & Zorn, 2013; Dickinson, Zorn, & Burroughs, 2014) is a two-part series published in the Journal of Legal Nurse Consulting and is a helpful resource for information on liability of nurse expert witnesses and legal nurse consultants.
- The Journal of Radiology Nursing is another valuable resource for radiology nurses interested in serving as expert witnesses.
- AALNC’s two-volume textbook Legal Nurse Consulting: Principles and Practices, particularly the chapter entitled “The Independent LNC” (Weitzel, 2010), offers additional information on the business behind serving as an expert witness.
- Module 8 of AALNC’s Legal Nurse Consulting Online Course, entitled “Business Principles and Practices” (Watson, Guadalupe, Summers, Joos, & Capella, 2006), is another available resource.

CONCLUSION
Expert opinion testimony is critical to medical malpractice cases. As such, expert witnessing is an exciting yet challenging way for experienced nurses to use their clinical education, training, and experience in the legal arena. As in the clinical setting, the nurse expert’s skill and expertise with legal work will grow and sharpen over time with experience. This article offers a foundation for the clinical nurse seeking to branch out into expert witnessing.

References


