Legal Expert Witness Testimony for PNPs and their fellow Pediatric-focused APRNs

Disclosures

- I hereby certify that, to the best of my knowledge, no aspect of my current personal or professional situation might reasonably be expected to affect significantly my views on the subject on which I am presenting.
- I will not discuss off label use and/or investigational use of agents or treatments in my presentation.

Learning Objectives

- Review the elements of malpractice and roles for expert testimony for nurse practitioners
- Discuss analysis of records and identify practical tips for success and efficient review and organization
- Identify successful expert practice from intake of the case, handling records, identifying standard of care, offering expert opinion, deposition, and testimony

Four Elements of Malpractice Suit

- Duty
- Breach of duty
- Damages
- Causation

Experts

- Role of Experts
  - Analyze records or documents to opine and testify about adherence to or deviation from established standards of care
  - Personal injury
- Skill set
  - Write opinion reports and/or testify at depositions and trials regarding quality of care provided
  - Ability to clearly communicate
  - Ability to utilize evidence-based standards
- Types of Experts
  - Life care planners
  - Expert witness
  - Pain and suffering expert
  - Damages expert

Expert Witness or Legal Consultant

- Definition of expert: a person who, through education or experience, has developed skill or knowledge in a particular subject to that he or she may form an opinion that will assist the fact finder. An expert witness is a qualified person who, by virtue of education, training, or experience, is expected to have an expert opinion on a matter of fact or an expert opinion on the evidence or a fact issue.
- Expert witness: is a person qualified by knowledge, experience, training or education to provide a scientific, technical, or other specialized opinion about the evidence or a fact issue.
- Legal consultant: may be an expert
- Opinion isn’t disclosed to opposition
- Expert witness
  - Name is given to opposing counsel
  - May have to testify in court
  - All comments, notes or reports may be discovered and reviewed by opposing counsel
  - Black’s Law Dictionary

Legal Expert Witness Testimony for PNPs and their fellow Pediatric-focused APRNs

Learning Objectives

- Review the elements of malpractice and roles for expert testimony for nurse practitioners
- Discuss analysis of records and identify practical tips for success and efficient review and organization
- Identify successful expert practice from intake of the case, handling records, identifying standard of care, offering expert opinion, deposition, and testimony

Four Elements of Malpractice Suit

- Duty
- Breach of duty
- Damages
- Causation

Experts

- Role of Experts
  - Analyze records or documents to opine and testify about adherence to or deviation from established standards of care
- Personal injury
- Skill set
  - Write opinion reports and/or testify at depositions and trials regarding quality of care provided
  - Ability to clearly communicate
  - Ability to utilize evidence-based standards
- Types of Experts
  - Life care planners
  - Expert witness
  - Pain and suffering expert
  - Damages expert

Expert Witness or Legal Consultant

- Definition of expert: a person who, through education or experience, has developed skill or knowledge in a particular subject to that he or she may form an opinion that will assist the fact finder. An expert witness is a qualified person who, by virtue of education, training, or experience, is expected to have an expert opinion on a matter of fact or an expert opinion on the evidence or a fact issue.
- Expert witness: is a person qualified by knowledge, experience, training or education to provide a scientific, technical, or other specialized opinion about the evidence or a fact issue.
- Legal consultant: may be an expert
- Opinion isn’t disclosed to opposition
- Expert witness
  - Name is given to opposing counsel
  - May have to testify in court
  - All comments, notes or reports may be discovered and reviewed by opposing counsel
**Professional Negligence**

- Screening cases for professional medical negligence
  - Interpreting/analyzing records
  - Relevant records
  - Medical literature search
- Locating experts

**Personal Injury (non-medical malpractice)**

- Identify, organize, and summarize medical records
- Determine whether negligence caused injury
- Pre-existing medical conditions
- Damages for pain and suffering

**Rules Governing Testifying as an Expert Witness**

- Requirements for serving as a medical malpractice expert witness vary in different jurisdictions
- Washington - can be found at Wash. R. Evid. 702
- Licensure
- Not being a full-time “professional Witness”
- Current or recent clinical practice or teaching or research experience
- Same specialty as defendant
- Licensure from a state requiring same or greater qualifications of subject state
- Complete review of the pertinent medical records
- Being from the same “community” as defendant or familiarizing self with standard and practices of a particular area
- Certain percentage of professional time devoted to active clinical practice
- Active practice in a similar community or locale under similar circumstances
- Routinely treats or has treated the diagnosis or condition at issue
- No license revocation or suspension in last year
- Retired less than 5 years
- Certain percentage of professional time devoted to active clinical practice
- No contingent fees
- Prior experience treating similar patients
- Unrestricted license
- No license revocation or suspension in last year

**Expert Qualifications**

- First and only absolute criterion:
  - Current licensure to practice
- Credentials must match or exceed the defendant’s
- Clinical expertise in same specialty
- Certification in clinical specialty
- Recent education relevant to specialty at issue
- Must be able to:
  - Describe the relevant standard of care
  - Describe how the provider deviated from the acceptable standard or met the standard
  - Explain how failure to meet acceptable standard caused or contributed to the patient’s injury

**Qualifications and Examination of Medical Experts**

- Federal Rules of Evidence
  - Frye v. United States (1923)
- Geographic
- Statutory reforms
- Daubert
- Rule 702

**What Makes an Expert?**

- Credible analysis
- Composure
- Objectivity
- Consistency
Nurses Evaluate Nurses

- APRNs review APRNs care
- APRNs review RNs care
- APRNs review PAs and MD care
  - Speaking to standard of care
  - For the defense

Presenting your CV

- Basis for determining credibility and appropriateness of expert
- Elements of the CV
  - Identifying details
  - Education
  - Specialized training, fellowships, residencies
  - Professional experience
  - Teaching experience
  - Publications/presentations
  - Professional affiliations

Skeletons in the Closet

- Terminations
- Suspension of license
- Nursing malpractice
- Income

Processing a Case

- Finding experts
- Initial Steps-the phone call
  - Conflict of interest
  - What are they asking?
  - Screening opinion
  - Testifying expert
  - Wanting an opinion?

Intake of Case

- Conflict of interest?
- What is the issue/concerns identified by attorney?
- Deadlines?
- Filing an affidavit for merit?
- Negotiating a contract
  - Fee schedule
  - Retainer
  - Tracking time
  - Billing/payment

Conflict of Interest

- Where does case originate?
- Name of defendant/plaintiff?
- System for tracking cases
Tips for Organizing

- Databases
- File naming
- Inquiry logs
- Taming the files
  - Semblance of order
  - Duplicate records
  - Cross-referencing
  - Timelines/medical chronology

Handling Records

- Taking notes
  - The 5 Ws and one H
- Reviewing health care records
- Preparing a chronology
- Deciphering words
- Flow sheets

Billing

- Charging by the inch
- Fee schedule
- Retainer
- Invoicing

Subcontractor Work

- Temporary
- Episodic and limited in scope
- Contracts/non-compete agreement

Standards of Care

- State Nurse Practice Act
- National Nursing Organizations
- Specialty Nursing Organizations
- Joint Commission
- Educational literature/textbooks
- Defendant's hospital's policies and procedures
- Defendant's competencies/orientation materials employment evaluation files

Clinical Practice Guidelines

- The Institute of Medicine defines clinical practice guidelines as “...statements that include recommendations, intended to optimize patient care, that are informed by a systematic review of evidence and an assessment of the benefits and harms of alternative care options”
- Sites for reviewing CPGs
  National Guideline Clearinghouse: http://www.guideline.gov/
  www.aap.org
  http://www.cdc.gov/std/treatment/
  http://www.acponline.org
Report of Findings

- Verbal report
- Written report
  - Medical summary/analysis
    - Formatting
    - Guidelines
    - References

Affidavit/Certificate of Merit

- Expert affidavit/Certificate of Merit
  - Purpose
  - Contents
    - Qualifications
    - Statutes
    - Medical records reviewed
    - Opinion
    - Damages and causes
    - Terms used/statements by expert

Testimony for Experts

- Deposition/Trial
  - Planning, preparation
  - What to expect
  - Jury expectations/decisions
    - What is the provider's conduct?
    - Did that conduct fail to meet accepted medical standards?
    - If negligence occurred, did the provider's conduct cause the harm?

Testimony Basics

- Only hard and fast rule it to tell the truth
- Other guidelines
  - Answer the question and no more
  - Ask for clarification on confusing questions
  - Take time to formulate a response
  - If answer is not a "yes" or "no"

Terms

- "likely than not,"
- "medically necessary,"
- "gross negligence."
- Physician experts like to deal in medical possibility, but the law requires causation to be proven by a lesser standard: a preponderance of the evidence, medical certainty, or the "more likely than not" rule, depend on the state.

Discovery Includes the Expert

- What is discoverable by opposing counsel
  - Entire case file
  - Everything shown or reviewed
  - Anything brought to deposition
  - Documents, research, etc
  - Order of received records
  - Prior expert testimony
Deposition Basics

- Discovery
- What a deposition is not
- Consistency is important
- Logistics of a deposition/ground rules
- Video recorded depositions

Opposing Attorney’s Goals

- Opposing counsel objectives for deposition
  - Gather information from you
  - Evaluate you personally
  - Clarify legal issues
  - Discover inconsistencies in testimony
  - Create a permanent record

Courtroom Demeanor

- Making a good impression on the jury
- Be patient
- If you don’t know the answer, say so
- Listen closely
- Answer only what the questioner has asked
- Above all, be honest

Successful Habits

- Understanding questions
- Active listening
- Poor listening consequences
- Responses to questions
  - Asking for clarification
  - Don’t improve poor questions
  - Don’t add intention
  - Focus on style of delivery rather than actual words
  - Distractions

In the Witness Seat

- Testify under oath as an expert
- Be firm in your convictions without being inflexible
- Describe complex nursing and medical tasks or medical jargon and abbreviations
- Be objective and credible
- Nonverbal communication
  - Open abdomen
  - Open palms, hands visible
  - Avoid repetitive habits

How to Answer the Questions

- Diagnosing questions
- Rate of questioning
- Questions about documents
Summary

- Experts must project an aura of objectivity and lack of bias, at the same time, they have to successfully convince the jurors that their interpretation is the right one.
- Experts need to boil down complicated, esoteric material into easily understandable pieces of information that make sense to a lay audience, without appearing patronizing.
- Good experts
  - Appear self-confident but not arrogant
  - Polite but not obsequious
  - Well-dressed but not too flashy or slick
  - Speak directly to the point-no waffling-without sounding blunt
  - Communicate to the jurors that they believe in their case
  - Sincere, without being perceived as an advocate

References


Rosenblum, J. (2011). Consider these points if you are a expert witness. Medical Economics. 88(5): 97-98.