

# Methods for Researching, Identifying, Vetting, and Retaining an Expert

Janet Attard RN IV, RNC-MNN, CLNC, MBA

Peter Bergé JD, MPA, PA-C Emeritus

Nikki Chambers RN, MSN

Lisa Mancuso BSN, RN, PCCN, CCRN, CLCP, LNCC

Jane Shufro, MS, BSN, CPAN, LNCC

Suzanne Smithwick RN, LNCC



# Conflict of Interest Disclosure

Janet, Lisa, Nikki, Peter, Jane, and Suzanne certify that, to the best of our knowledge, no affiliation or relationship of a financial nature with a commercial interest organization has significantly affected our views on the subject on which we are presenting.

# Learner Outcomes

- Identify how the Legal nurse expert witness enhances litigation effectiveness.
- Discuss expert witness's credentials & experience maximize case analysis.
- Understand expert list services, advertisements & databases.
- Discuss expert testimony; Daubert vs. Frye gatekeeper challenges and Evidence rule 702/reasonable & relevant/general acceptance
- Identify the purpose of vetting experts and what it means to “vet” an expert
- Explain the LNC's role in vetting a testifying expert
- Discuss methods by which to vet experts
- Discuss how the LNC prepares the expert from the perspective of an in-house plaintiff and an in-house defense LNC.
- Discuss concepts of billing by expert witness for the LNC to best understand and work with various experts

# Why utilize an Expert Witness? LNCs who are Experts

**Part 1**

# Legal Nurse Consultant and Expert Witness

- Nurse Consultants work “behind the scenes,” in-house or independently, providing an informed, cost effective view on complex medical issues. The work product generated by the legal nurse consultant is considered privileged and confidential attorney-work product not subject to disclosure in discovery.
- Nurse Expert Witnesses provide “behind the scenes” legal nurse consultant actions plus testify at trial. Nurse Experts who testifies in malpractice claims possess specific experience and training in similar clinical environments to the event in question enabling them to provide relevance in court .

# History of the Legal Nurse Consultant

- Legal Nurse Consultants acted as collaborators, strategists, and educators by offering support in medical-related litigation >30yrs.
- With the progression of nursing malpractice litigation, in late 1980's, nurses were increasingly sought to opine on the standards of the nursing practice. Serving as expert witnesses, it became clear to attorneys nurses were uniquely qualified to assist them in a myriad of ways inside and outside of the courtroom.
- The American Association of Legal Nurse Consultants (AALNC), founded in 1989, is dedicated to the professional enhancement and growth of registered nurses practicing in the specialty of legal nurse consulting, and the advancement of the nursing specialty.

# Legal Nurse Consultant

- A Legal Nurse Consultant is a registered nurse who uses expertise as a health care provider and specialized training to consult on medical-related legal cases.
- A Legal Nurse Consultant assists the attorney in reading medical records and understanding medical terminology and healthcare issues to achieve the best results for their clients.
- Legal Nurse Consultants provide “behind the scenes” case review for merit, an essential part of the team, providing chronology, case summary and litigation reports.

## Nurse Expert Witness

- Credentials and Experience establish credibility
- Available nationwide/locally to testify to the facts
- Superior expertise in a variety of medical specialties
- Review medical records, x-rays, relevant literature
- Objectively evaluate Nursing Standard of Care
- Educate Attorney on facts/ issues related to the case
- Report/Chronology/Visual on Negligence (breach, duty, causation, damages- standard of care). (Consultant)
- Provide testimony- Deposition and Trial



## Expert Witness Testimony:

- Federal Rules of Evidence: Rule 702. Testimony by Expert Witnesses
- 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.

## Expert Witness Duty

- Expert Witness complies with procedural rules applicable in a Court of specific jurisdiction to provide truthful, reliable, relevant, impartial independent opinion whether opinions favor the case.
- Expert testifies to generally acceptable medical information in the area of specialization in the form of verbal or written summary report, chronology or audio visual display.
- The duty to the court supersedes all duties.

# Expert Witness

- Expert Witness plays an essential role, can make or break a case, is an asset to the legal team objectively assesses the strengths and weaknesses of the case to determine merit.
- Expert possesses credibility, experience, credentials to make relevant opinion of the facts, able to testify to standard of care.
- Expert presents themselves professionally, possesses stellar professional skill, qualification publication, maintains professional demeanor, communication skill, reputation among peers, diverse experience in practice and as nurse expert.

# Determine Merit

- A Legal Nurse Consultant/Expert Witness educates the Attorney about acceptable Standard of Care. The Expert explains administrative procedures, practical guidelines, medical-nursing roles of diverse professional specialists from an inner workings perspective of the hospital or health environment.
- A Legal Nurse Expert Witness is a powerful member of a team to make a difference in the litigation process, analyzes and explain essential information to the jury or trier of fact, helps the Lawyer with complex medical issues in a specialty area (medical malpractice, personal injury, toxic tort and product liability cases) testifying to the relevant facts at trial and deposition.

# Define a Strategy for Case Analysis

- A Legal Nurse Consultant enables Attorney to have a clear understanding of case dynamics, assists in development of a defined strategy for case analysis and/or investigation.
- Legal Nurse Consultant communicates critical questions in a concise orderly and efficient manner to determine case merit.
- Legal Nurse Expert testifies in court to fact based scientific or technical opinion.

# Types of Expert Witnesses

- Testifying Expert: Appointed by one party to the dispute whose duty it is to assist the Court on matters within his/her expertise. The duty to the court overrides all other obligations. ABA divides testifying expert witnesses into two categories: those who have specialized knowledge, and those who can attest to damages
- Consulting Expert: Appointed by one party to advise them in the dispute to develop and advance a particular argument or strategy or tactical approach on behalf of their clients behind the scenes. Advice provided not covered by Civil Procedure Rules, no duty to the court.

# Medical Case Review

- Nurse Expert is hired by the Attorney to speak to the specialized knowledge required by the facts of the case. (Labor and Delivery, Surgery, Home Care)
- Nurse Expert provides insight into unique specialized knowledge, expertise or skill of a specialty area not readily known or understood by the average fact finder.
- Nurse Expert maintains current knowledge of Standards of Practice, Guidelines, Policies and Procedures in a specific setting involving treatment or research both current and applicable to testify in a particular case.
- Nurse Expert attained essential skill set, background and experience while possessing credentials and education to advance case theory, trial strategy, increase chances of favorable outcome.

## Expert Witness Inspires Confidence

- Expert Witness with knowledge, credentials and background experience in a specialty area will analyze and explain critical information in an understandable fashion to Attorney, Jury or trier of fact; express independent expert opinion based on information and facts with the material evidence provided.
- Expert Witness is the essential “opinion evidence” to assist in the resolution of a dispute leading to early resolution or may involve court proceeding where expert is called to give evidence.
- Expert Witness represents a specialty area of practice (OB, Surgery, Med Surgical) providing essential testimony at trial providing a level of understanding not otherwise available to the trier of fact.



## Relevant Testimony

- Precise combination of knowledge, skill, and communication ability in an expert witness. “Adequate” Expert will not be good enough to carry the day for client, results must be unsurpassed, relevant, reliable,
- Communicate information about what you need from the Expert, make it easy for Expert to produce high-quality results, generally acceptable.
- Provide time lines and deadlines for the Expert to allow for Expert to produce relevant testimony based on methodology to help a case.
- Expert is prepared to deal with opposing counsel, courtroom etiquette.

## Courtroom Experience

- A seasoned and experienced Expert Witness remains calm during a difficult cross-examination.
- Newer Expert may be intimidated during cross-examination conceding points when pressed therefore preparation prior to court is essential.

# Case Analysis



# Standard of Care

- Standard of Care is the degree of reasonable prudence and caution required of an individual who is under a duty of care based on minimum patient care standard (statute, court decision, policy or professional guidelines).
- Nurse Duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonable well qualified nurse practicing under the same or similar circumstances giving due consideration to the locality involved.
- A Nurse who breaches her/his Duty resulting in Duty, Breach, Causation and Damages is Negligent.
- (Uniform Jury Instructions)

# Duty of Nurse Expert Witness

- Provides opinion within their specific area of expertise.
- Accepts an appointment which does not involve a conflict of interest.

# Where do you start to find the perfect expert for your case?

Experts can make or break your case.

What is the underlying alleged tort(s) in the litigation or claim?

- Criminal
- Civil
- Medical malpractice
- Personal injury
- Slip and falls
- Automobile accidents
- Toxic tort
- Class action lawsuit
- Pre-suit evaluation

# What type expert do we need or do we need an expert?

1. What are the damages? Negligence/malpractice? Other?
2. Are the damages the result of tort? Causation?
3. What type of physician or professional is treating the plaintiff?
4. Just because there is an alleged an injury (i.e. memory loss) is the plaintiff actually receiving treatment?
5. Is the plaintiff still undergoing treatment/surgery?
6. Do we need the scene assessed or site inspection?
7. Future losses? Do we need a lifecare planner?
8. Is it possible that this injury was the result of something else? i.e. rheumatoid arthritis versus osteoarthritis

# What do we want our expert to do?

1. Provide expertise to address the claimed liability or breach of standard of care
2. Provide direct causal relationship between liability or breach of standard of care and damages or injuries
3. Provide expertise to address damages/injuries
4. Consultations at any point before and during all phases of a case from initiation to appeals
5. *Independent* opinions



## When do we need an expert?

Anytime during the case from inception to appeal:

- Merit to the case before bringing a lawsuit
- Support of a motion with:

Affirmation: factual information to support the basis of the motion made under penalty of perjury or

Affidavit: factual information sworn before a notary

- Appeals
- Trials
- Preparation of the case

BE UPFRONT THAT YOU MAY NEED THEM TO TESTIFY AT TRIAL

# CAUTION!!

- Named defendant physician can be used as an expert
- All expert material is discoverable
- Watch for conflicts with your expert (i.e. same practice as the plaintiff is treating)
- Only under specific circumstances (i.e. workers compensation) provide an outline of issues you want the expert to address
- Do NOT send any internal reports - will be used against you at trial if it is found

# Vetting an Expert

- Conduct an exhaustive search for an Expert Witness.
- Seek out local University Departments, Consulting Firms, Search Engine, Expert Witness Directories and Professional Organizations.
- Tap into Professional Networks and those of your clients.
- Trusted Colleagues serve as experts or provide referrals.
- Find Expert Witnesses whose specializations, training and certifications enable them to speak to the central questions of fact with authority.

# Where to Find the Expert?

- Legal Nurse Expert works Independently or Jointly with other Consultants on case by case basis or with Insurance companies, Financial institutions, Law Firms in house or Work Compensation Settings.
- In-house consultant for a Law Firm who works for the attorney behind the scenes is usually prevented from testifying because of an inherent conflict of interest.

# Expert Witness Directories/Referrals

- Some examples:
  - [www.aalnc.org/page/lnc-locator](http://www.aalnc.org/page/lnc-locator)
  - [www.verajuris.com](http://www.verajuris.com)
  - [www.almexperts.com](http://www.almexperts.com)
  - [www.amfs.com](http://www.amfs.com)
  - [www.expertinstitute.com](http://www.expertinstitute.com)
  - [www.experts.com](http://www.experts.com)
  - [www.expertpages.com](http://www.expertpages.com)
  - [www.SEAK.com](http://www.SEAK.com)
  - [www.forensisgroup.com](http://www.forensisgroup.com)

# CASE STUDY

## OB- EXPERT REVIEW

LABOR INDUCTION- RHYTHM STRIP, COMMUNICATION, DYSTOCIA IN NEWBORN,  
ANOXIA

- QUESTIONS:
  - Whether decision to induce labor was within the Standard of Care
  - Whether communication of risk was timely to Physician per Standard of Care.
  - Whether actions per the Standard of Care were appropriate give fact scenario.
  
- EXPERT CONCLUSIONS:
  - Negligence- Duty of Nurse to monitor and report patient risk per Standard of Care..
  - Duty of Nurse- Act per Standard of Care with Category II or Category III Rhythm Strip.
  - Failure of Nurse to communicate high risk facts of fetal distress to the Physician.
  - Failure of Nurse to Act constitutes breach of the standard of care.

# CASE STUDY

## CARDIAC – EXPERT

- FAILURE TO FOLLOW MD ORDERS- STROKE
  - EXPERT CONCLUSIONS:
    - Failure of Nurse to notify Physician of symptoms within first 3 hours to minimize brain tissue damage. Work up by Nurse includes medical history, physical, neurological examination to evaluate the level of consciousness, sensation (visual, motor, language) determine the cause, location, and extent of the stroke.
    - Failure to provide prompt physical examination assessing the airway, breathing, and circulation (ABCs) and vital signs. The head (including ears, eyes, nose, and throat) and extremities are also examined to help determine the cause of the stroke and rule out other conditions that produce similar symptoms.
    - Failure to collaborate with and communicate presenting symptoms of the patient associated with stroke in a timely manner constitutes breach of the standard of care.

# CASE STUDY

## HEMATOLOGY/ONCOLOGY- EXPERT

### QUESTIONS:

- Did the Nurse evaluate the patient presenting with various complaints?
- Did Nurse communicate his/her findings to treating Physician, did that contribute to a delay in diagnosis of the patient's condition?

### • EXPERT CONCLUSIONS:

- Failure of the Nurse to evaluate and report to Physician his/her findings on physician examination and results of lab work to effect the timely diagnose and treatment to patient leading to diagnosis of lung cancer constitutes breach of the standard of care.



FRYE

DAUBERT

THE RULES

# FRYE DAUBERT & THE RULES

## Daubert 1993

Applied in Federal Court and several states

Stricter rules governing expert testimony

## Rule 702 : Testimony by expert witnesses

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.

The Rules places a burden on the judge to ensure that the evidence is reliable as the "Gate keeper"

# FRYE DAUBERT & THE RULES

## FRYE 1923

Applied in many states

“General acceptance test”

Per Justice Orsdel:

“...Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs”. 54 App. D.C., at 47, 293 F., at 1014

Term: Acceptance has been litigated to determine its actual meaning

## **Frye v United States December 3, 1923 No. 3968 (D.C. Cir, 1923)**

James Alphonso Frye convicted of second degree murder  
Appealed the conviction

- **CASE FACTS**

During the trial the DA used scientific experimental the time testing to determine that Mr. Frye was guilty. The basis for the appeal was that the “deception test” or precursor to todays lie detector was not consistent with generally accepted knowledge.

Basically the DA claimed that this test which Mr. Frye underwent contended that the fluctuation in Mr. Frye’s systolic blood pressure was evidence of guilt.

**In 1923 Appellate Court of District Court of Columbia under Chief Justice Smyth, associate Justice Van Orsdel and Presiding Judge of the United States Supreme Court**

**The judgment authored by Justice Van Orsdel:**

“General acceptance test”

Per Justice Van Orsdel:

“...Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs”. 54 App. D.C., at 47, 293 F., at 1014

# **Daubert v Merrell Dow Pharmaceuticals INC**

## **United States Court of Appeals**

### **Decided June 28, 1993**

**JUSTICES: Blackmun, White, O'Connor, Scalia, Kennedy,  
Souter and Thomas**

Case: parents on behalf the children sued Merrell Dow Pharmaceutical claiming that serious birth defects were the result of prenatal ingestion of Bendectin (used for treatment of nausea and vomiting during pregnancy), prescription drug by Merrell Dow. There were several credentialed experts that based their conclusions on animal studies, chemical analysis and unpublished "reanalysis" of previous published human studies.

# Frye Daubert and DTI

## DTI or diffusion weighted imaging

Used in Traumatic Brain Injury to determine the brain was injured

Issues raised:

- Variable techniques
- Variable control sets
- Not reproducible

Argued in courts since at least 2004 as to the science between DTI imaging and brain injuries

<https://www.natlawreview.com/nlr-legal-analysis-and-news-database-search?qnlr=Diffusion%20tensor%20imaging#gsc.tab=0&gsc.q=Diffusion%20tensor%20imaging&gsc.page=1>

<https://www.natlawreview.com/article/federal-trial-court-once-again-upholds-introduction-diffusion-tensor-imaging>

In English:

- Peer reviewed in the literature
- Scientific methods used to establish claims and error rate
- General acceptance in the medical community
- Whether or not claims can be proven wrong

***This renders cross examination of each expert crucially important***



## RULE 104: Expert Qualifications

Concerns the foundation for the expert to present their qualifications as an expert to address the issues before the court and/or the admissibility of the evidence to the court  
Evidence is any fact that is of consequence to determination of the action

### Note:

In general the Civil Courts have allowed expert physicians to testify to areas other than specialty based on the fact they graduated medical school

## RULE 402

Nearly all relevant evidence is admissible

## RULE 403

Basically rules that any evidence which is prejudicial or misleading or confusing to the jury will not be admitted

# Vetting the Expert

Part 3

*TO VET AN EXPERT  
MEANS TO INVESTIGATE  
AND EVALUATE THEM.*



# Why do we vet experts?

Enter: Bermejo v Amsterdam

Activity: Click the button below to read about an expert who tanked the defense's case and the judge who didn't let it slide.

<http://www.newyorkpersonalinjuryattorneyblog.com/2013/07/judge-rips-doc-for-huge-lie-perjury-prosecution-possible-victims-may-number-in-thousands.html>

# Why do we vet experts?

- Prevents your expert from being excluded.
- Prevents catastrophic surprises at trial, which could turn a win into a loss.

# American Medical Association - Ethics of Testimony

Code of Medical Ethics Opinion 9.7.1

When physicians serve as witnesses they must:

- Accurately represent their qualifications.
- Testify honestly.
- Not allow their testimony to be influenced by financial compensation. Physicians must not accept compensation that is contingent on the outcome of litigation.

Click this button → [to learn about a doctor who had his license revoked for lying as an expert witness.](#)

# American Medical Association - Ethics of Testimony

Click this button → [to learn about a doctor who had his license revoked for lying as an expert witness.](#)



# AALNC - Standards for Nurse Expert Witnesses

*“Nurses have legal obligations to the public, their patients, the profession, and their employers. Unethical and inaccurate testimony is contrary to these obligation, an established code of ethics and professional standards. This testimony is one that plagues not only nursing, but other professions as well.”*

We need to scrutinize our hired experts with the same thoroughness that we do the opposing expert.



# LNC role in vetting experts

- Expert testimony is needed in almost every medical case.
- Locating appropriate experts can be a daunting task for many attorneys.
- The LNC is expertly equipped to speak with their medical colleagues regarding the case details and weed out those experts who do not meet the attorney's need.

# LNC role in vetting experts

- Each name submitted to an attorney as a potential candidate must have some level of “vetting” performed by the LNC.
  - Your ability to maintain professional relationships with your attorney clients is determined on the quality of work-product produced.
  - In this case, your work-product is the high quality expert name submitted for consideration.
  - In-house LNCs may perform more of the legal vetting i.e. reviewing previous court opinions involving the expert witness.
  - Independent LNCs may not have access to these databases.
- Not performing some level of vetting is not serving your clients.
- Now that you have someone who looks good on paper, lets dig into them!

# Methods of Vetting

- Phone call
- CV review
- References
- Testimony history
- Broad internet search
- Social networks
- Fee schedule
- Prior publications
- Public records



# First step - - A simple phone call

## Information that can be gathered in a simple conversation:

- Opportunity to assess the experts communications skills.
  - Are they easy to understand?
  - How is the tone of their voice? Do they come off as arrogant or condescending?
  - How do they explain complex and technical information?
  - Is the expert willing to discuss SOC in the case?
- What is their character like?
  - How forthcoming are they with delicate information?
  - If they were named in a prior suit, how do they relay those details to you?

## Best tips:

- Have a template of questions you want asked so you can be efficient and respectful of the expert's time.
- Use a hands free set so you can make notes regarding the expert's responses.
- Gather as much information as possible directly from the expert so you can dig deeper once you are off the phone with him/her!

## List of questions to ask on the phone with an expert:

1. Conflict check with all parties involved.
2. Provide a quick overview of the case and ask specific questions pertaining to experience, skill, procedure and/or disease process.
3. Are you listed with any expert locating services? i.e. SEAK
4. Have you ever been named as a party in a malpractice suit?
  - a. If so, what was the outcome?
5. Do you have any prior convictions or restrictions on your privileges or your license?
6. Have you served as a testifying expert before?
  - a. Approximately how many depositions in the past 4 years? (plaintiff vs. defense)
    - i. What was the outcome of those cases?
  - b. Approximately how many trial testimonies in the past 4 years? (plaintiff vs. defense)
    - i. What was the outcome of those cases?
  - c. If 100% of your experience is either plaintiff or defense, are you opposed to acting as an expert for the other side?
7. Please provide me with the name of an attorney you have worked with before.
8. What is the total percentage of time spent doing expert work?
9. Are you willing to travel to provide trial testimony if it came to that?
  - a. How much notice would you need in order to rearrange your clinical schedule?

# CV Review

- Verify all claimed credentials.
  - Use online databases:
    - American Board of Medical Specialities
      - Click [here](#) to check a physician's board certifications.
      - Navigate to "Is my doctor board certified"?
      - Type in an expert's name and state at a minimum.
    - Verify state licensure(s) and expiration dates.
      - Click [here](#) to find any state medical board's website to check licensure.
    - Verify education and degrees received - National Student Clearinghouse
      - Click [here](#) to find verify a degree.
- Look for discrepancies and gaps.
  - Are they still clinically active? When was the last time they had a clinical/bedside position?
  - Are there older versions of the experts CV online? Has information changed over time?



# References

- Contact attorneys who have worked with the potential expert before.
  - Some questions to consider asking:
    - How easy was the expert to work with?
    - Did the expert meet deadlines?
    - Did the expert respond timely to requests?
    - How well did the expert explain complex issues?
    - How relatable was the expert?
    - Were there any concerns you noted when working with the expert?
    - Would you work with this expert again?

# Testimony History

- Federal statute require experts to keep records of all cases where deposition and trial testimony were given for four years.
- Experts should be able to provide a written copy of this to you after your phone call with them.
  - Does the expert show a bias toward plaintiff or defense?
  - Often a simply search on the internet may populate a video of an expert's previous testimony. This would provide ample insight into how they present themselves.
- Search news stories that may have quoted the expert if the case was high profile.

# Testimony History

- Database:
  - The [Daubert Tracker](#) (\$295 annual subscription) or can pay for individual sessions.
  - LexisNexis Expert Research On-Demand
- Other Databases (not available for independent LNC)
  - TrialSmith
  - [www.westlaw.com](http://www.westlaw.com)

# Broad internet search

- College and University websites
- Compare different online bios
  - See if this information aligns with data provided on CV.
  - Do the dates for certifications, employment and clinical appointments align across websites?
- Search for audio and video recordings of experts
- Are there public statements made by the expert outside of legal proceedings that are damaging to their reputation or that go against the theory of your case?

# Social Networks

- In today's technology based society, many experts have social media accounts. Some are private and some public.
  - LinkedIn
    - Check recent activity for any posts in groups.
  - Facebook
  - Instagram
  - Xing
- Blogs
- Discussion boards
- Personal websites

# Fee schedule

- Have a conversation with the attorney to know the budget for experts.
- The goal is to find an expert who has right clinical knowledge and still fits into the budget for the case.
- Experts need to be appropriately compensated for their time, however, some experts significantly add to their annual income by doing expert cases with *excessive fees*.
  - Excessive fees may lead counsel to question the integrity of the expert in being a “professional expert”.

# Prior Publications

- Review past publications listed on CV.
  - Perform a quick search on Pubmed and see if other publications populate.
  - Google scholar
- Briefly look at abstracts from literature listed on CV.
  - Peer reviewed material can be found on [www.pubmed.gov](http://www.pubmed.gov).
  - If abstract indicates more details regarding your case theory may be contained, locate full text articles.

# Public record

- Basic public record searches are widely available and inexpensive online.
  - Although this information may not be relevant to their medical practice, it may shed light into what type of person they are outside of medicine.
  - Are they party to any pending litigation?
  - Inexpensive websites for basic public records:
    - [www.beenverified.com](http://www.beenverified.com)
    - [www.instantcheckmate.com](http://www.instantcheckmate.com)



# Preparing the plaintiff's expert for testimony

Part 3A

# Categories of Testifying Experts

## **Purpose of testimony**

- Liability/standard of care
- Causation/injury/damages
- Combined (liability and causation)

## **Retained (hired) experts vs. treating experts**

## **Principal proceedings for expert testimony**

- Deposition
- Trial

# General Preparation

- Be clear about the focus and limits of testimony
- Understand essential points for qualification as an expert, and how to explain meeting the requirements to defense counsel\*
- Be able to define critical terms per jurisdiction and the attorney/client, including
  - Reasonable degree of probability/certainty
  - Standard of care
- Beware of “complete list” questions
- How to respond to “possibility” questions

\*<https://casetext.com/case/nicholas-v-hackensack-univ-med-ctr>

# General Preparation

- **Avoid** use of terms such as *may, might, could, can, possible, possibility, I think, and judgment\**
- **Use** terms such as *will, most likely, probably, most probably, to a high degree of probability, in my experience, in my specialty (or, in specialty X), and in my training/education*
- Listen carefully to objections by the attorney, take lessons/guidance from them

\* <https://tinyurl.com/NJmedicaljudgmentcharge>

# Deposition Preparation

- Understand the goals of deposition, including
  - Evaluate strengths and weaknesses of expert and her/his testimony, *including credibility and demeanor*
  - Ascertain and “lock in” areas of testimony
  - Attempt to strengthen the claim and increase the probability of settlement
  - Obtain information that will help the opposing expert
- Be prepared for videorecording of deposition

# Deposition Preparation

- Dealing with questions about literature
  - Referred to in plaintiff's expert's report
  - Used or "relied on" for report or testimony
  - Referred to by defense expert
  - "Out of the blue"
  - Authored by your expert
- Responding to aggressive, provocative or annoying opposing counsel

# Deposition Preparation

- Carefully prepare the “file” and all materials to be brought to the deposition
  - Is it complete, to the extent required?
  - Are all materials there discoverable? Review with attorney and “sanitize” if indicated by rules of court and/or rules of evidence, per attorney
  - Review all notations, “sticky notes,” drafts, etc. to be sure that they may properly be seen by defense counsel

# Trial Preparation

- Discuss the expected sequence of events
  - This attorney's style of *voir dire* and direct examination
  - Likelihood and use of redirect
  - Caution regarding restrictions on communication with counsel or other witnesses, if any
- Teach the jury (and/or judge)
- Use of visual aids



# Trial Preparation

- Discuss critical phrasing required for plaintiff to sustain burden of proof
  - Reasonable degree of certainty/probability
  - Conclusions regarding deviations/departures
  - Conclusions regarding causation
- The expert should carefully review her/his deposition testimony and report (if any) and flag important areas of the medical record for easy reference

# Trial Preparation

- Handling “yes or no” questions
- Responding to questions about testimony on other occasions, documents, literature: “may I see that, please?”
- Answering questions such as, “didn’t you testify that...?”
- “Complete list” questions
- “Possibility” questions

# Trial Preparation

- Focus on and return to central themes
  - It was a team effort; the team failed
  - In *this* case, under *these* facts, this outcome should not have occurred
  - The flaws in the system set up the conditions for the death of Mr. Jones
  - A patient should not die from respiratory arrest in an intensive care unit

## Case Study

- Male in his 50's transferred to ICU after emergent c-spine fusion. Awake, talking en route to ICU, denies pain after dose of Dilaudid.
- Chews on mask in ICU, given morphine. Desaturates, bagged but goes into brady-asystolic arrest.
- Suffers global anoxia, eventually dies.

# Trial Preparation

- Know when, and when not, to concede
  - Be very, very hesitant to directly answer seemingly innocent “yes or no” questions. Options: not necessarily, under most circumstances, in general, not usually
  - Avoid appearing unreasonable. If the jury thinks that you won’t even concede what your name is, they may choose not to believe you in general

# Preparing the Expert for the Defense

Part 3B

# The Expert: Who is Prepping Who?

The reason you are working with an expert:

1. Basis for arguing your perspective for defense at any point during the discovery through trial
2. Listen to your expert
3. Defense strategy: confirming your defense contentions or steering the defense in a different direction
4. Addressing different opinions

# Initial Contact

- Screening the expert

Phone call is ok here

General information regarding the case: Not your opinions

Resume and Fee schedule

Get feedback

- Know your expert and the experts testimonial history
- Confirm qualifications
- Has your expert been party to a lawsuit?
- Check for conflicts with other parties or treating providers
- Ensure your expert is really qualified to address the issues in the case!



## During discovery Decision making

How best to proceed?

- Independent exam and medical review  
or
- Medical record review

Issues to consider:

- Case facts
- Potential expert will confirm the damages
- Potential expert will find more problems (i.e.): neurocognitive testing

**NEVER SEND YOUR REPORT OR ANY INTERNAL REPORTS: DISCOVERABLE**

# Medical Records to Expert

## **Anticipate expert will request the following:**

Any neurocognitive:

- Get raw data

DTI testing:

- Very hard to get the raw data-proprietary

Untimely death- medical examiners case:

- Get the slides or cuts if taken
- Request ME notes

Psychiatric/psychological:

- Ask for the notes-not just summary by the treating provider

**NOTE:**

Authorizations: Request- without date restrictions

# Outline for the Expert

- Workers compensation

Issues to consider:

- ALL information sent to the expert- discoverable
- Trial- review the experts file

# After the Independent Medical Exam or Record Review

Ideally face to face meeting with trial attorney or attorney assigned

- Listen to your expert & ASK questions
- IF need an Independent Medical Examination: INDEPENDENT
- Give the expert everything and everything requested
- Now is the time to find out where the expert stands on your case
- An expert will have insight into their area of expertise- and that insight is what you need to tap
- Be flexible with your defense strategy

# Expert opinions?

- What do you do when your expert cannot defend your case?
  - Is it that the expert really not have the right experience to address the issue?
  - Other experts?
  - Other strategy?
  - Plaintiff oriented expert?
  - Consult to aid with pitfalls?

NOTE: Standard of care is what the expert says it is.

# Multiple Experts

- Look at both sides of the case
- Multiple experts- differing opinions
- Be flexible with ideas or strategies
- Other potential experts in different field may better insight

# Expert Disclosure

## New York State CPLR 3010d

- Each state has different requirements

New York State: 3101 D of the Civil Practice Laws and Rules (CPLR)

In preparation for trial the CPLR section 3010 (d) guides the scope of the disclosure of each expert to include:

- Identification (except in medical, dental podiatric malpractice may omit only the expert medical, dental or podiatric names)
- Qualifications/credentials
- Substance of the facts
- Substance of the opinion
- Grounds or basis of formulation of the opinion

# Expert Disclosures

## LNC role:

- Must work very closely with the expert on the draft of the disclosure
- Must be comprehensive, general and specific enough to allow the expert to testify to the issues (standard of care/damages)
- Include that your expert will provide rebuttal testimony to plaintiff's experts
- Must be disclosed timely to plaintiff
- Disclosure can be supplemented up to trial
- Make sure the expert reads the disclosure before it is disclosed



# Expert Disclosures Independent Examinations

- Independent medical examinations (IME)

In NY IME must be completed within 30 days of plaintiff's deposition  
DON'T WAIT until last minute

*MUST disclose* the report and findings of an expert

- Initial screening of the expert is crucial:
  - Stuck with the findings
  - Altering the opinion(s) will come out during the trial
- Questionable cases: records reviewed before IME
- Should the LNC attend the IME?

# Affidavits and Affirmations

- At any time have expert (may or may not be the one testifying at trial) sign and affirmation or affidavit to support defense stance:

Motion

Order to show cause

LNC role:

Must ensure the details provided are accurately reflected in the records

Must include supportive records/evidence

Work very closely with the expert on this- once signed and disclosed the expert owns it

# Strategy Immediately Preceding and During Trial

Strategy can change at any point

Based on several factors including:

- Testimony
- Plaintiff's strategy is clarified
- New evidence/documents just prior to trial

LNC and trial attorney

- Discuss the new evidence and findings before and during the trial with your expert
- Send the expert the daily testimonial transcripts (always recommend this)
- If your disclosure is broad enough to include your expert is a rebuttal witness to the testimony likely won't need to supplement the disclosure
- If necessary supplement the disclosure

# Expert Consultants

- Don't have to disclose
- Recommend if you have a tricky case with concern there will duplicitous testimony or conflicting testimony
- Can provide extensive assistance in how strategy proceeds

# Novice Experts

- Meet with the trial attorney to learn potential trial strategies used by attorneys in questioning:
  - The YES trap
  - Authoritative literature
  - Breach of standard of care
  - General questions not specific to the case
  - “Pregnant pauses”
- DO NOT tell the expert what to say about your case- it must be their opinion(s)

# Potential Issues During Trial: Failure to Call the Expert

## Missing witness

CPLR 3101 disclosed as a witness with the intent to provide testimony

- What if you find your expert opinion is adversarial?

Failure to call the witness has potential consequences:

Per Pattern Jury Instructions 1:75

It can allow the jury to charge allowing an adverse inference to be drawn:

1. If the defense has a reasonable explanation for not calling the witness and jury finds it reasonable they will be instructed not consider it during deliberations
2. If the failure to call the witness isn't explained or reason considered unreasonable the jury may conclude the witness would not have been favorable to the defense and therefore can draw the strongest inference against the defense

# Missing Witness Charge

Preconditions to this jury charge:

- 1) Witness had knowledge about a material issue in the case
- 2) Witness was available to testify
- 3) Witness testimony would be favorable to the opposing side
- 4) Witness would provide non-cumulative testimony

# Pattern Jury Instructions

- Framework for specific instructions and relevant law provided to the Jury.
- The basis for which the jury is to answer questions (charges) agreed upon by both parties to consider during deliberation



# Pitfalls for an Expert

- Unprepped testimony is a record that can be used against the expert in a later trial
- Provide the expert with everything as well as everything they request (NO internal reports)
- Know what the expert is anticipated to say during trial
- Know if your expert has a negative opinion about i.e. codefendants actions
- During trial- reliance on any piece literature as authoritative
- In general all testimony is public and PEER reviewable

# Post trial

Let the expert know the result!

# Billing for Expert Services

Part 4

# Contracts

*A contract is an agreement between two parties with terms and conditions.*

## Elements:

Identify the parties

Obligations

Terms

Costs

Payment terms

Warranties

Liability

Termination

Confidentiality

Disputes

Signatures

# Billing for Expert Services

## Contract agreements

- Is it necessary?
- Will your client sign it?
- What does it say?



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# Letters of Understanding v. Contracts

## **Why use them?**

Outlines the terms of the spoken agreement of services

- The nature of the assignment
- Deadlines
- Fees
- Billing Practices

# Sample Letter

Dear *(Attorney Name)*:

Thank you for speaking with me yesterday. I appreciate the opportunity to consult on your case.

As agreed, my Emergency Department/Home Health RN employee will perform the following services at a rate of *(specify amount)* per hour:

- Medical record analysis for deviations in standards of care.
- Medical chronology related to the allegations we discussed.

I will also supply you with the name of a board certified Emergency Department physician for a fee of *(specify amount)*. The physician will bill you directly for his review of the medical records.

A retainer of *(specify amount)* is due when I pick up the pertinent medical records.

If analysis of the records requires more than 4 hours, I will get your approval for any additional time. I will bill in ¼-hour increments and payment will be due upon receipt of invoice.

I understand that you need the analysis on or before *(date)* and the expert physician name on or before *(date)*.

Thank you again for this opportunity. I look forward to working with you.

Sincerely,

# Sample Letter of Retention

Dear (expert),

We are retaining you on behalf of (your client/insurance company) to perform an Independent examination and medical records of (plaintiff's name). Please be advised that (your client/insurance company) and not (law firm) is responsible for your fees/payments. Kindly forward your invoices to the undersigned so we can begin processing them for payment.

Enclosed please find for your review:

1. Pleadings
2. List all medical records individually with date ranges
3. CDs of films CT scans and MRI's from (facility and dates)

Kindly let us know if you would like any further documents for your review. We look forward to speaking with you following the IME and review of (plaintiff's name) medical records. I can be reached at (cell number) and the attorney handling the matter (name and number).

Regards,



# Billing Practices—The Fee Schedule



- Retainer (replenishing??)
- Medical record review
- Report (written? Verbal?)
- Payment Terms
- Deposition testimony
- Trial testimony
- Travel expenses
- Cancellation and Rush fees

***BE REASONABLE , BUT DON'T UNDER CUT YOURSELF!***

# Fee Schedule: KISS principle

- Different charges for teleconferences?
- Different charges for things like research or attending depositions as a “bystander.”
- Billing in increments, such as “the first 15 minutes are free...”
- Requiring “special treatment”



# Billing for Expert Services

- Creating Your Fee Schedule

How Do I set my Fees?

## Simple

Hourly: \$XXX.00

Deposition/trial half day: \$XXXX.00

## Complex

Separate fees for each service

# Sample Fee Schedule

## Fee Structure and Contract of Payment

### FEE STRUCTURE

- Case Analysis/Report Production/Deposition Review/similar services \$XXX/hour
- Deposition testimony (Minimum fee 3 hours) \$XXX/hour
- In-Court testimony (Minimum fee 4 hours) \$XXX/hour
- *Urgent Turnaround Fee applied if expert opinion related to record review, deposition review is requested to be reviewed in less than 7 days (25% additional to above fees)*

### EXPENSES

- Any additional expenses: photocopies, approved research items, mailings, airfare, hotel, meals, mileage/rental car, and similar travel expenses will be billed to retaining attorney/firm at cost and are to be guaranteed by the requesting attorney/firm prior to date in question.

### RETAINER/PAYMENT TERMS

- A retainer required for initiation of case review of case materials. This retainer is not an estimate of the total charges to be earned or the amount of work to be performed by xxx
- A retainer is required in advance of deposition testimony or trial testimony. All other fees must be paid within 60 days of receipt of Invoice from xxx. If not paid within 60 days, an interest rate of 3%APR will be added to the existing charges. In the event of scheduled appointment cancellations or postponements, a 48-hour notice is required to avoid a cancellation charge in which case. If no cancellation notice is given, a charge of \$250 will be incurred by the attorney.
- I, \_\_\_\_\_, Bar Number \_\_\_\_\_, do hereby agree to pay xxxx in accordance with the terms and conditions set forth above. I understand that this agreement is a binding contract between "X " and me and is not a contract between "X" and my client.
- Date: \_\_\_\_\_
- Signed (Attorney Signature)\_\_\_\_\_

# Billing for Expert Services

## Plaintiff v. Defense Practices



- Deposition or trial testimony charge for the day versus half day
- Record review hourly

Limitations plaintiff counsel: out of pocket

Limitations defense counsel:  
Client guidelines

# Billing for Expert Services



- **Tracking your Time:**
- Harvest
- Quick Books
- Pencil/Paper
- Make Some Time
- My Hours

# Avoid Billing Mistakes...

- Not getting a Retainer
- Not keeping accurate track of time
- Vague Billing
- Late Billing
- Block Billing
- Use of Medical terms on invoice
- Billing for learning curve
- Invoicing for non-billable tasks

# Billing for Expert Services

- Advice from an in-house LNC
  1. Recognize cost limitations:
    - Flexible rates
      - Plaintiff must pay out of pocket
      - Defense are limited by client guidelines
    - 2. Submit bills timely
    - 3. Reasonable fees: don't expect to fly first class



# Invoicing

Invoice Date: February 1, 2019

Client/Attorney Conklin & Worster, PCC

File Number/Reference Jack White vs St Peters Hospital

CONFIRM	February 29, 2019 Deposition Date Scheduled 1pm	* 4 hours minimum	\$XXX/hour Total \$XXXX due on 2/15
	* Paid two weeks in advance of testimony date by retaining Attorney.		
	Note: Usual fee waived of \$XXX/hour above \$XXX cancellation fee for testimony cancelled within two weeks of testimony date.		

Rate \$XXX/hour

Total Hours 4.0

Total Due February 15<sup>th</sup> \$XXXX.00

*Please note for Deposition to proceed, payment must be received by February 15, 2019*

*Please make checks payable to -----*

# Invoicing cont....



From **Legal Nurse Collaborative**  
 137 Westgate Rd, Wellesley, Ma 0281

Invoice ID **6**  
 Issue Date 03/10/2014  
 Due Date 03/10/2014 (upon receipt)  
 Subject Chandler v. Palntation

Invoice For **Searcy Denney Scarola  
 Barnhart & Shipley**

Item Type	Description	Quantity	Unit Price	Amount
Service	Retainer # 266374	1.00	\$1,000.00	\$1,000.00

Subtotal **\$1,000.00**  
 Payments **-\$1,000.00**

**Amount Due \$0.00**

# Billing for Expert Services

You did the work and should get paid for services:

Dispute?

Not paid?

- Submit bills timely!
- Process time
- Follow up!

Recourse:

- Collection agency
- Litigation

# Resources

- <https://www.theexpertinstitute.com/how-to-find-expert-witnesses-the-ultimate-guide/>
- <https://www.theexpertinstitute.com/beyond-daubert-state-specific-expert-witness-requirements/>
- <https://www.theexpertinstitute.com/daubert-versus-frye-a-national-look-at-expert-evidentiary-standards/>
- <https://www.theexpertinstitute.com/the-history-of-daubert-v-merrell-dow-pharmaceuticals/>
- <https://www.theexpertinstitute.com/admitting-expert-testimony-under-the-frye-standard-the-ultimate-guide/>
- <http://www.academyofexperts.org/guidance/users-experts/what-an-expert-witness>
- <https://www.hgexperts.com/expert-witness-articles/the-many-ways-a-legal-nurse-consultant-can-serve-as-an-expert-witness-45610>
- <https://www.theexpertinstitute.com/4-common-mistakes-working-experts-avoid/>
- <https://www.specialcounsel.com/eq-legal-consulting/>
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- [https://en.wikipedia.org/wiki/Frye\\_standard](https://en.wikipedia.org/wiki/Frye_standard)
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[https://www.law.ufl.edu/\\_pdf/faculty/little/topic8.pdf](https://www.law.ufl.edu/_pdf/faculty/little/topic8.pdf)

- Daubert decision

<https://supreme.justia.com/cases/federal/us/509/579/>

- DTI information and the courts decisions:

[https://www.researchgate.net/publication/328701763\\_Diffusion\\_Tensor\\_Imaging\\_Failing\\_Daubert\\_and\\_Fed\\_R\\_Evid\\_702\\_in\\_Traumatic\\_Brain\\_Injury\\_Litigation](https://www.researchgate.net/publication/328701763_Diffusion_Tensor_Imaging_Failing_Daubert_and_Fed_R_Evid_702_in_Traumatic_Brain_Injury_Litigation)

- CPLR 3101

<https://codes.findlaw.com>

## Presenters' Contact Info:

- Janet Attard RN IV, RNC-MNN, CLNC, MBA
  - [janattard1@gmail.com](mailto:janattard1@gmail.com)
- Peter Bergé JD, MPA, PA-C Emeritus
  - [pberge.atty@yahoo.com](mailto:pberge.atty@yahoo.com)
- Nikki Chambers RN, MSN
  - [nikki@chambersmlc.com](mailto:nikki@chambersmlc.com)
- Lisa Mancuso BSN, RN, PCCN, CCRN, CLCP, LNCC
  - [lmancuso@mancusomedlegal.com](mailto:lmancuso@mancusomedlegal.com)
- Jane Shufro MS, BSN, CPAN, LNCC:
  - [jane@janeshufroinc.com](mailto:jane@janeshufroinc.com)
- Suzanne Smithwick RN, LNCC:
  - [Suzanne.Smithwick@wilsonelser.com](mailto:Suzanne.Smithwick@wilsonelser.com)