



courtroomsciences.com

# Nurse Depositions Gone Bad: Diagnosis and Treatment



**A**CROSS THE COUNTRY, MEDICAL malpractice litigation creates a painful scenario for the health care industry, causing incalculable financial losses and rendering emotional turmoil to the health care professionals who have been positioned unwittingly as pawns in the game. These pawns are often the ill-fated nurses who play a crucial role testifying in medical malpractice cases. Whether a seasoned nurse practitioner or a recently-employed CNA, the story is the same and it goes something like this: A happily-employed, intelligent, and professional nurse receives notice of a deposition. Although she seems a bit anxious about having to testify, everyone believes “she will be fine” because she is smart, professional, and friendly. She has been instructed by counsel to keep her answers short, to “listen carefully to each question,” and to tell the truth. Unfortunately, what happens on deposition day (otherwise known as “D-Day” for the witness) is an all-too familiar picture experienced by defense attorneys, claims representatives, and nurses all over the country. Consider the following scenario:

*Nurse Jones arrives for the deposition with some combination of the following feelings and emotions: anxiety, anger, frustration, apathy, fear, sadness, and even sympathy for the plaintiff. In spite of this, however, she is “ready” for her deposition because she has met with the lawyers and reviewed the medical records. The rest of the players arrive and take their places – plaintiff’s counsel is seated on one side of the table; defense counsel sits on the other; the court reporter gets situated; the videographer (often with a full A/V rig) sets up; and, much to the surprise of Nurse Jones, the plaintiff also arrives.*

*The stage is set. The shine of the videographer’s lamp illuminates the room. The camera is aimed at the witness. The court reporter swears in the deponent and the questions begin.... Despite Nurse Jones’ nervousness, things start out “OK” during the first few introductory and innocuous questions. Then it happens: a shift in the line of inquiry to the case specific questions, followed by a palpable change in the aura of the room. Tension increases, Nurse Jones’ anxiety elevates and before long, the nature and persistence of the interrogation has Nurse Jones doubting the quality of her nursing care. Slowly but methodically, Nurse Jones is led down a slippery slope on which she feels she has no choice but to “admit” that because the charting of the patient care in this case was “incomplete,” she, along with other nurses in the case, “breached the standard of care.” The next “admission” from Nurse Jones is that because she deviated from the exact wording of the hospital’s written policy, she must have again deviated from “the standard of care.”*

*Unfortunately, plaintiff’s counsel is just getting started. Much to the surprise of the defense team and co-defendants, Nurse Jones’ opinions do not stop with the nursing care; rather, she also responds to questions about the medical care and diagnoses of the patient. In due course, Nurse Jones even proffers opinions about the medical decisions made by the physicians and what they “should” or “should not” have done that “could have” or “would have” prevented the patient’s injury or death. At this point, defense counsel is white-knuckling his legal pad, and co-defense counsel is frustrated because his physician has just been “thrown under the bus” by Nurse Jones.*

*As if these admissions were not bad enough, during the course of the deposition, Nurse Jones' anxiety causes her to make factual errors in her testimony. She becomes emotional (breaking down into tears), argumentative, angry, frustrated or perhaps even sarcastic with plaintiff's counsel. This is all recorded in the permanent transcript of course, and the videographer also has it all captured and preserved on video. Defense counsel, stunned to say the least, now has to inform his client (the claims manager) about Nurse Jones' catastrophic deposition.*

The proverbial "bell has been rung" – loudly – and it will be re-rung by plaintiff's counsel for settlement leverage, or as a way to provoke trial jurors. What should and could have been a relatively uneventful deposition, limiting plaintiff's leverage and strengthening the defendant's settlement position, has turned into a dream for the plaintiff's lawyer and a nightmare for the defendants.

An emotional shift has taken place among all the parties involved in this case (see Table 1). The following quote from a Missouri-based medical malpractice defense attorney highlights the point: *"Words can't really do justice to describe the sick, sinking feeling that you get in the pit of your stomach when a key witness drops the ball at deposition in a case you know in your heart is otherwise defensible. It's like getting punched in the gut when you aren't expecting it."*

Table 2 below represents what would have been the result if the witness had been properly assessed and trained to testify effectively from both from the legal and the non-legal perspective. This recent quote from an Orlando-based medical malpractice defense attorney illustrates the point: *"During the day, I watched my nurse respond warmly and positively to your advice as you built her confidence and communication ability. My nurse became convinced that your interests were her interests and*

**Table 1. Poor Deposition Emotional Effect**

Emotional Assessment		
<b>Pre-Deposition</b>	<b>Defense Attorney</b> <b>Plaintiff Attorney</b> <b>Plaintiffs</b> <b>Defense Witness</b> <b>Claims Manager</b>	<b>Confident</b> <b>Confident</b> <b>Nervous/Hopeful</b> <b>Anxious/Fearful/Angry</b> <b>Confident</b>
Emotional Assessment		
<b>Post-Deposition</b>	<b>Defense Attorney</b> <b>Plaintiff Attorney</b> <b>Plaintiffs</b> <b>Defense Witness</b> <b>Claims Manager</b>	<b>Frustrated/Fearful</b> <b>More Confident</b> <b>Excited/Confident</b> <b>Distressed/Depressed</b> <b>Angry/Shocked</b>

**Table 2. Strong Deposition Emotional Effect**

Emotional Assessment		
<b>Pre-Deposition</b>	<b>Defense Attorney</b> <b>Plaintiff Attorney</b> <b>Plaintiffs</b> <b>Defense Witness</b> <b>Claims Manager</b>	<b>Confident</b> <b>Confident</b> <b>Nervous/Hopeful</b> <b>Anxious/Fearful/Angry</b> <b>Confident</b>
Emotional Assessment		
<b>Post-Deposition</b>	<b>Defense Attorney</b> <b>Plaintiff Attorney</b> <b>Plaintiffs</b> <b>Defense Witness</b> <b>Claims Manager</b>	<b>Confident</b> <b>Frustrated/Irritable</b> <b>Discouraged</b> <b>Relieved/Proud</b> <b>Confident/Happy</b>

*became more and more able to incorporate the substantive points of the defense into her testimony as she worked with you. I believe the case is much stronger now than it would have been without your efforts."*

*criticize the clinical judgment of the physicians in the case?*

If the answer to each of these questions is a resounding "NO," then why did Nurse Jones testify as she did? Why did she ... Undermine the defense's case? Point the finger at the other nurses? Admit to breaching multiple standards of care? Criticize the medical judgment of the physicians? Prevention cannot be addressed prior to causation and the answers to these questions can only be uncovered by first recognizing that the causes of a nurse's struggle in the deposition are tied to certain aspects inherent to the profession as a whole. Many personality and job-related factors negatively impact nurses' abilities to tell the truth *effectively* in a legal/adversarial context. These include the individual characteristics of the nurse in general; the nurse's training (professional and academic); on-the-job experiences; the requirements and expectations from supervisors, physicians, patients, and patients'



## Deposition Post-mortem

A figurative "autopsy" must be performed by both defense counsel and the claims manager to determine the root cause of the disastrous deposition, which raises the following questions:

- *Did Nurse Jones in the vignette really mean what she said?*
- *Does she harbor ill-will toward the hospital?*
- *Does she actually believe she and her nurse counterparts breached nursing standards of care?*
- *Does she really think she is qualified to offer medical opinions and that she had the right to*

family members; the pressures and demands of the job; and, additionally the strategic methods the nurse must employ to efficiently and effectively fulfill her various roles and responsibilities in the medical setting. Upon further analysis, it becomes clear that much of what it takes to make people GOOD nurses makes them POOR deponents, transforming one of health care's greatest and valued *assets* into one of its biggest legal *liabilities*. Left unchecked, this leads to needlessly handing leverage and money over to the opposition.

The following section highlights some of the most common aspects of the nursing profession that create the greatest pitfalls for nurses in the deposition.



## Nurses Must Have Answers – Always

**Professionally:** Patients routinely ask nurses about their condition, treatment, and prognosis; and nurses either must have the answers or find the answers. Physicians also rely on nurses' assessments to develop the treatment plan. It would be professional suicide for a nurse to simply say, "I don't remember" or "I don't know" in response to an inquiry from a physician about a particular patient, or to a patient's inquiry about his current medical condition. Moreover, not only must nurses have answers, they must respond quickly, which means they often anticipate the questions from the patients or the physicians, and they formulate their answers *before* the patients or the physicians have finished asking the questions. Professionally this is a necessary skill set and it promotes efficiency in the work setting.

**In the Deposition:** Because nurses are required to have all the answers in their professional daily lives, it makes their job in the deposition extremely difficult.

*"Upon further analysis, it becomes clear that much of what it takes to make people GOOD nurses makes them POOR deponents..."*

They feel compelled to provide an answer to every question, even if they do not know the answer. Thus, when a question is posed during a deposition to which they do not know the answer, they speculate, hypothesize, or guess – all of which can prove catastrophic in this setting. Additionally, feeling compelled to have answers *on the spot* is extremely problematic in the context of a deposition. When the nurse thinks she knows what is being asked by plaintiff's counsel, she starts to formulate her response before the question is even on the table, sometimes answering a question from opposing counsel *before* he has finished asking it.

**The Result:** The nurse's authentic, but incorrect, guesses and hypotheses are now part of the court record and the nurse, the defendant, and the other deponents are now held to, and compared with, the "truths" of her testimony. When a nurse anticipates the question in a deposition, her attention is split between the question being asked and her formulation of a response, causing her to make critical mistakes – either agreeing with something untrue, guessing and getting it wrong, admitting to something that did not happen, or

adopting counsel's terminology and elevating the severity of the occurrence at issue, (and the list goes on). Inconsistencies between her testimony and the testimony of the other deponents (and sometimes the actual facts) create more hurdles for the defense team to overcome, and ultimately increase plaintiff's leverage either in settlement negotiations or at trial.



## Nurses Volunteer Information

**Professionally:** Whether an inquiry from a physician about a patient's vital signs and current response to a treatment plan, or a question from a patient or a patient's family member about his or her medications, treatment, or prognosis, nurses must make sure their responses include sufficient *detail* to ensure total clarity and understanding. This is done for efficiency, which is crucially important in the medical setting where time is a precious commodity. In this regard, it is better for a nurse to err on the side of providing more, rather than less, detail in her responses and communications. The informed consent requirement, something which nurses deal with every day, illustrates the point, i.e. no matter how remote the possibility of a negative side effect for a given procedure, nurses must operate under the standard that "more information is better." This good nursing practice ensures the patient understands virtually all the risks associated with a particular procedure prior to the procedure taking place. Professionally, this is good nursing practice.

**In the Deposition:** One of the biggest gifts a deponent can give plaintiff's counsel is information that goes beyond the question – an all too common occurrence – or provides an answer to a question

*"The nurse's authentic, but incorrect, guesses and hypotheses are now part of the court record and the nurse, the defendant, and the other deponents are now held to, and compared with, the 'truths' of her testimony."*

that has not been asked. Nurses frequently fall prey to this vulnerability because as competent and efficient nurses, they are accustomed to providing detailed explanations to doctors, patients, and patients' families. In the deposition, a nurse falsely believes that providing full and complete answers with plenty of detail will be an efficient way to "tell the story," get the "whole truth" out, and convince everyone (hospital administrators, fellow nurses and even plaintiff's counsel) that she did nothing wrong. She also hopes that this "efficiency" will help end the deposition quickly.

**The Result:** Volunteering unsolicited information in the deposition simply gives plaintiff's counsel more ammunition, more questions to ask, and more areas of inquiry. It opens up pathways for plaintiff's counsel to probe, prod, and pry. Providing detailed answers ultimately produces unanticipated (and unwelcome) "surprises" to defense counsel and takes nurses out of their areas of expertise, spheres of experience, and knowledge base, into unfamiliar territory. The likelihood of more speculation, guesses,

and errors increases. The deposition tends to last longer, increases the witness frustration, decreases the nurse's confidence, and ultimately makes her look and feel incompetent. In turn, the nurse's anxiety elevates, her concentration wanes, and ultimately, plaintiff's counsel's job becomes easier and defense counsel's job becomes more difficult.



## Nurses Form Opinions

**Professionally:** Nurses must form opinions about their patients every day, including responses to treatment; improvement or deterioration of patients' conditions; and the efficacy of prescribed medications. In practice, nurses' opinions can be centrally important to the physicians, who rely on nurses' assessments because they are on the forefront of care. Even though outside their realm of responsibility and qualifications, nurses frequently have opinions about the many aspects of the treatment plan (including the selection and dosage of medications) – opinions they and physicians know are often correct.

**In the Deposition:** Plaintiffs' attorneys know nurses have opinions about medical care and treatment, and it is easy for them to elicit these opinions in the deposition. Plaintiffs' attorneys are also keenly aware that nurses have opinions about the quality of care provided by other nurses, which is not always flattering. When asked for their opinions in the deposition, nurses often feel compelled to respond because they *do* have opinions and they feel it would be a violation of the oath they just took (to tell the truth) not to give their truthful opinions. What the nurses do not realize is that in the legal

context, an opinion is more than just an "opinion," and anything outside their area of training and qualifications or their actual involvement in the care of the patient is off-limits.

**The Result:** Plaintiff's counsel, via leading questions, will lead the nurse to a point at which her opinion will either necessarily support plaintiff's position, will contradict the conduct of the medical professionals in the case, or will trap her into agreeing with something she does not actually believe. Additionally, pointing the finger, even subtly, at other nurses or medical professionals does not take the heat off the deposed nurse as she might hope. In contrast, she will likely testify at trial when she might not have had to otherwise. Ultimately, opinions that fall outside a nurse's expertise, training, and sphere of experience, *and* that are critical of other parties only serve to make the defense of the case more challenging, and the nurse's job in the deposition and at trial more difficult.



## Nurses Defer to Authority

**Professionally:** Even though nurses are on the frontline of patient care, they recognize that the medical decisions, diagnoses, and treatment plans are the responsibility of the physician – the authority in the patient care hierarchy. In their profession, nurses must defer to this ultimate authority for the medical care of the patients. And, although nurses might have opinions that differ from those in authority, they typically do not challenge the physicians, nor do they attempt to override the physician's opinions and medical judgment.

**In the Deposition:** Lawyers are seen as the authority figure in the legal arena, particularly in the deposition where there is an absence of a higher authority (i.e., the judge). Because a plaintiff's lawyer can sound commanding, act in an authoritative manner, and sound "physician like" in his questioning, he in effect, takes the place of the physician in a nurse's mind. A nurse is likely to have a difficult time respectfully disagreeing with the attorney (authority), even when all her training and experience tells her what the plaintiff's attorney is saying is incorrect. Additionally, during questioning, when this authority figure applies pressure, raises his voice, becomes aggressive, quotes hospital's policies and procedures, and tells the nurse that she violated the standard of care, the nurse will frequently acquiesce. The plaintiff's attorney takes advantage of the dynamics at play between physicians and nurses in the medical arena and uses it to manipulate nurses in the deposition. The tactics plaintiffs' attorneys use to intimidate nurses are not much different in appearance and feel than the demeanor and tone employed occasionally by some physicians.

**The Result:** Sometimes even when a nurse has been prepared by defense counsel, has practiced answering adversarial leading questions, and seems to be in line with the defense themes, she will falter in the deposition. This is because many nurses do not have the communication tools, preparation, or "permission" to respectfully disagree with plaintiff's counsel in the deposition. In the end, nurses who do not believe they violated the standard of care might admit to standard of care violations because they do not know how to disagree with "the authority" in the right way and without appearing argumentative or defensive.



## Prevention

The good news is that the scenario in the vignette outlined at the outset is preventable; the bad news is that it continues to occur every day, reaping devastating and unnecessary financial and emotional repercussions in the medical industry. In order to appreciate the financial consequences that result from poor witness testimony, one only need consider that approximately 85,000 medical malpractice lawsuits are filed each year. In 2010 alone, of the reported medical malpractice verdicts and settlements, 126 of them were over \$1 million totaling approximately \$615 million (mean verdict amount of \$9 million). Importantly, these figures only represent the reported verdicts and settlements and do not account for any of the verdicts and settlements below \$1 million. Considering these figures alone, the financial exposure to insurance carriers, self-insured hospitals, and the medical industry in general is staggering. And, perhaps as important, when a caring, professional, and unsuspecting nurse is not properly prepared for the legal and non-legal aspects of her testimony, the emotional and psychological toll taken is immense. Pre- and post-deposition, nurses often report significantly elevated levels of anxiety and depressive symptoms that last for months, and sometimes years.

An investment in a prevention program is the key to successful nurse depositions. In consideration of the inherent challenges nurses face in the deposition and the financial risks, a collaborative approach to witness preparation is essential. This approach requires a joint effort between the legal team and a qualified witness trainer with expertise in litigation



psychology, witness psychology, and communication science.

***“When asked for their opinions in the deposition, nurses often feel compelled to respond...”***

Just as it is crucial to address the legal/factual elements of the case, the same attention must be given to the non-legal aspects of deposition testimony, which are rooted in the fields of psychology and communication science. A Chicago-based medical malpractice attorney had the following to say in this regard: *“Because of your expertise in psychology and witness preparation, you were able to diagnose and unearth problems that were preventing this witness from being an effective communicator in a matter of minutes, problems which this witness did not reveal to me for years while the case was pending. I was impressed.”*

In terms of medical malpractice litigation, a qualified witness trainer who is well-versed in the emotional, psychological, and cognitive struggles nurses face in the adversarial legal arena must be included as a vital member of the litigation team. This trainer understands the science of legal communication and trial psychology and has an intimate understanding of the underlying reasons nurses struggle in the deposition. Only then can nurses’ challenges be assessed, addressed and resolved, and catastrophes averted. In this regard, a Missouri-based medical malpractice attorney said the following: *“Nurses can be difficult witnesses.*

*Their background and nature require a different approach than preparation of standard fact witnesses. Your insight into why they are a challenge helps both the nurse and counsel prepare for what are frequently the most important depositions in a malpractice case. Your help is invaluable!”*

Medical insurers have found that the inclusion of witness trainers, who address this non-legal side of witness testimony, greatly enhances witness performance in depositions. The result is that thousands, if not millions, of dollars per case can be protected through outright dismissal from the case, lower settlements, and more frequent defense verdicts at trial.

Consider this email from a national medical insurer claims manager, *“Remember our favorite nurses...?? Plaintiff has agreed to dismiss the entire case!!!! You honestly saved me thousands and thousands of dollars on defending this case with your help preparing these witnesses!! I can’t thank you enough!!”*



## Key Things to Remember When Working with Nurses:

- **Avoid Last-Minute Preparation** – Nurses sometimes require more than one training session for optimal performance in the deposition. If training is put off to the last minute, some of the most important behavioral and attitudinal changes will not take place because time simply runs out.
- **Do Not Rely on Social Evaluations** – Many nurses thrive in the work setting and in social environments, including informal discussions of their case. However, a good skill set socially can often work against a nurse in the deposition. A communication assessment, tailored for the psycholegal context wherein depositions exist, is vital to accurately identify potential problem areas and to effectively address them *before* they manifest themselves in the deposition.
- **Provide Emotional Support** – It is important to support nurse deponents emotionally. Ask your nurse how she is “holding up emotionally,” give her “permission” to vent her negative feelings, and remain open to listening to her concerns and fears.
- **Establish Trust** – Many nurses will be wary of anything or anyone associated with the litigation process, including defense counsel. It is important to emphasize to nurse witnesses that you are there to help them, you care about them, and you are going to supply them with the necessary tools to navigate the deposition safely.
- **Reassure Nurses** – A pervasive belief among nurses who are deposed is that they are at risk of losing their jobs, their licenses, their reputations, and possibly even their livelihoods. It is important to address these concerns and to eliminate inaccurate beliefs and assumptions with nurses as early as possible in the litigation process.
- **Distinguish Charting from Causation** – Plaintiff’s counsel will always find something “incomplete” in the charting. Nurses are exceedingly vulnerable in this regard during depositions and need to embrace the concept that patient care trumps charting, and that something “missing” from the chart is not a cause of the patient’s harm.
- **Teach The Standard of Care** – Nurses mistakenly believe that something less than perfection is a breach in the standard of care. For example, nurses often believe that a bad outcome, a missing chart entry, or a deviation from hospital policies are all *per se* breaches in the standard of care. Thus, nurses need to be taught what the standard of care means in the legal context, how it applies to the care they rendered, and how plaintiff’s counsel will attempt to use it in the deposition. Nurses must be armed so they can identify and handle all of the various forms of the standard of care questions in the deposition.



*Copyright 2013 Litigation Psychology, LLC. All Rights Reserved.*

Crisis Communications

Records & Depositions

Litigation Psychology

Trial Consulting

4950 North O'Connor Road, Suite 100, Irving, TX 75062-2778

Phone 972.717.1773

Toll Free 800.514.5879

[courtroomsciences.com](http://courtroomsciences.com)