

Medical Fact Witnessing: An Emerging Role for Nurses

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With any medically related litigation, the medical record is very important for the judge and jury to understand. Consequently, the facts within the record must be presented in a clear and concise manner. Attorneys have traditionally used the physician to introduce the medical records into evidence. However, the legal nurse consultant (LNC) is emerging as a cost-effective resource for this purpose.

What experience qualifies the LNC for this role? The answer lies within the daily responsibilities of a nurse. A nurse is trained to have a working knowledge of the medical record. Reviewing the history and physical, discerning the physician's orders and progress notes, interpreting lab and/or diagnostic reports and understanding the nursing flow sheet are a part of the nurse's daily practice. Quality care is a result of synthesizing all parts of the medical record. As a result, the LNC's background and education enables them to be an expert on the medical record.

Understanding the role of the fact witness will allow the attorney to use the LNC more effectively. The primary function of a fact witness is to educate the judge and jury regarding the contents of the medical record. Opinions regarding the standard of care and/or appropriateness of treatment are usually not the responsibility of this type of witness. To avoid any misunderstandings, expectations of the witness should be discussed. Good communication between the attorney and LNC is always crucial.

The LNC's previous experience in patient education is also brought into the courtroom. In the clinical setting a physician will describe a procedure or diagnosis to the patient. Most of the time it is the nurse who expands on the physician's explanations and ensures that the person understands his or her situation. Consequently, as the LNC is able to explain the medical record in layman's terms, they become an effective resource to the judge and jury.

When does the attorney find it necessary to use the fact witness? With any long hospitalization or convalescent period, the summary and presentation of a large amount of medical records may be needed. For example, if your client was in an accident and hospitalized for 2-3 weeks, it would take the testimony of 20-30 different health care providers to accurately convey the medical care received. A LNC functioning as a fact witness could summarize this medical care for the jury in less than an hour, saving valuable court time and retaining the jury's attention.

The defense may object to using a nurse in this capacity, saying that they are not qualified to interpret or summarize the medical records. We have discussed why the LNC is uniquely qualified for this role above, but citing Federal Rule 702 might also assist in qualifying the LNC. This rule states "If scientific, technical, or other specialized

knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” The defense may also object to the LNC’s report, charts, and summaries. Federal Rule 1006 states “The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation.”

The medical record may also be particularly important in illustrating pain and suffering. For instance, a summary of the multiple surgeries needed to treat the attorney’s client or a review of pain medication utilized by the client may support or defend the amount of suffering the client endured. This writer assisted a Virginia attorney with a products liability case. This case involved a roll over and fire of an all terrain vehicle being used by a meter maid. She suffered 2nd and 3rd degree burns over more than 50% of her body. In anticipation of acting as a fact witness in this case, 11 months of medical records were summarized in a chart. Numerous surgeries and procedures were explained in lay terms. The medical records were also thoroughly searched for every instance of pain and suffering that could be found. All of the sedatives and pain medication this client received during her initial 2-month hospitalization was also summarized in a table. The bottom line was that this client received enough pain medication in the first 6 weeks after her accident to relieve the pain of 850 heart attacks or 1700 hours of labor pains. This puts the pain and suffering into terms that a jury can more easily understand. Of course the defense does not want a jury to hear this information. This case never went to trial, but the report was used to obtain a \$14,000,000 settlement.

Other areas of litigation, such as domestic relation cases, may also find a need for the medical fact witness. Subsequent to an allegation of abuse, the attorney may want to show a jury that the medical record supports this claim.

Presenting the medical record to the trier of fact is the fact witnesses primary objective. When presented with medically related litigation, whether it is the dominant claim or secondary to the case, a number of resources are available to the attorney. Understanding the role of each resource, particularly the LNC’s role, can strengthen your position in a more cost-effective manner.◆

Reference: Federal Rules of Evidence, 2001, found at <http://www.law.cornell.edu/rules/fre/>

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