

# How to be an Expert Witness

By L.E. & F.A. Rozovsky

With the increasing amount of litigation in our society, the operating room nurse is bound to become involved in the judicial system. The nurse will become involved in two ways. The first is as a witness for the purpose of advising the court what was seen and what was done. The second is as an outside expert to give the court professional advice.

## What does an Expert Witness do ?

The difference between the ordinary witness and the expert witness is that the ordinary witness simply reports in response to questions by lawyers on the facts. The expert is a professional advisor who presents not facts, but opinions. The expert is from outside and may not be aware of the facts first hand.

Lawyers are becoming increasingly aware of the value of the expert nursing witness and are looking for nurses who can fulfill this role.

The expert is primarily retained as a consultant to advise either counsel for the plaintiff or counsel for the defendant. This may result in meetings with counsel and the drafting of a report. The most common use of the expert nursing witness is to comment on whether appropriate nursing care was performed. On this basis, the court determines whether the defendant was negligent or not. The question is whether the defendant lived up to reasonable nursing standards. The expert is first asked to determine what the reasonable standards are in the circumstances, and secondly whether the defendant met those standards.

Frequently more than one expert is retained. Each side will have their own experts. The views expressed by those experts may differ. The difference may be due to differing assumptions upon which those opinions were based, or the opinions being matters of judgment are simply different. The court is then forced to choose which view will be applied to the case before it. The fact that the court does not accept the views of one expert does not mean that the expert is not competent.

Experts is not retained because of their expertise in performing their professional tasks. They are retained because they are experts in having knowledge about the opinions which they are asked to express.

On being contacted by a lawyer for an expert opinion, the first thing to remember is that the relationship must be completely professional. The relationship

should be set out in a letter. The letter must make clear a number of factors. The first is that the duties of the expert are to be outlined. Is a written report required? Will there be meetings with the lawyer? Will travel be required? Will the expert be involved in discovery proceedings, and possibly a trial? How much advance notice of any proceedings will be given so that the expert can schedule the time ?

The letter must also explicitly outline the fees to be paid. If they do not, the expert should put these fees in writing and require a written acknowledgement before any work is commenced. The fees should be for the preparation of a report or opinion, meetings, appearances at discovery proceedings, appearances at court, and fees for any canceled court appearances for which the expert has prepared. Out of town fees should also be noted. Because of the uncertainty as to how much time will be involved, since there is always the possibility that the matter is settled out of court, the fees should be on a per diem basis rather than on a flat all-inclusive basis. Provision should also be made for any expenses incurred.

Detailed instructions should be sought with respect to the preparation. What are the questions which should be examined? Who can the expert consult ?

If another lawyer or some other person contacts the expert and wishes to discuss the case, no discussion should be had until the expert contacts the lawyer who retained the expert.

The agreement between the expert and the lawyer should state very clearly that it is the lawyer who is hiring the expert and will be responsible for all fees and expenses. It should also state that the experts account will be due when it is billed. The reasons for these precautions are that the lawyer may not want to use his or her own funds and may have difficulty getting paid by the client. A well-run law office usually does not hire experts therefore, until the client has put money in trust for the payment of such expenses.

## The Expert on Trial

To a certain extent the expert is on trial. Since the expert is retained to promote the client's case, the lawyer for the opposing party will do everything to oppose the expert's opinion. There may be an attempt to show that the expert is not very knowledgeable or

experienced in the subject upon which an opinion is being given. Counsel will try to get the expert to make contradictory statement, and to appear as lacking confidence. In order to be an effective expert a number of rules should be observed.

- (1) Obtain and follow instructions from legal counsel, but do not agree to express an opinion which you do not in fact hold.
- (2) Do not over-rehearse your testimony, otherwise it will not sound genuine.
- (3) Be very careful not to make errors in giving testimony either during discovery proceedings nor at the trial, since even minor errors may damage your credibility.
- (4) Do not contradict yourself either within testimony or with anything that you have written or said before unless you are able to explain why you are now giving a different opinion.
- (5) Do not promote the position of the party for whom you are testifying, since it will reduce your credibility as an independent professional.
- (6) Do not appear to be unhappy about being called upon to be in court.
- (7) Do not be hostile, arrogant, flippant, condescending, argumentative, rude or emotional.
- (8) Do not fidget, look about or yawn
- (9) Do not speak in too much technical language, unless you define the terms and phrases you are using.
- (10) Be confident.
- (11) Answer the questions in a straightforward manner by answering the questions that were asked, and only those questions.
- (12) If you do not understand the question or if it cannot be answered in the manner in which it was phrased, do not hesitate to ask the judge for assistance.
- (13) Do not assume that the court is in possession of certain facts.
- (14) Speak slowly, clearly and loudly
- (15) Dress as a professional advisor, which you are.
- (16) Address a male Supreme Court judge as "My Lord" and a female Supreme Court Judge as "M'am". Judges of lower rank such as provincial court and family court judges should be addressed as "Your Honour".
- (17) Do not try to argue the case, since that is the lawyer's job, not the expert's.

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