Anatomy of a Lawsuit: The Process of Litigation in Medical Malpractice Cases
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Objectives

At the end of this presentation, the participant will be able to:

1. list the steps in the litigation process,
2. identify situations in the care setting that can put the nurse at risk for liability claims, and
3. explain the nurse’s role during deposition testimony from the perspectives of fact witness, defendant, and nursing expert.

I. Introduction

Nurses are increasingly being named in medical malpractice cases. Understandably, this can be a stressful and overwhelming experience. An understanding of the legal process can help alleviate some of the stress and anxiety associated with being involved in the litigation process. In this lecture we will discuss current legal issues affecting perinatal, neonatal, and pediatric nursing practice, and will explore the nurse’s role during deposition testimony from the perspectives of fact witness, defendant, and nursing expert.

II. The Process of Litigation in Medical Malpractice Cases

A. Allegation of Harm

- The patient, parent, or legal guardian is dissatisfied with the outcome of care provided to the patient

B. Seeking Legal Counsel

- A plaintiff’s attorney is consulted by the patient, parent, or legal guardian to evaluate if the allegations have merit
- The plaintiff’s attorney must ascertain if the legal elements of negligence are present in order to proceed with the lawsuit:
  - The nurse had a duty to the patient
  - There was a breach of that duty
  - Harm or damages occurred to the patient
  - That harm or damage occurred as a result of the breach
- If these four elements are present, the attorney will file the complaint
C. Review by Medical Experts

- Medical records are obtained from the health care institution and providers involved in the case with the patient’s/parent’s/legal guardian’s consent
- Medical experts are consulted to help determine if a breach has occurred and the lawsuit has merit

D. Initiation of a Lawsuit

- If the plaintiff’s attorney, along with the advice of medical experts, finds that the medical records indicate that the legal elements of negligence are present, a complaint is filed in the appropriate court of law
- The defendant(s) is (are) served a copy of the complaint
- The insurance carrier is notified by the defendant(s)/health care facility
- The defense lawyer is notified by the defendant(s) and/or the insurance carrier

E. Discovery Period

- Consists of both sides gathering information about the circumstances surrounding the case
- Depositions are taken during this process
- This period of time allows both sides to prepare for trial, should it come to that point
- The discovery period can take months, even years to complete
- Often leads to settlement in the case

F. Settlement or Trial

- Settlement can occur at any time, up to and including trial and/or jury deliberation
- Trial is the formal process where the case is presented before a judge and a jury
  - Includes testimony from fact and expert witnesses
  - May include testimony from actuaries to establish damages

G. The Verdict Stage

- After all evidence is presented, the jury decides which side presented more favorable evidence
- A judge may reverse the jury’s judgment (rare)

H. The Process of Appeal

- Verdicts may be appealed
- Appellate courts often will rule on issues of law
  - For example—whether proper procedure was carried out during the trial
III. Deposition Testimony

A. Definition and Purpose

- A deposition can be thought of as a “fact-finding mission”
- It is a formal legal proceeding that includes oral testimony under oath led by the opposing attorney
- The attorneys for both the defense and the plaintiff seek to establish the facts of the case from the perspectives of both fact witness and medical experts not directly involved in the case
- The goal is to gather the facts of the case and put them on the record
- The deposition is conducted in the presence of a court reporter and the attorneys for both the plaintiff and the defense
- Attorneys representing other parties involved in the case may also be present
- Although a judge or a jury are not present, the deposition is conducted in the same manner as any legal proceeding
- The deponent is sworn in under oath and must answer truthfully
- Answers given at deposition are recorded in the legal record and may be presented during trial

B. The Role of the Nurse Called to Testify as a Fact Witness

- A nurse may be contacted by a claim representative or by an attorney as a potential witness who was involved in the patient’s care but is not being named as a defendant
- Fact witnesses have first-hand knowledge of the facts of a case
- Fact witnesses are able to testify only as to what was directly observed in the clinical situation

C. The Nurse as Defendant in a Claim

- A nurse also may be contacted by a claim representative or by an attorney as a named defendant in the case
- The first step is to contact the Risk Management department of the facility where the alleged incident occurred
- The initial investigation will focus primarily on documentation in the medical record, but will also include the defendant’s recollection of the case, independent of what is documented in the medical record
D. The Role of the Nurse Called to Testify as a Fact Witness

- The role of the expert witness nurse is to evaluate, analyze, and give informed opinions about nursing care in a case
- Expert witnesses help educate the court about matters that are not generally known to laypeople
- Two key elements of a good expert are honesty and objectivity
- Expert witnesses are qualified by their knowledge, training, and expertise to offer opinions on a case based on the standard of care
- Sources of written standards of care may include:
  - Nurse practice acts, accreditation and licensing standards
  - Federal and state laws and regulations
  - Textbooks and other publications
  - Facility or agency policies and procedures
  - Equipment or product information
- Qualifications of an Expert Witness Nurse
  - The most qualified expert witness is one with a solid background in his/her area of clinical practice
  - Though no set standard exists, a minimum of two years’ experience in the specialty area is a good guide
  - Expert witnesses may only testify to the standards to which they, themselves are qualified to practice
- Certification as a Legal Nurse Consultant
  - Formal education or training as a Legal Nurse Consultant (LNC) is not necessary, although several programs and classes do exist
  - Since 1998, certification as an LNC is available through the American Legal Nurse Consultant Certification Board (ALNCCB)
  - Successful completion of the certification exam allows the nurse to use the designation LNCC
- Fees for Services
  - Generally, expert witnesses charge an hourly rate for their work based on years of nursing experience and training
  - Advanced degrees or specialty certification add to the credibility of an expert witness nurse and should be considered when establishing fees

E. Deposition Basics

- Be prepared—read all the information provided to you before you sit for a deposition. Make sure you know the case and what the issue is that has resulted in the lawsuit.
- Be professional—that means not only conducting yourself in a professional manner, but presenting yourself in that way as well. Excellent communication skills, both written and verbal, are a must.
- Be calm—you need to remain poised under pressure. Depositions can create much anxiety—whether you are the nurse involved in the lawsuit or you just happened to be working that day.
IV. Tips for Successful Deposition Testimony

- Be prepared
- Be on time—better yet, be early
- Relax
- Listen carefully to the questions being asked
- If you can’t remember the question, ask that it be repeated before answering
- If you don’t understand the question, ask that it be rephrased before answering
- Take your time answering questions
- Answer only the question being asked
- Refer to the medical record when needed
- Know what you know
- Know what you don’t know
- Say what you mean
- Mean what you say
- Don’t argue with the attorney
- Don’t take things personally
- If you need a break, ask for one
- Ask to review the transcripts once they are available

V. Malpractice Insurance for Nurses

A. Claims-made

B. Occurrence

C. Tail policy
References


