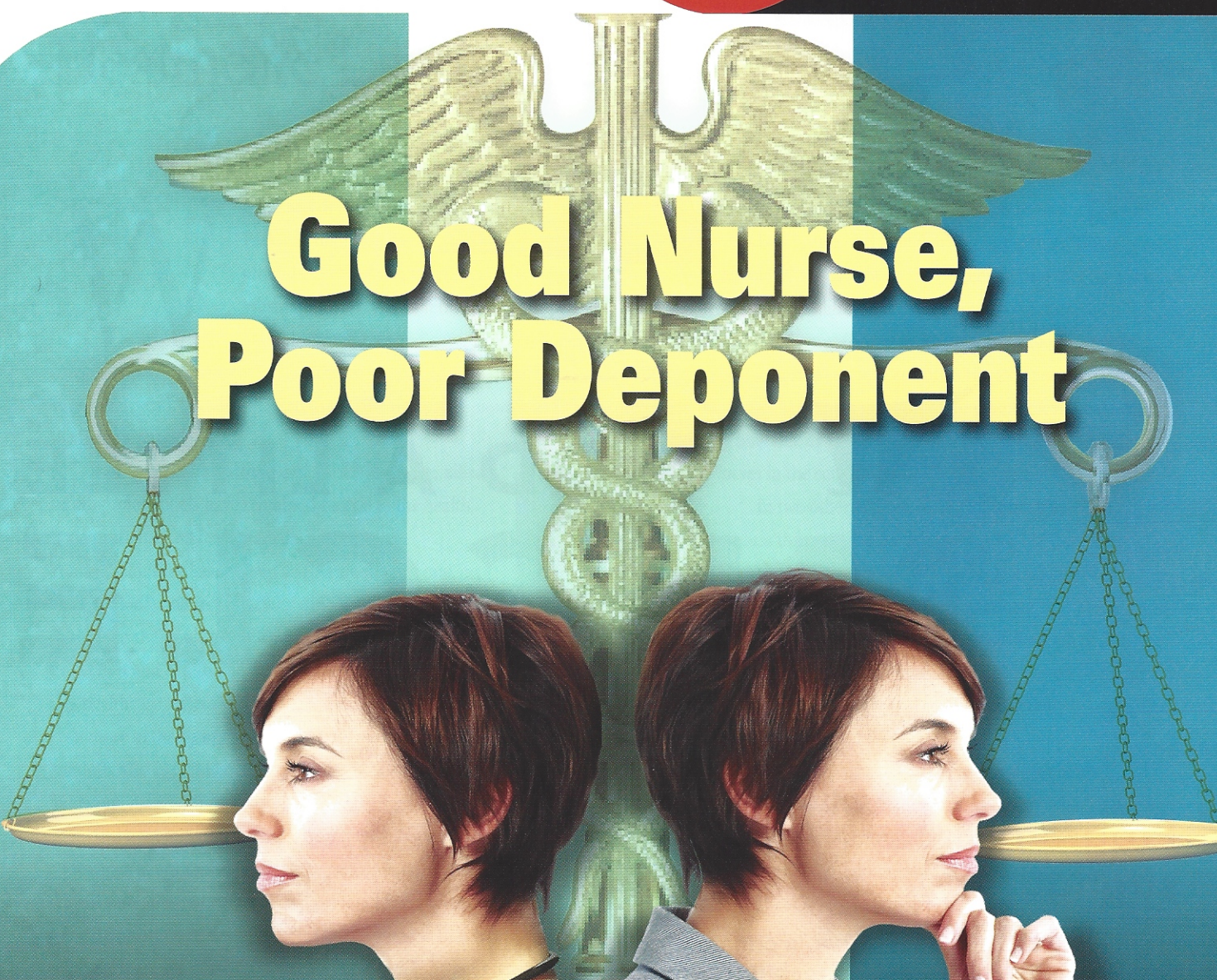


# physician **in** insurer



## Good Nurse, Poor Deponent

A N D

**Professional  
Guidelines vs.  
Standards  
of Care**



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2012 FOURTH QUARTER

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“ One of the biggest gifts a deponent can give plaintiff’s counsel is an answer that goes beyond the question—an all too common occurrence—or a response to a question that hasn’t actually been asked. Quite often, nurses are vulnerable in this regard. —Cover story ”

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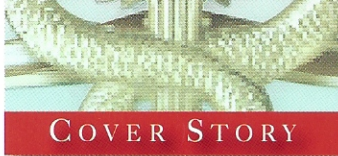
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# Good Nurse, Poor Deponent: *How to Fix This Problem*

BY JEFFREY DOUGHERTY

Unfortunately, much of what it takes to make people good nurses tends to make them poor deponents, transforming one of health-care's greatest and valued assets into one of its biggest legal liabilities. Left unchecked, this may lead to unnecessary loss of both leverage and money to the opposition.

Here, I highlight some of the most common aspects of the nursing profession that create the greatest pitfalls for nurses in the deposition.

## 1. 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, nurses must respond quickly, which means that they frequently anticipate questions from patients or physicians, and then respond before the patients or the physicians have finished asking the questions. Professionally, this is a neces-

sary skill set, and it promotes efficiency in the work setting.

**In the deposition:** Because nurses must have all the answers in their professional daily lives, it makes their job in the deposition extremely difficult. They feel compelled to provide an answer to every question, even if they do not know the answer. Thus, when they are asked a question during a deposition and they don't know the answer, or if the answer is outside their area of expertise, they tend to speculate, hypothesize, or guess—all of which can prove catastrophic in this setting. In addition, 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 it is asked.

**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

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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.

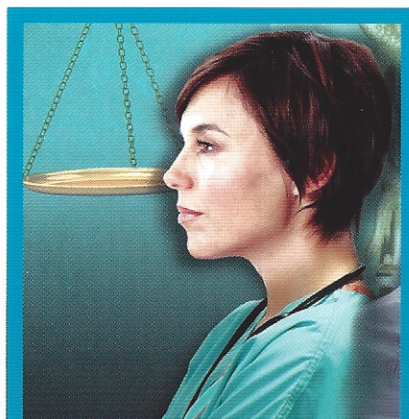
## 2. Nurses volunteer information.

**Professionally:** Whether the question comes from a physician about a patient's vital signs and current response to a treatment plan, or from a patient or a patient's family member about his 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, not to be wasted. 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 that nurses deal with every day, illustrates the point. For example, 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 that the patient understands virtually all the risks associated with a particular procedure before it is performed. Professionally, this is good nursing practice.

**In the deposition:** One of the biggest gifts a deponent can give plaintiff's counsel is an answer that goes beyond the question—an all too common occurrence—or provides an answer to a question that has not been asked. Nurses frequently fall prey to this vulnerability because, as competent and efficient health professionals, 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 deposi-

tion 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, thereby increasing the witness's frustration, decreasing her confidence, and ultimately, making her look and feel incompetent. In turn, the nurse's anxiety elevates, her concentration wanes, and plaintiff's counsel's job becomes easier, and defense counsel's job becomes more difficult.



**One of the biggest gifts a deponent can give plaintiff's counsel is an answer that goes beyond the question—an all too common occurrence.**

## 3. 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 it is 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 that they and physicians know are often correct.

**In the deposition:** Plaintiffs' attorneys know that 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 where 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. In addition, 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 be compelled to testify at trial, which otherwise might have been avoided. 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 more difficult.

### 3. 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 pro-

feSSION, 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:** In the legal arena, it is the lawyers who are seen as the authority figure, particularly in a deposition, where no higher authority (i.e., a judge) is present. 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 of her training and experience tell her that what the plaintiff's attorney is saying is incorrect. In addition, during questioning, when this authority figure applies pressure, raises his voice, becomes aggressive, quotes hospital's

## 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, possessing a good skill set in social and professional situations can often work against a nurse in a deposition. A communication assessment, tailored for the psycho-legal context wherein depositions occur, 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 provide them with the necessary tools to navigate the deposition safely.

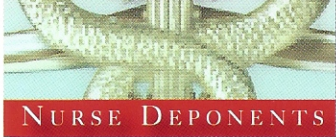
■ **Reassure nurses.** A pervasive belief among nurses who are deposed is that they are at risk of losing their jobs, their licenses, their reputations, and possibly even their livelihoods. It is important to address these concerns and to eliminate inaccurate beliefs and assumptions with nurses as early as possible in the litigation process.

■ **Distinguish charting from causation.** Plaintiff's counsel will always find some-

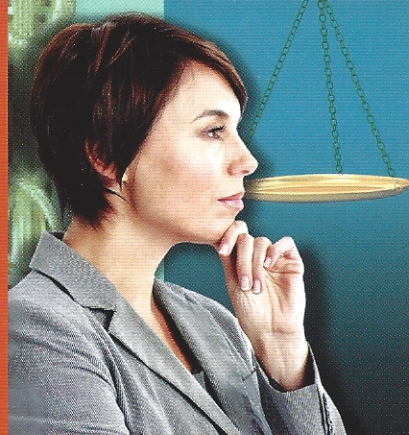
thing "incomplete" in the charting. Nurses are exceedingly vulnerable in this regard during depositions; they need to embrace the concept that patient care trumps charting, and that something "missing" from the chart is not a cause of the patient's harm.

■ **Teach the standard of care.** Nurses might mistakenly believe that something less than perfection is a breach in the standard of care. For example, nurses commonly 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. So nurses need to be taught what "the standard of care" actually means in the legal context, how it applies to the care they provided, and how plaintiff's counsel will attempt to use it in the deposition. Nurses must be forearmed, so they can identify and handle all of the various types of standard-of-care questions they may face in a deposition.





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 dynamic in play between physicians and nurses in the medical arena, and he uses it to manipulate nurses in the deposition. The tactics plaintiffs' attorneys use to intimidate nurses are not much different in appearance and feel from the demeanor and tone employed occasionally by some physicians.



**Nurses frequently have opinions about the many aspects of the treatment plan—opinions that they and physicians know are often correct.**

**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 becoming defensive.

**Prevention**

An investment in a prevention program is the key to successful nurse depositions. A qualified witness trainer who is well-versed in the emotional, psychological, and cognitive struggles nurses face in the adversarial legal arena should 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. Then, nurses’ challenges in the setting of a deposition can be assessed, addressed, and resolved—and catastrophes averted. #PIAA

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