



The American Association of Nurse Attorneys

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Experts on Nursing: TAANA Takes a Stand

Can a physician offer expert, opinion evidence as to the nursing standard of care? That was the issue recently before the Illinois Supreme Court. Citing repeatedly to a brief submitted by The American Association of Nurse Attorneys written by Karen A. Butler, the Court held that only a nurse is qualified to offer expert evidence as to the standard of care for nurses (Sullivan v. Edward Hosp., No. 95409, 2004 WL 228956 (Ill. Feb. 5, 2004)).

Even before the Sullivan case, for over two years, the Litigation Section of TAANA had been working on a position paper surveying the laws in most states relative to whether a non-nurse could testify as to the standard of care for nurses. Through their research TAANA learned that only a physical therapist could testify as an expert as to the physical therapy standard of care and only a chiropractor could testify as to the standard of care for a chiropractor. Similar decisions were found for psychologists, audiologists and podiatrists. For example an orthopedic surgeon could not testify as to the standard of care of a podiatrist and a psychiatrist was precluded from offering expert testimony as to the standard of care for a psychologist. It was clear in every jurisdiction that only a physician could offer expert testimony as to the standard of care for a physician. [1]

When it came to the profession of nursing, however, non-nurses (physicians) routinely offered expert, opinion evidence as to the standard of care for nurses sometimes with no more foundation than the fact the witness was, indeed, a physician. Despite the fact that every state has a complex regulatory and licensing scheme for nurses including educational requirements and examination, the courts were still treating the profession of nursing as some lesser appendage of the medical profession.

It is clear that the profession of nursing, though closely related to the practice of medicine, is, indeed, distinct with its own licensing scheme, educational requirements, areas of specialization, Code of Ethics, models and theories and contract with society. The standard of care for nurses arises from the very nature and scope of nursing and is derived from the nursing process. The nurse is not a "junior doctor" nor is the nurse a mere "underling" of the physician. For the courts to so hold would negate the existence of nursing as a profession and would render the Nurse Practice Acts in every state, commonwealth and territory meaningless. It is unlikely that any physician, unless he/she has completed a nursing program and has practiced as a nurse, is capable or qualified to offer competent, reliable expert opinion on these nursing standards. The nursing profession and only the nursing profession has the right and duty to determine the scope and nature of nursing practice including the standard of care for nurses.

During the course of their research TAANA learned that a case was heading to the Supreme Court of Illinois in which the Court was being asked to consider this specific issue. In Sullivan the plaintiff alleged the nurse was negligent in preventing the patient from falling during an agitated state. To support the allegations against the nurse, the plaintiff offered the testimony of a physician but not a nurse. The physician testified the nurse was negligent in not more forcibly conveying to the physician the condition of the patient and in fact that the "nurse missed the diagnosis of delirium completely."



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In September, 2003, TAANA submitted an Amicus brief to the Illinois Supreme Court in the case of Sullivan v. Edward Hosp. The brief was drafted by Karen Butler, Chair of the Litigation Section based on their previous research and supplemented by extensive research relative to Illinois law. The Chicago Chapter, particularly, Leatrice Schmidt, reviewed and submitted the brief. Citing to multiple authorities throughout Illinois, as well as multiple other jurisdictions, statutory authority and scholarly studies of this issue, TAANA argued that nurses, and only nurses, have the authority and responsibility to define the scope and practice of nursing. Therefore, only a nurse is qualified to offer expert, opinion evidence as to the nursing standard of care.

The Illinois Trial Lawyers also submitted an Amicus Brief arguing that physicians can do anything a nurse can do and, therefore, a physician can always testify as to the standard of care for nurses. At the very least, because physicians work with nurses everyday, their familiarity with the practice of nursing from observation is enough to allow the physician to testify as to the nursing standard of care. In response to this argument TAANA pointed out that certainly, nurses are not permitted to offer expert testimony against a physician based on their observances of physicians or their familiarity with the procedures involved. An operating room nurse, who stands shoulder to shoulder with surgeons everyday, would not be permitted to testify as to the standard of care of a surgeon. An endoscopy nurse would not be permitted to testify as to the standard of care of a gastroenterologist performing a colonoscopy. A labor and delivery nurse would not be permitted to offer expert, opinion testimony as to the standard of care for an obstetrician or even a midwife. Nor would a nurse be permitted to testify that, in her experience, when she calls a physician, he/she usually responds in a certain manner. Such testimony would be, essentially, expert testimony as to the standard of medical care.

The Trial Lawyers Association argued that the question should not be whether the expert is a nurse or a physician, but rather, whether the expert is familiar with the procedure in question. Under this rule where both nurses and physicians are familiar with and perform a specific procedure (for example starting an intravenous) the physician should be allowed to testify as to the standard of care for a nurse. Under this analysis, the nurse should likewise, be permitted to offer expert, opinion evidence as against the physician. However, this is a position taken by no court or jurisdiction in the United States.

The Trial Lawyers also argued that a physician is familiar with and is capable of performing any nursing procedure using as an example, a bath. The members of TAANA were not familiar with any situation in which a physician would give a bed bath and it is unlikely physicians are familiar with this process any more than any other intelligent, lay person. The issue would be whether the process of bathing a particular patient is a task which can be safely delegated to unlicensed personnel. It is unlikely a physician is familiar with the training and education received by ancillary health care workers such as nurses aids and would not be qualified to delegate tasks to such workers. Delegation of tasks to unlicensed health care workers as well as supervision of such workers is but one example of the responsibilities of the Registered Nurses with which physicians have almost no experience.

On February 5, 2004, The Illinois Supreme Court issued a decision. Citing extensively to the TAANA brief and also to the authorities cited by TAANA, the Court ruled that only a nurse is qualified to offer opinion evidence as to the nursing standard of care.[2]

It remains the position of The American Association of Nurse Attorneys that the only expert competent to testify as to the standard of care for nurses is a nurse.

[1] For citations please refer to (Sullivan v. Edward Hosp., No. 95409, 2004 WL 228956 (Ill. Feb. 5, 2004).



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[2] The Litigation Section would like to take this opportunity to thank the Chicago Chapter, particularly Leatrice Schmidt for reviewing and submitting the brief and those members of the Chicago Chapter who traveled to Springfield in November to hear oral arguments. We would also like to thank the law firm of Thuillez, Ford, Gold, Johnson and Butler for underwriting the cost of researching and preparing the brief for submission. We anticipate that both the TAANA brief and the decision will be published in an upcoming issue of the Journal of Nursing Law.