

## **Medical Malpractice**

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# **When is a Physician Qualified to Testify on the Standard of Care of a Nurse?**

### **Introduction**

Expert testimony is required in Illinois medical malpractice cases to establish the standard of care of the defendant. *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 848, 932 N.E.2d 1037 (2010). A medical expert must satisfy certain criteria to be qualified to render standard of care opinions. 735 ILCS 5/8-2501. The criteria have changed somewhat over the years, but the primary requirements remain and have been confirmed by the Illinois Supreme Court. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100 (2004). Specifically, the expert must be licensed in the same profession as the medical professional in question and also must be familiar with the medical issues involved. *Id.* at 112. “There is nothing which a nurse can do which a doctor cannot do” is a generally-accepted supposition. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 120 (2004). The two disciplines are not licensed in the same profession, however, and this supposition has been rejected by Illinois courts when it comes to expert testimony. Is a physician therefore unqualified to give nursing standard of care opinions? The answer is, as usual, it depends.

### **Statutory Requirements for Experts**

Illinois Tort Reform brought about sweeping changes to the laws governing medical malpractice litigation in Illinois via P.A. 94-677 (“the Act”) in 2005. From the defense perspective, one of the more popular provisions of the Act was the revised standards on expert testimony and qualifications 735 ILCS 5/8-2501. The new law required an expert witness to be board certified or board eligible in the same specialty as the physician-defendant, and devote most of his or her time to the type of care at issue in the case. *Id.* This was a significant change from the previous version of the statute, which only required the court to consider the medical specialty of the expert in relation to the issues involved in the case. The purpose of the amendment was to require a plaintiff’s standard of care expert to be truly knowledgeable as to the medical care and treatment that was provided by the defendant physician. But, the Illinois Supreme Court declared the 2005 expert qualification standards unconstitutional with the rest of the Act because it was unseverable. *Id.* Therefore, the statute reverted back to its previous language<sup>1</sup>:

**Sec. 8-2501. Expert Witness Standards.** In any case in which the standard of care given by a medical profession is at issue, the court shall apply the following standards to determine if a witness qualifies as an expert witness and can testify on the issue of the appropriate standard of care.

- (a) Relationship of the medical specialties of the witness to the medical problem or problems and the type of treatment administered in the case;
- (b) Whether the witness has devoted a substantial portion of his or her time to the practice of medicine, teaching or University based research in relation to the medical care and type of treatment at issue which gave rise to the medical problem of which the plaintiff complains;
- (c) whether the witness is licensed in the same profession as the defendant; and
- (d) whether, in the case against a nonspecialist, the witness can demonstrate a sufficient familiarity with the standard of care practiced in this State.

735 ILCS 5/8-2501.

Although an expert no longer is required to be board certified or board eligible in the same specialty as the defendant, the law still mandates that the expert be licensed in the same profession. The question then arises whether this requirement is a strict bar to physicians providing standard of care opinions for nurses.

### **Experts in Medical Malpractice Cases Must Meet Two Criteria**

The seminal case on this issue is *Sullivan v. Edward Hospital*, in which the Illinois Supreme Court held that a physician was not qualified to provide standard of care opinions for a nurse. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100 (2004). There, an elderly hospital patient attempted to get out of his bed through the side rails. *Id.* at 104. The nurse on duty had instructed the patient to remain in bed but he again made an attempt to get up. *Id.* Concerned that the patient was not following instructions, the nurse telephoned the attending physician who gave orders to administer medication to help him sleep, and the nurse followed the orders. *Id.* The patient, however, was found on the floor soon thereafter with an injury to his head. *Id.* at 104. The patient and his family brought a lawsuit against the physician and also against the hospital for the actions of the nurse. *Id.* at 105. Plaintiff's trial expert was a physician with experience in patient fall prevention. *Id.* The expert opined that the hospital nurse deviated from the standard of care by failing to inform the physician of the patient's condition, and also for failing to (1) go up the nursing chain of command; (2) provide an alternative to the physician's orders; and (3) provide constant supervision of the patient. *Id.* at 119.

The trial court struck the failure to communicate opinion because it was not properly disclosed by the plaintiff pursuant to Rule 213. *Id.* at 106. The trial court further barred the experts' remaining opinions on the nursing care provided, ruling that he was unqualified to render such testimony. *Id.* The appellate court affirmed. *Sullivan v. Edward Hospital*, 335 Ill. App. 3d 265, 269 (2nd Dist. 2003).

The Illinois Supreme Court agreed, holding that an expert must meet two criteria to be qualified to testify as an expert in a medical malpractice case:

- (1) The physician must be a licensed member of the school of medicine about which he proposes to testify; and
- (2) the expert must show that he is familiar with the methods, procedures, and treatments ordinarily observed by other physicians, in either the defendant physician's community or a similar community.

*Sullivan*, 209 Ill. 2d at 112-113, citing *Purtill v. Hess*, 111 Ill. 2d 229 (1986). Once these two foundational requirements have been met, the trial court has the discretion to determine whether a physician is qualified and competent to state his opinion as an expert regarding the standard of care. *Id.*, citing *Purtill*, 111 Ill. 2d 229.

In *Sullivan*, the supreme court reasoned that although the plaintiff's expert was experienced in the area of patient fall prevention, he was not a licensed nurse. Therefore, the expert was prohibited from providing

nursing standard of care opinions. *Sullivan*, 209 Ill. 2d at 113. The court further reasoned that the Illinois legislature has clearly distinguished between the different schools of medicine by creating distinct laws that govern each discipline. *Id.*, citing *Dolan v. Galluzzo*, 77 Ill. 2d 279 (1979). The supreme court also noted that there is an element of fairness in distinguishing between the various professions when the law defines the standard of care for one of its members. *Id.* Significantly, there is no universal standard for the treatment of patients, and there should not be a universal application of the standard of care among different licensed healthcare professionals. *Id.*, citing *Dolan v. Galluzzo*, 77 Ill. 2d 279 (1979). (The Illinois Supreme Court held in *Dolan* that an orthopedic surgeon was not qualified to testify as to the standard of care of a podiatrist because “in order to testify as an expert on the standard of care in a given school of medicine, the witness must be licensed therein.” *Dolan*, 77 Ill. 2d at 285).

The plaintiff in *Sullivan* argued that an expert is not required to be licensed in the same school of medicine if the care and treatment at issue is within his knowledge and observation. *Sullivan*, 209 Ill. 2d at 114, citing *Jones v. O’Young*, 154 Ill. 2d 39 (1992). The plaintiff’s reliance on *Jones* was misplaced. *Id.* Only after the expert has met the two requirements set out by *Purtill* may the trial court evaluate whether the care at issue is within the sound knowledge and observation of the expert. *Sullivan*, 209 Ill. 2d at 113.

In contrast, the Illinois Appellate Court, Second District, has held there are circumstances where a physician may testify as to the nursing standard of care. A physician can testify on nursing care when the issue involves proper communication to a physician and not nursing procedure. *Wingo v. Rockford Memorial Hospital*, 292 Ill. App. 3d 896, 901 (2nd Dist. 1997). The appellate court found that the licensing requirements as set out in *Dolan* did not apply. *Wingo*, 292 Ill. App. 3d at 906. In *Wingo*, the plaintiff alleged that the hospital’s nurse failed to communicate to the patient’s physician that her condition had changed. *Id.* at 900. Three physician experts testified that the failure to communicate this information was a deviation from the nursing standard of care. *Id.* at 901. The court allowed the opinions, finding that the allegations of negligence did not concern an area of medicine about which there would be a different standard between a physician and a nurse. *Id.* at 902. Furthermore, the Second District found that the allegations of negligence were well within the testifying doctors’ knowledge and experience. *Id.* The appellate court believed that a physician should be entitled to testify about what he or she relies upon in the area of communication from a nurse in the context of a team rendering care to a patient in a hospital. *Id.*

As discussed above, the plaintiff’s expert in *Sullivan* also opined that the nurse deviated from the standard of care for failing to communicate the patient’s condition to the attending physician. *Sullivan*, 209 Ill. 2d at 119. That opinion however, was barred due to the plaintiff’s failure to disclose it pursuant to Rule 213, and the court, therefore, did not address the merits of whether the expert was qualified to offer such an opinion. *Id.* at 106.

### **Conclusion**

Although the language of § 8-2501 no longer contains the additional requirements for expert qualification in the 2005 version of the Act, physicians are not qualified to render standard of care opinions for nurses unless they are also a licensed nurse and are familiar with the issues involved in the case. *Sullivan*, 209 Ill. 2d at 113. But, as with nearly every legal principle, exceptions exist. In Illinois, according to *Wingo*, a physician may testify on nursing standard of care if the expert’s opinion involves the communication upon which a physician is entitled to rely. *Wingo v. Rockford Memorial Hospital*, 292 Ill. App. 3d 896, 906 (2nd Dist. 1997). If the plaintiff retains a physician to provide standard of care opinions of a nurse, defense counsel should consider moving to bar such testimony and argue that the care at issue involves nursing procedure, along with an argument that the physician fails to meet the two criteria required by *Sullivan*. *Sullivan*, citing *Purtill v.*

*Hess*, 111 Ill. 2d 229 (1986). Also, if counsel is defending the care provided by a nurse, the best practice is to retain a licensed nurse, and not a physician, to provide standard of care opinions.

## **About the Author**

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