



# Nurse Spotlight: Preparing for a Deposition

Nurses Service Organization (NSO), in collaboration with CNA, has published our 4th Edition of the NSO/CNA *Nurse Liability Claim Report*. It includes statistical data and case scenarios from CNA claim files, as well as risk management recommendations designed to help nurses reduce their malpractice exposures and improve patient safety.

You may access the complete report, and additional Risk Control Spotlights, at: [www.nso.com/nurseclaimreport](http://www.nso.com/nurseclaimreport).

This Nurse Spotlight focuses on our analysis and risk management recommendations regarding one of the most significant topics in the report: **Preparing for a deposition**.

Nurses may be subpoenaed to provide a deposition or court testimony in matters where they are not a defendant, but are or were involved in the treatment and care of a patient who is involved in legal action. Being deposed in a professional liability lawsuit or licensing board investigation is potentially one of the most stressful events a nurse may encounter. Depending upon the facts and information revealed, deposition testimony can directly influence the outcome of a case. This spotlight provides an overview of the legal process relating to depositions and imparts helpful tips on how to prepare for and provide deposition testimony. We examine the objectives of the pre-deposition meeting with your attorney, what a witness can expect during deposition questioning, and essential suggestions for conveying confident responses.

The 4th Edition of the NSO/CNA *Nurse Liability Claim Report* observed that deposition assistance-only requests reflected an average cost of \$2,467. The average total expense represents the claim expenses, including attorney fees and other administrative costs.

## Analysis of Deposition Assistance by Expense

Coverage type	Number of deposition closed claims	Total expense	Average total expense
Deposition assistance	159	\$392,221	\$2,467

## Case Study: Deposition Request involving a nurse with over forty years of experience

An insured nurse with over forty years of experience was convicted of assault against her teenage granddaughter. The facts and circumstances of the offense involved the nurse slapping her 13-year-old granddaughter on the face and on the shoulder. Approximately one month prior to the assault incident, the nurse also was involved in an altercation with her 24-year-old granddaughter, during which the nurse slapped the granddaughter across the face. The nurse was placed on informal probation for three years, on terms and conditions which included attending a 52-week parenting class and paying fines and fees. These offenses and the nurse's conviction raised concerns

about her fitness to be a nurse, and the likelihood of her mistreating a patient or co-worker. The State Board of Nursing (SBON) opened an investigation, which, as part of the process, required the nurse to be deposed.

The insured nurse and her counsel were able to present evidence that established that the incidents occurred during a period of great family stress. During her testimony, the SBON found the nurse to be remorseful and compliant with probation. The nurse stated that she had been attending court-mandated parenting classes and explained to the SBON that she learned strategies to diffuse stress.

During the deposition process, several key witnesses also testified on the nurse's behalf, including a psychologist and several co-workers. All provided crucial testimony as to their experience working with the insured nurse, her professionalism, her strong work ethic, and fitness to continue working in the nursing profession. The nurse's daughter also testified and described the nurse as loyal, helpful, a "great mom," and that these incidents were "out of character."

The SBON concluded that it did not appear that the nurse was likely to re-offend, nor did she appear to pose a threat of harm to patients or co-workers. Criminal convictions for assault, especially assault of a minor, offered the SBON grounds to potentially revoke the nurse's license. In viewing the circumstances in their totality, the SBON concluded that the nurse presented sufficient evidence of rehabilitation to justify retaining her license, albeit on a probationary basis. The SBON believed that probation was necessary in order to ensure that the nurse respondent continued in her rehabilitation. However, because there was no evidence that the nurse presented a risk of violence to her patients, the SBON concluded that any probationary conditions which placed limits on her employment, required that she be supervised, or required additional coursework were not necessary in order to protect the public.

The nurse completed the terms of her probation, and she is still practicing with an unencumbered license today. The total costs associated with defending her license in this case exceeded \$12,000.

### **Risk Management Comments**

Nurses must understand and recognize stressful situations that may lead to conduct which may be deemed unprofessional even if it occurred outside of the nurse's clinical practice. Nurses should be proactive in seeking support to manage the situations or circumstances that can make them vulnerable. Nurses must educate themselves on an ongoing basis about quality of care, work/life issues and strategies, and focus on mastering and reinforcing key competencies. The importance of maintaining these skills cannot be overemphasized.

The deposition is one of the most critical stages of litigation and State Board of Nursing complaints and can directly influence the outcome of a case. With respect to depositions, effective testimony requires preparation. Nurses may be named as a defendant in a malpractice lawsuit. Even if you're not named in the lawsuit, you may be called as a witness to respond to questions in a pre-trial deposition. Thus, the importance of being prepared for a deposition cannot be minimized. A nurse should always prepare with his or her attorney prior to any deposition.

Nurses also should maintain files that can be helpful with respect to demonstrating their character and the confidence that others have placed in the nurse. This includes letters of recommendation, performance evaluations, documentation of volunteer activities, continuing education certificates, and thank-you letters from patients. These types of documents can be useful to provide to the Board of

Nursing during the disciplinary defense process. For more information on protecting your license and disciplinary defense, see the [Nurse Spotlight: Defending Your License](#).

### **Risk Management Recommendations**

When determining whether or not to release confidential information after receiving a subpoena to provide a deposition, consider the following guidelines:

- **Engage and inform your professional liability insurance provider, your employer's risk manager and legal counsel pertaining to the deposition notice.** In advance of the deposition date, your legal counsel will meet with you to outline the defense, as well as discuss the anticipated line of questioning.
- **Know and practice within the state scope of practice act,** and in compliance with the standard of care and state board of nursing requirements.
- **Understand and comply with the Nursing Code of Ethics** and other relevant ethics codes issued by other professional organizations or state boards of nursing.
- **Never ignore a subpoena,** whether it involves releasing clinical records, appearing for a deposition or testifying in court. Consult with an attorney knowledgeable about health law and request guidance about potential conflicts between legal mandates and client privacy rights when responding to a subpoena.
- **Prepare for any deposition or testimony under oath with the assistance of your attorney.** The preparation should include practice in responding to questions truthfully and accurately, without providing information that is not sought.

To help nurses understand the deposition process, this section provides a brief overview of what is a deposition, what actions nurses should take if they receive a subpoena, and associated expectations. It also imparts helpful tips on how to prepare for and provide deposition testimony including objectives of the pre-deposition meeting with your attorney, what a witness can expect during deposition questioning, and essential tips for conveying confident responses.

#### **What is a deposition?**

A deposition is a question-and-answer session conducted under oath for the purpose of compiling information from an individual who is either named in a lawsuit (i.e., a named defendant) or is a witness to the matter being litigated. An attorney will ask the witness questions while a court reporter records the testimony verbatim. In some cases, the deposition may be videotaped.

#### **What actions should be taken following receipt of a subpoena?**

The first action nursing professionals should take is to inform their professional liability insurance provider and employer's risk manager or legal counsel of the deposition notice. These professionals help ensure that a proper response is filed, while also counseling clinicians against the unauthorized release of information in their

response. In advance of the deposition date, legal counsel will meet with the witness regarding the litigation in order to outline the defense, as well as discuss the anticipated line of questioning.

### **What are the objectives of the pre-deposition meeting with your attorney?**

The pre-deposition meeting serves to inform the witness about the details of the lawsuit or State Board of Nursing investigation, including the specific allegations being asserted. It should be a face-to-face meeting with defense counsel and held well in advance of the deposition date, in order to allow sufficient time for preparation. A primary objective of the meeting is to outline the legal arguments for the defense. Often, counsel may construct a defense theme that will resonate throughout the litigation process. The preparation meeting also serves to discuss the questioning process. Defense counsel will review standard guidelines designed to help witnesses provide truthful responses. For additional deposition guidance, see “12 Essential Deposition Tips for Conveying Confident Responses.”

### **What measures are required before the pre-deposition meeting?**

Before the pre-deposition meeting, a witness should thoroughly review any pertinent documents, including the client’s healthcare information record, personal notes and any medical literature consulted during treatment, carefully comparing the facts of care to the allegations asserted in the lawsuit. Any concerns or issues raised during the review should be shared with defense counsel at the meeting, in order to ensure that the witness has an accurate recall regarding the incident in question.

### **What can a witness anticipate during deposition questioning?**

Depositions may appear, on the surface, to be more informal than testifying in court because they are typically conducted in an attorney’s office without a judge present, and attorneys may dress casually and appear relaxed. However, depositions are equally as important to the case as the court trial and should not be taken lightly. Plaintiff attorneys will often try to restrict witnesses to one version of the incident, forcing them to be as accurate and precise as possible in their responses. During depositions, the plaintiff’s attorney may use complex or aggressive questioning techniques, and the nurse must be able to answer all questions truthfully, without divulging additional or extraneous information. A witness should remain calm during questioning and permit the defense attorney time to interject or object to an improper question.

## **12 Essential Deposition Tips for Conveying Confident Responses**

Notwithstanding thorough preparation, giving a deposition can be an anxiety provoking and uncomfortable experience. The following tips can help witnesses to convey a professional demeanor and confident responses:

1. Always tell the truth.
2. Listen carefully and think before you speak. Don’t be pressured into rushing a reply.
3. Speak slowly and clearly, and answer in a courteous manner.
4. If you need to consult the medical record, ask to do so.
5. If your attorney objects, stop speaking.
6. Do not look at your attorney when a question is asked. It is your testimony.
7. If you do not know the answer to a question, do not guess. Say that you do not know the answer.
8. If you do not remember something, say so.
9. If you do not understand a question, ask for clarification or rephrasing.
10. Answer only the question asked and do not anticipate further questions.
11. Understand the theme of the defense and assert it in response to allegations being made against you.
12. If you need a break, ask for one.

Compliance with subpoenas for deposition is important from legal, ethical, and risk management perspectives. Ignoring deposition requests will not make the subpoena “go away”. Moreover, failure to comply with a request can result in legal ramifications for the nurse.

## **Nurse Spotlights**

For risk control strategies related to:

- [Defending Your License](#)
- [Documentation](#)
- [Liability for Nurse Managers](#)
- [Home Care](#)
- [Medication Administration](#)
- [Communication](#)

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### **In the event of legal action**

If you have received a subpoena to provide a deposition or court testimony as a named defendant, or if you are or were involved in the assessment and/or treatment of a patient who is involved in legal action, adequate preparation is critical to a successful outcome. The following measures can serve as a guide on how to prepare for and provide deposition testimony, as well as avoid potential missteps in the pivotal first phases of a lawsuit:

- **Consult with an attorney knowledgeable about health law** and request guidance about potential conflicts between legal mandates and patient privacy rights when responding to a subpoena.
- **Do not discuss the case with anyone** except your defense attorney and your professional liability insurance provider.
- **Do not accept or sign any documents related to the claim** from anyone without obtaining approval from your professional liability provider.

- **Avoid discussing, commenting upon or taking issue with any information you receive** regarding judicial or administrative proceedings.
- **Do not admit to liability, consent to any arbitration or judgment, or agree to any settlement proposal without consulting with your defense attorney.**
- **Contact your attorney or professional liability insurance provider** before responding to calls or emails from other parties involved in the case.
- **Report any communication you receive from the patient, patient's attorney or any administrative, licensing or regulatory authority to your professional liability insurance provider.**
- **Promptly return calls from your attorney and professional liability insurance provider.**

This information is designed to help nurses evaluate risk control exposures associated with their current practice. It is not intended to represent a comprehensive listing of all actions needed to address the subject matter, but rather is a means of initiating internal discussion and self-examination. Your clinical procedures and risks may be different from those addressed herein, and you may wish to modify the tool to suit your individual practice and patient needs. The information contained herein is not intended to establish any standard of care, serve as professional advice or address the circumstances of any specific entity. These statements do not constitute a risk management directive from CNA. No organization or individual should act upon this information without appropriate professional advice, including advice of legal counsel, given after a thorough examination of the individual situation, encompassing a review of relevant facts, laws and regulations. CNA assumes no responsibility for the consequences of the use or nonuse of this information.



This information was excerpted from NSO and CNA's full report, *Nurse Professional Liability Exposure Claim Report: 4th Edition*. [www.nso.com/nurseclaimreport](http://www.nso.com/nurseclaimreport)



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