



## Going to Trial: Preparing for the Unknown and the Unknowable

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## A View From The Defense: Looking at Your Work From the Other Side

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### Why this session?

Testimony is often the most dreaded part of a forensic nurse's practice, primarily because of the unknown of cross-examination.

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### Adversarial System

- Foreign concept to nurses
- People tend to see defense experts as testifying *against* them

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### Defense Counsel

In many cases, a savvy defense counsel will hire an expert to advise, assist with strategy, and/or provide testimony that may contradict (in part or all) of the treating clinician's anticipated testimony.

- Runs gamut from reasonable (wants to identify any weaknesses that exist in the case) to ethically questionable (wants \*anything\* that will torpedo the testimony of the treating clinician to include character and other personal attacks).

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### Defense Experts

Also can run the gamut from reasonable to unethical (including inventing or misrepresenting science).

- Defense expert doesn't need to be seen as the enemy, even though the role is adversarial.
- Defense experts do an important job, including policing the profession, and helping to ensure that both sides have access to current science and professional standards.

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### Evaluating the Treating Clinician

1. Did they do a good job?
2. What are their weaknesses (bias, knowledge of science and standards, qualifications)?
3. What are the weaknesses of their organization?
4. Is there any wiggle room (attacking the science or the diagnosis)?

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### Did They Do A Good Job?

- Completeness of documentation
- Comprehensiveness of exam
- Adherence to recognized standards
- Adherence to agency policies and procedures
- Accuracy of documentation

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### Did They Do A Good Job?

- Here's where you discover just how important it is to have:
  - QA/Peer Review/QI process
  - Medical director who has a role that is more than figurehead
  - Programmatic/personal commitment to continuing education
  - Knowledge of foundational elements
  - Regularly reviewed policies and procedures

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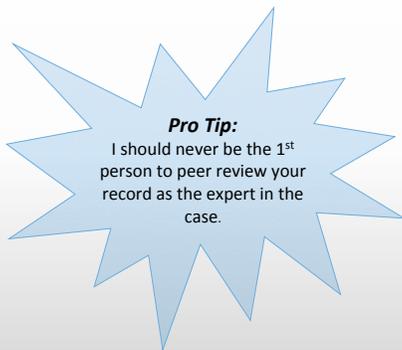
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### Clinician Weaknesses?

- Education (formal, certificates, continuing)
- Certification
- Experience (not just years of forensic practice)
- Obvious biases (documentation, testimony, social media)
- Knowledge base

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### Clinician Weaknesses

- Here's where you discover just how important it is to have:
  - Proper CV
  - Knowledge of practice standards
  - Self-awareness (limitations, view of yourself a *complete* nursing professional)
  - Understanding of appropriate social media use
  - Regular evaluation

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**Pro Tip:**  
 The answers to the questions: "What is a forensic nurse/SANE?" and "What is your role?" are everything.

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### Organizational Weaknesses

- Organizational philosophy
- Co-location
- Policies and procedures
- Eligible patients
- Mission statements and other written info

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## Organizational Weaknesses

- Here's where you discover just how important it is to have:
  - Regularly reviewed policies and procedures that support practice and are consistent with standards
  - A practice philosophy that reflects nursing practice
  - An articulated connection to other healthcare services with which the patient may interact
  - Control over publicity materials

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"The Sexual Assault Nurse Examiner program has trained, certified nurses to collect forensic evidence for the police."

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**Pro Tip:**  
Google your program, review written materials, and make sure they don't create the wrong impression.

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### Wiggle Room?

- Interpretation of findings
- Explanation of science
- Diagnosis

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### Wiggle Room?

- Here's where you discover just how important it is to have:
  - Good grasp of the science (including gaps)
  - Differential diagnosis

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**Pro Tip:**  
If you are not confident in your knowledge of the science let the prosecutor know during prep.

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## The Ethical Defense Expert

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How many people have ever received formal education on being an effective and ethical defense expert consultant and witness?

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“Expert ethical behavior should be judged by the standards of the discipline of the expert.”

Joseph Sanders, Expert Witness Ethics, 76 Fordham L. Rev. 1539 (2007).

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### IAFN Vision of Ethical Practice

**Obligation to Science:**

- “Forensic nurses should seek to advance nursing and forensic science, understand the limits of their knowledge, and respect the truth. Forensic nurses should ensure that their research and scientific contributions are thorough, accurate and unbiased in design and presentation.”
- “Scientific misconduct, such as fabrication, falsification, slander, libel, and plagiarism are incompatible with this Vision of Ethical Practice.”

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### IAFN Vision of Ethical Practice

**Dedication to Colleagues:**

- “Forensic nurses should treat colleagues with respect, share ideas honestly, and give credit for their contributions.”

<http://www.forensicnurses.org/?page=VisionEthicalPract>

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### Takeaways

- An adversarial system doesn't have to be hostile system
- Cross exam doesn't need to be as much of a mystery as you think and prep is possible (and should be happening)
- You can be an effective defense expert and not be a complete \_\_\_\_\_

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### Introducing Our Science At Trial

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### When will you testify to the science?

- When you are testifying as an expert.
- Although you can be qualified an expert simply because of your knowledge and experience (from training and clinical practice), you *should* be able to speak to the science in most instances if you are being qualified as a witness on a particular topic.

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### Common Topics

- Anogenital injury
- Absence of injury
- Reactions to trauma
- Strangulation

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### Reading and Understanding Research

- How comfortable are you interpreting a research article?
- How comfortable are you determining applicability of article content to a specific case?
- How comfortable are you interpreting the overall research underlying the basis of our opinions?

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### Critically Reading Research

What is a research article?

- “A paper written by authors who either collected and analyzed their own data (primary data analysis), or analyzed data that had been collected by someone else (secondary data analysis).”

Rachel Dunifon Ph.D., (2005) How to Read a Research Article, Cornell University Cooperative Extension

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Forensic Healthcare Online

## How is research generally presented?

- Abstract
- Introduction
- Methods
- Results
- Discussion
- Implications for policy and practice
- Conclusion
- References

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## Source:

Peer Reviewed Journal  
vs.  
Research Brief  
vs.  
Web

Rachel Dunifon Ph.D., (2005) How to Read a Research Article, Cornell University Cooperative Extension

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### A ROUGH GUIDE TO SPOTTING

## • BAD SCIENCE •

- 1. SENSATIONALISED HEADLINES**  
Headlines of articles are commonly designed to attract attention and draw you in. It's not the article, it's how the article is written. The headline is often written to attract attention and draw you in. It's not the article, it's how the article is written.
- 2. MISINTERPRETED RESULTS**  
Headlines often focus on the results of a study, but not on the context. This can lead to a misinterpretation of the results. The headline is often written to attract attention and draw you in. It's not the article, it's how the article is written.
- 3. CONFLICT OF INTERESTS**  
Many researchers are employed by the pharmaceutical industry. This can lead to a conflict of interest. The headline is often written to attract attention and draw you in. It's not the article, it's how the article is written.
- 4. CORRELATION & CAUSATION**  
Correlation does not equal causation. Just because two things are correlated does not mean one causes the other. The headline is often written to attract attention and draw you in. It's not the article, it's how the article is written.
- 5. SPECULATIVE LANGUAGE**  
Headlines often use speculative language to attract attention. This can lead to a misinterpretation of the results. The headline is often written to attract attention and draw you in. It's not the article, it's how the article is written.
- 6. SAMPLE SIZE TOO SMALL**  
A small sample size can lead to unreliable results. The headline is often written to attract attention and draw you in. It's not the article, it's how the article is written.
- 7. UNREPRESENTATIVE SAMPLES**  
A sample that is not representative of the population can lead to unreliable results. The headline is often written to attract attention and draw you in. It's not the article, it's how the article is written.
- 8. NO CONTROL GROUP USED**  
A control group is essential for a valid experiment. The headline is often written to attract attention and draw you in. It's not the article, it's how the article is written.
- 9. NO BLIND TESTING USED**  
Blind testing is essential for a valid experiment. The headline is often written to attract attention and draw you in. It's not the article, it's how the article is written.
- 10. 'CHERRY-PICKED' RESULTS**  
Only the results that support the hypothesis are often reported. The headline is often written to attract attention and draw you in. It's not the article, it's how the article is written.
- 11. UNREPLICABLE RESULTS**  
Results that cannot be replicated are not reliable. The headline is often written to attract attention and draw you in. It's not the article, it's how the article is written.
- 12. JOURNALS & CITATIONS**  
Check the journal and citations for credibility. The headline is often written to attract attention and draw you in. It's not the article, it's how the article is written.

Source: <http://www.compoundchem.com/2014/04/02/a-rough-guide-to-spotting-bad-science/>

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### Knowledge of literature

- You do not need to know every article or book written in this field.
- You **should know and be familiar with** the well-known articles that are foundation of your training and opinions.

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### Testifying to Science

- Relying on a single article is rarely going to be useful in either preparing for or testifying at trial.
- Understanding the scope of the research is necessary if you are going to provide an expert opinion.
  - Range of findings on the topic
  - Science that is in opposition to your opinion
  - Type of research conducted on the topic

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### Testifying to Science

Keep in mind that providing statistics from a single study when testifying can open you up to questions about any other portion of that study, so be prepared to discuss if questioned.

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## Testifying to Science

Reconsider bringing articles with you on the stand (if that's something you've done or would like to do).

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## Testifying to Science

What happens if you are confronted with research on the stand?

- When it's from an article you have read?
- When it's from an unfamiliar source?

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## Explaining the Role of the Forensic Nurse

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Why does this matter?

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How do the professional standards define the role of SANEs?

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How do we answer the basic questions?

- What is a SANE?
- What is the purpose of the sexual assault exam?

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What impact do our word choices potentially have?

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...[N]urse acted in an agency relationship with law enforcement in performing the examination, nurse informed victim that purpose of examination was to discover and preserve evidence of the assault, nurse questioned victim according to a statutorily mandated format, any deliberate falsehoods by victim might have constituted a criminal offense, and victim's statements were not made to deal with a contemporaneous medical situation that required immediate information.

178 Cal.App.4th 647, 100 Cal.Rptr.3d 578

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[T]estimony from sexual assault victims qualifies under the medical records exception to hearsay rules because their statements "assist medical providers in recommending potential treatment for sexually transmitted disease, pregnancy testing, psychological counseling and discharge instructions." HOWEVER

Judge May also wrote that evidence must be presented to show that a child victim, such as B.E., understands a medical professional's role and the importance of being truthful.

*Wiley W. Walters, Jr. v. State of Indiana*, 35A02-1601-CR-168.

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Goebel testified that she relied on the medical history to guide her examination and used it “to diagnose and treat,” thereby satisfying the first prong of the reliability test. She also testified that SANEs normally rely on similar histories to “guide the[ir] diagnosis and treatment,” thereby demonstrating the reasonableness of her reliance on G.A.’s statements

*People v. Tyme* (Colorado Court of Appeals)

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Nurse Redolfo testified that she had been trained to question suspected rape victims and that she had been instructed by speakers from law enforcement agencies and from the district attorney’s office on how to collect evidence and how to ask questions. Nurse Redolfo often testifies at trials in her capacity as a sexual assault nurse examiner. When she spoke to M.N., Nurse Redolfo introduced herself and explained her role. Nurse Redolfo performed a structured examination and interview of the victim, which Nurse Redolfo described as an “investigation” designed to gain information about the rape. Additionally, Nurse Redolfo described the physical examination she performed as a forensic examination.

*State v. Cannon*, 254 S.W.3d 287, 305 (Tenn. 2008)

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