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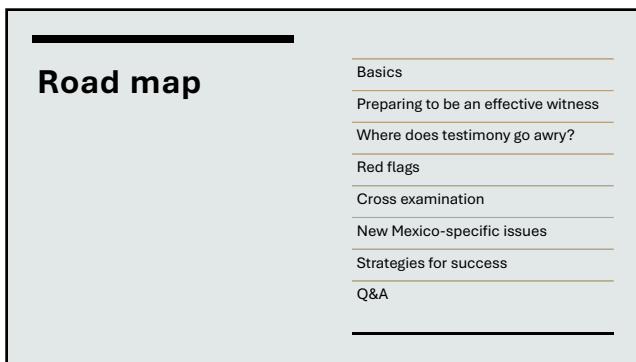
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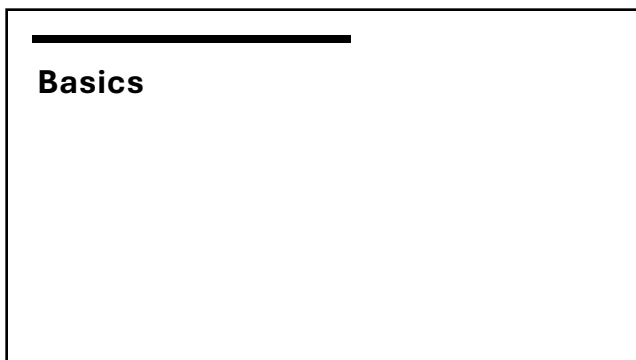
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## Why does language matter?

Establishes competency

Establishes objectivity

Provides accurate scientific information to the fact finders

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## Your job

Teaching the judge or jury members.

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## What makes a good teacher?

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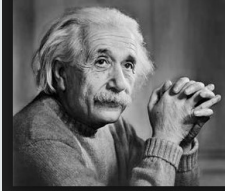
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If you can't explain it **simply**, you don't understand it well enough.

– Albert Einstein



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## How can language make a difference?

Consider for a minute how you describe the role of a forensic nurse.

- What does it say about your personal practice philosophy?
- Does it imply any type of bias?

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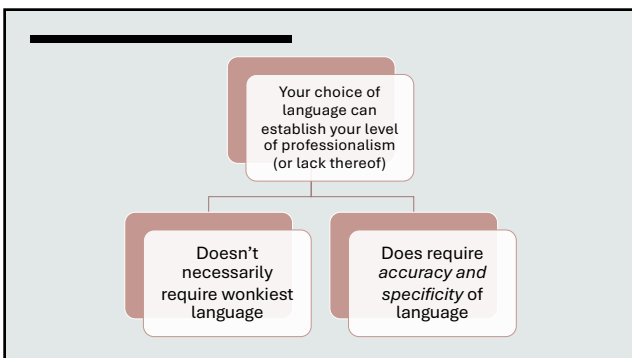
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## Clinical testimony

- Typically describes the exam process, the physical findings, and their interpretation.
- Jury will want to hear a definitive dx of sexual assault, strangulation, etc., which cannot be provided.

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## Testimony by Forensic Nurse

- FNEs cannot make any definitive conclusions regarding the degree of force used by the assailant or issues such as consent.
- What the FNE *may* appropriately conclude is whether there is evidence of sexual contact and/or recent trauma.
- The FNE may make a conclusion regarding consistency between the physical findings and the victim's history if asked.

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## Expert Testimony by Forensic Nurse

- Critical that the expert has specialized training and experience AND ideally a deep understanding of the research and its limitations.
- Opinions need to be supported by a combination (ideally) of science and experience.

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## Scope of FNE Testimony

Clinician qualifications

Exam process

Injury findings

Absence of injury

Chain of Custody

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## What Lawyers Should Expect

Knowledge of standards of practice

Current education

Understanding of policies and procedures

Professionalism

Knowledge of existing research

(EXPERTS)

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## Testimony

Testimony is where defensible practice is tested.

What have you done to make sure you are prepared to provide the most effective and ethical testimony?

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## Effective testimony

...teaches people what they need to know without passion or prejudice. It is testimony that specifically addresses the issues for which they are being called.

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## Ethical Testimony

...is rooted in the existing practice standards, science, and clinical knowledge base and yields to potential limitations. It's testimony that acknowledges that as a profession forensic science or healthcare as a discipline hasn't figured it all out yet; that we as professionals don't all agree; and that as a clinician, I don't know everything either. Specifically, ethical testimony is honest in its representation of the science and the expert presenting the testimony (Markowitz, 2021).

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## Preparing To Be an Effective Witness

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## 1.) Maintain Currency

What do you do to make sure your knowledge base is as current as possible?

- Peer-reviewed journals (e.g. JFN)
- Continuing education
- Networking with colleagues
- Peer review/QA/QI
- Routine clinical practice

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## 2.) Analyze scientific sources

What are the scientific sources you use and are they:

- Current with the state of the science?
- Scientifically sound?
- Generally accepted as reliable among the profession (e.g. adequate sample size; reproducible results)?

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## 3.) Know your limits

Know your limits and consider how they will impact your testimony:

- Think about what you can comfortably say and what you may not be comfortable saying (and convey that on prep with the subpoenaing attorney).
- Can you back up your opinions with the science and/or your clinical experience?

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### 3a.) Don't rush to expert

- There's a difference between understanding the basic underpinnings of an issue and being an expert in that issue.
- Just because someone else thinks you are an expert on something doesn't mean you actually are.

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### 4.) Testify truthfully/accurately

- Acknowledge errors in your record or gaps in your knowledge.
- Do not make things up; "I don't know" is an acceptable sentence.
- Refrain from speculation.
- Don't allow anyone to pressure you into providing testimony you don't agree with or are uncomfortable with.

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### 5.) Be a pro

- The less professional you appear, the less weight jurors will give your testimony.
- Consider appearance, body language, and choice of words.
- Show up prepared.
- Professionalism extends beyond the courtroom.

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## 6.) Know your foundations

Testimony is not just about the medical-forensic exam.

Prepare to discuss:

- Education, regulation and policy that supports your practice.
- Any national, state and local protocols that impact practice
- Agency policy and procedure.

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*Nursing integrates the art and science of caring and focuses on the protection, promotion, and optimization of health and human functioning; prevention of illness and injury; facilitation of healing; and alleviation of suffering through compassionate presence. Nursing is the diagnosis and treatment of human responses and advocacy in the care of individuals, families, groups, communities, and populations in recognition of the connection of all humanity.*

Contemporary Definition of Nursing

*Nursing Scope and Standards of Practice, 4<sup>th</sup> Edition (American Nurses Association, 2021)*

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*Nursing integrates the art and science of caring and focuses on the protection, promotion, and optimization of health and human functioning; prevention of illness and injury; facilitation of healing; and alleviation of suffering through compassionate presence. **Nursing is the diagnosis and treatment** of human responses and advocacy in the care of individuals, families, groups, communities, and populations in recognition of the connection of all humanity.*

Contemporary Definition of Nursing

*Nursing Scope and Standards of Practice, 4<sup>th</sup> Edition (American Nurses Association, 2021)*

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## 7.) Know your terms

- Medical Terms (including injury descriptors)
- Scientific/practice terms (e.g. evidence-based practice)

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## 8.) Remember: Testimony is forever

"Science is not the truth. Science is finding the truth. **When science changes its opinion, it didn't lie to you. It learned more.**" -Brene Brown

- Prior testimony can be used to impeach you on the stand.
- Do not take the experience lightly—practice and prepare
- Do the after-action review so you learn from the experience

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## 9.) Create & maintain a CV

- CVs should be a complete catalog of what you have accomplished as a professional
- They don't need aspirational statements or long descriptions
- They **DO** need all of your clinical work and relevant education, not just your forensic-related information
- CVs are not a place to flex your creativity

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## Where does testimony go awry?

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## Types of problematic testimony:

Testimony that makes assertions, even in the absence of science.

Testimony that asserts that an issue is settled science or policy when it is not.

Testimony that is not grounded in healthcare.

Testimony that is outside the clinician's scope.

Testimony that literally makes no sense.

Testimony that tries to be clever

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## Testimony that makes assertions, even in the absence of science

- Any testimony that asserts that ALS should have identified bruising on a strangulation victim
- Any testimony that attempts to connect + ALS findings with a specific incident
- Any testimony that attempts to age bruising in living victims
- Testimony that attempts to differentiate injury from consensual versus nonconsensual anal penetration
- Testimony that tries to correlate position of the sexual assault with genital injury

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### Testimony that asserts that an issue is settled science or policy when it is not

- Much of the testimony that attempts to differentiate between injury from consensual and nonconsensual sex
- Testimony that asserts a specific way in which a medical-forensic exam must be conducted or which specialty techniques must be used—there are a lot of jurisdictional differences in how patients are cared for (both SA and IPV)

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### Testimony that is not grounded in healthcare

- Any testimony that sounds investigative—words like *victim*, *interview*, *story* are clues
- Testimony that crosses the line of what a clinician can reasonably assert

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### Testimony that is outside the clinician's scope

- Testimony that is clearly not within the expert's purview
- For experts who are registered nurses, any testimony that starts to invade the province of the advanced practice nurse, PA or physician could be problematic.

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## Testimony that literally makes no sense

**Question on cross:** "You are not following current evidence based practice standards of care, are you?"

**Forensic Nurse's answer:** "I am going beyond evidence based practice and doing a better job."

*"Many times patients go into something called a neurobiology of trauma where they don't have a blackout or a pass out..."*

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## Testimony that tries to be clever

- Testimony that attempts to sneak in impermissible information (412 or 513) or is just too over the top.
- Testimony that is snarky, or tries to get one over one opposing counsel

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## Red flags when prepping witnesses

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**1.) Hiding behind the term “best practice” or using it like a weapon**

Anything that is actual best practice exists on paper.

Just because it's taught somewhere doesn't make it best practice.

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**2.) Asserting practices that are unique or otherwise seem odd or extreme.**

That doesn't mean they are going the extra mile

It means they are ignoring protocol or simply making things up.

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**3.) Opinions that seem overzealous**

There aren't too many *always*, *nevers*, *couldn'ts* and *musts* in medical forensic exams.

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## 4.) Unsupported testimony



*That's the way I was taught*



*That's how we've always done it*



*No peer review process*



*No continuing education*



*No membership in any relevant professional organization*

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## The [dreaded] cross-examination

*A quick and dirty primer*

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## Common areas of challenge:

### Qualifications

- To render *this/any* opinion
- Education
- Clinical experience

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## Common areas of challenge:

### The exam

- Documentation
- Method
- Evidence collection

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## Common areas of challenge:

### Refusal to make concessions

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## Common areas of challenge:

### Opinions

- Without support
- With statistics

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## Ways People Make Themselves Vulnerable

Refusing	Refusing to concede the obvious or easy
Failing	Failing to know the science; cherry-picking the science; bending the science to fit your opinion
Straying	Straying from standards of practice

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## Easiest way people make themselves vulnerable:

Getting nasty on cross

- Counsel has had days to build rapport with the jury; you've had minutes.
- Counsel can characterize you and your testimony any way they choose during closing arguments and there's nothing you can do to rebut it.

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## INDECISION JEOPARDY

GOOD & DEBACLES I THOUGHT I SHOULD BE ASKING FOR HELP	THINGS I SHOULD BE ASKING FOR HELP	POTENTIALLY CRAFTY, BUT REGRETS	PEOPLE WHO HAVE LISTENED TO ME DESHO	OUTLANDISH MOST CASE SCENARIOS
\$200	\$200	\$200	\$200	\$200
\$400	\$400	\$400	\$400	\$400
\$600	\$600	\$600	\$600	\$600
\$800	\$800	\$800	\$800	\$800
\$1,000	\$1,000	\$1,000	\$1,000	\$1,000

@LIZANDMOLLIE

Things NOT to do after a tough cross:

1. Go back and change the way you practice
2. Quit

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## New Mexico-Specific Issues

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### TB Dye

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*Does it falsely make injury look worse?*

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*Is it unethical to use it?*

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*How do you refute the idea that uptake was just an artifact?*

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### How do you stay calm when you are attacked?

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### When findings are *consistent with...*

Can you say a finding is consistent with fingernail, a handprint, a bite mark, etc.?

Can you be unbiased if you feel the finding is **likely** from a fingernail, a handprint, a bite mark, etc.?

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### Consensual vs non-consensual sex injury vs self-inflicted injury...

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### How can we say we believe a patient without saying we *believe* a patient?

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**How much of the chart should I bring with me to testify?**

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**How do I chart injury so I don't end up testifying beyond my scope?**

*e.g. bruise vs. discoloration?*

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**How do we field technical questions about techniques and tools we use like TB dye, ALS, and cameras?**

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**How do we  
effectively  
handle the bad  
hygiene  
defense?**

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**What about using  
filters in our  
photo-  
documentation?**

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**Can you talk about  
the impact of  
*Crawford v.*  
*Washington* from  
your perspective?**

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**How can I be  
more confident  
in court?**

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**Strategies for Success**

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**Strategies for Success**

- |  |  |                                   |  |   |
|--|--|-----------------------------------|--|---|
| <b>01</b><br>Find the<br>supporting<br>documents | <b>02</b><br>Familiarize<br>yourself with<br>your<br>foundations | <b>03</b><br>Practice<br>out loud | <b>04</b><br>Peer<br>review<br>testimony | <b>05</b><br>Know<br>reading<br>must be part<br>of your job |
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## Consider

How do you strengthen your skills as a teacher?

Can you explain complex subjects simply?

How can you practice honing your testimony skills?

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## The importance of pretrial prep...

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## Areas for prep

Bio

Basic definitions

Exam process

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## The best testimony is...

Plainly worded

Simple

Concise

Peer reviewed

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*Patients should not luck into an encounter with a forensic nurse who can provide complete, competent testimony. They deserve a clinician who puts as much thought and effort into maintaining this particular set of skills as any other skill related to the patient encounter.*

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## Q&A

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330.671.4470

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