An LNC Primer: Screening and Investigating Potential Medical Malpractice Cases

Elizabeth K. Zorn, RN, BSN, LNCC
Stephen G. Schwarz, Esq.

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Medical malpractice cases are difficult, time-consuming, and expensive. Non-meritorious and even equivocal cases are vigorously, and rightly, defended. However, plaintiff firms do not generate revenue on non-meritorious claims, so they must recognize claims that are likely to fall short on liability, causation, or damages.

Experienced medical malpractice attorneys reject most medical malpractice inquiries. Although there is no central repository of statistics, at our firm we reject 90 to 95% of all potential malpractice cases because we don't believe there was any negligence or don't believe we can prove it. This is remarkable because lawyers, judges, physicians, and other professionals make most of these referrals, not claimants. However, most lawyers and physicians truly do not understand how difficult it is to succeed in a medical malpractice case.

Clients often say that a healthcare provider advised them to seek counsel. Typically, this is in the setting of a poor or unexpected outcome in which there may or may not have been malpractice. Providers rarely know the legal and other standards for proof and are not necessarily qualified to render an off-the-cuff opinion, especially if they have not even reviewed the medical records; these same providers are often unwilling to speak to the attorney about it. Although a referral from the medical community can be a factor, it should not be the sole basis for proceeding with an investigation. Comments from providers about a potential legal claim may be misunderstood or even the result of acrimony between two providers. Endorsements from subsequent treating doctors or well-meaning nurses are unreliable in predicting the success of a claim.

ROLE OF THE LNC IN INITIAL SCREENING

Highly skilled and experienced trial attorneys who have spent years in the trenches learning the medicine and the art of trial work are best qualified to

handle medical malpractice cases. Legal nurse consultants are tremendously valuable in this work, and nowhere more than in screening cases. However, attorneys should never entirely delegate this responsibility to legal nurse consultants (or anyone else). Screening cases is an interdisciplinary process involving medicine, science, law, and often economics. Attorneys who fully delegate the screening decision to non-lawyers of any background do so at their peril.

At our firm, both a nurse and an attorney review all potential medical malpractice claims. For those we reject outright, the client receives a letter from the attorney explaining that we will not investigate their potential claim. Usually we tell them the reasons for this in very general terms. We remind them that a SOL applies and encourage them to seek the advice of another attorney "who may feel differently about your potential claim." It is very important from a legal risk management standpoint to let clients know that our decision not to investigate their claim is our judgment and does not mean they have no case.

LNCs can assist the attorney in several ways to screen cases effectively including:

- Developing a good medical malpractice intake form that includes essential information. At our firm, the nurses created both the original intake form and a detailed client questionnaire for those cases we agree to investigate.
- Training paralegals or secretaries to take initial information from prospective clients. We train them to obtain the essential information without spending too long on the phone.
- Reviewing potential claims so the attorney can decide whether to accept the case for investigation. This is a great opportunity for the lawyer to learn medicine from the LNC and for the LNC to learn about the legal standards from the attorney.
- Getting additional information from the client for the attorney to reach a decision. This is a perfect role for the LNC; nurses are adept at taking medical histories.
- Conducting a quick literature review. A quick literature review may indicate that a surgical complication is fairly common, decreasing the chances of proving negligence.
- Drafting the letter to the client a summarizing facts supporting or rejecting a case for the attorney's review and signature.
- Helping the attorney process new client intakes timely, important both for public relations and risk management. If the attorney declines to investigate a case, the client should have time to seek other counsel well before the SOL expires.

CONSIDERATIONS FOR INITIAL SCREENING

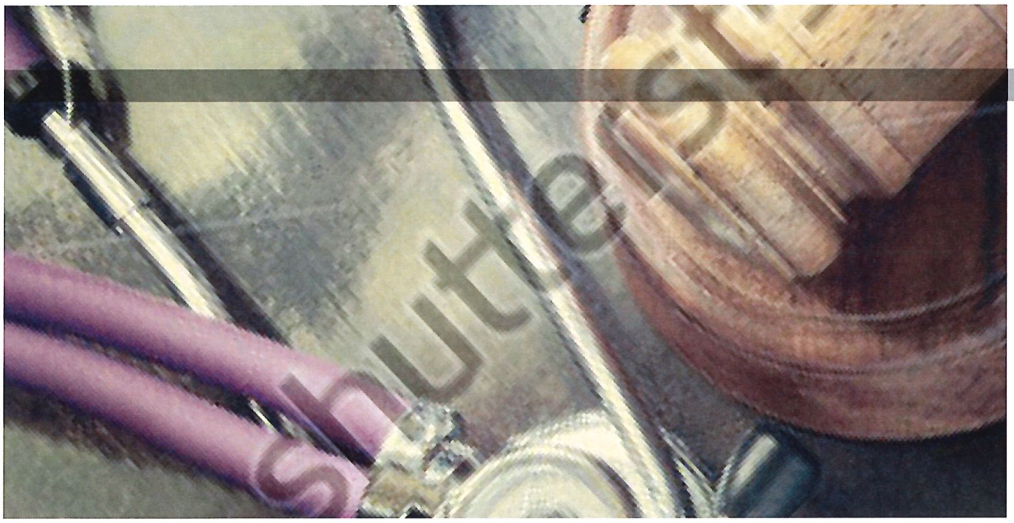
Always remember all the elements of a viable medical malpractice claim. If the case involves catastrophic injuries but liability is not good or causation is unlikely, the attorney could spend a lot of money working the case up and getting it reviewed all for naught. This said, though, it is important to be very careful and thorough in cases involving very serious injuries. The consequences of a wrong call and rejecting a catastrophic injury case are worse than in rejecting a case that someone eventually settles for $75,000.

One of the first questions to ask is, "How is this case likely to be defended?" Playing devil's advocate early on is safest. The client has likely not told you everything, potentially purposely, but just as often because he or she is unaware of certain medical data buried in the records that may contradict the theory of liability. We try to be sympathetic to potential clients but cynical about their claims until convinced otherwise. Some have said that good judgment comes with experience, and experience comes from bad judgment. Nowhere is this truer than in plaintiff malpractice claims.

POSSIBLE REASONS FOR REJECTING A CASE OUTRIGHT

There are several general justifications for immediately declining to investigate a potential medical malpractice claim:

- **Conflict of Interest:** Conflicts can be legal (e.g., the firm has represented a potential defendant before) or personal (e.g., a defendant is the friend or treating doctor of a firm member or employee). Most plaintiff malpractice firms also do general personal injury cases. Many current clients are being treated by orthopedic surgeons or pain management specialists. Suing any of these physicians for malpractice may not technically be a conflict of interest, but it is not in the interest of the personal injury client to sue his treating physician for malpractice.
- **Expired or limited Statute of Limitations (SOL):** SOL rules vary by state, type of case, and whether it involves a minor. Due to the complex nature of the continuous treatment doctrine or discovery exceptions, it's not always possible to determine the SOL without first reviewing medical records and sometimes conducting legal research. If the care took place in a state other than where the attorney practices, alarms should go off immediately; research must be done before making any commitment to investigate. We were recently asked to review a legal malpractice case against an attorney in New York who took a case on behalf of a former



client's minor child who moved to Pennsylvania and received medical care in Delaware. He did not know that Delaware has a particularly ungenerous statute of limitations for minors, resulting in the legal malpractice claim alleging improper legal representation resulting in harm to the client's case.

Even if the SOL has not expired, the deadline may not allow enough time to investigate the claim thoroughly before suit must be brought. This is undesirable, because the attorney may decide not to take the case, leaving the client with insufficient time to find another lawyer willing to bring the case. The attorney may be forced to bring a case she does not believe has merit just to preserve the SOL to prevent subsequent legal malpractice action.

We prefer not to accept a case for investigation with less than six months before the SOL runs because it typically takes several months to obtain the pertinent medical records and an expert review. However, if the case appears strong, it may be worthwhile to mobilize firm resources to evaluate the case and file the documents in a short timeframe to preserve a client's legal right to bring a claim.

- **Limited damages:** It doesn't make sense to spend $20K to pursue a claim in which the potential recovery is only $50K. Most plaintiff firms have a minimum "damage threshold" range, anywhere from $25K to $500K or more, depending upon the firm. Also, the attorney must consider whether there are any third-party liens that must be satisfied, such as workers comp, Medicaid, or Medicare, which could consume most of the net proceeds if they can't be reduced.

  Determining potential economic recovery involves assessing:

  - Physical/emotional pain & suffering
  - Functional limitations
  - Economic damages (lost wages, liens, out of pocket medical expenses)
  - Loss of enjoyment of life

  Attorneys may also want to research prior awards in the same state and venue for similar injuries, including outcome of appeals related to inadequate or excessive awards. If the defendant's conduct constituted gross negligence, this may increase the settlement value since the insurance carrier may feel it's too risky to take the case to trial, especially a case with significant damages.

  Litigation when the cost may exceed recovery include those involving:

  - only minor injury
  - no permanency or significant functional limitation
  - a very brief period of conscious pain and suffering, or none at all
  - a decedent who was very old or very young and had no one relying on him or her for support (in states where wrongful death damages are limited to financial loss)

  Although there are always exceptions, it very difficult to find economical justification for cases like these. This is especially true in New York State, with its very restrictive wrong death statute that does not permit distributees of an estate any monetary recovery for emotional harm suffered from the death of a loved one.

  Clients often tell us that "it's not about the money," or they "don't want the same thing to happen to someone else." We gently remind them that the only reason to sue is to recover money for injury from improper care, not to punish or sanction a provider or undo what has been done. People who truly feel this way are much better served by filing a complaint with the appropriate state Licensing Board, which will cost the client nothing and can (although rarely) result in suspension or removal of the provider's license.

- **No legal cause of action:** When a potential defendant has immunity or the plaintiff cannot establish a duty between the plaintiff and the potential defendant, a suit is not viable. Some states do not recognize a cause of action for wrongful birth/life, which precludes a failed tubal ligation claim, for example. Prisoners who are injured through malpractice while in prison must prove "deliberate indifference," which is often impossible.

- **No liability or causation:** The attorney must prove departure from the standard of care, damages,

and a causal link between them. Damages must be enough to offset the cost of litigation. Even egregious medical errors do not support a good malpractice case without these elements. The worst possible outcome does not overcome failure to prove departure from the standard of care. Typically we analyze first what appears to be the hardest of these elements to establish. If the liability looks promising we will choose first to analyze causation, coming back to liability only if we are satisfied that a reasonable causation claim can likely be established.

PROBLEMATIC PLAINTIFF CASES

Though all cases must be evaluated on their own merits, the following may present particular hurdles:

- Cosmetic surgery cases when the client's primary complaint is dissatisfaction with the cosmetic outcome. A jury may not be sympathetic to a plaintiff who undergoes an elective cosmetic procedure and then doesn't like the result.
- Psychiatric cases when the client alleges wrong diagnosis or treatment. These are quagmires with large volumes of records created over many years and numerous diagnoses and treatments. It's difficult to establish improper care and that different care and treatment would likely have resulted in a significantly better outcome.
- Cases when the client has a litany of complaints about many aspects of their care, including care rendered by multiple providers. While some may be valid, it is not likely that most resulted in a worse outcome. Also, it may be difficult to convince a jury that multiple providers provided substandard care.
- Clients who are (or were) non-compliant or otherwise partially responsible for their injuries, e.g., a heavy smoker complaining of a fracture nonunion or a delay in diagnosis and treatment of smoking-related lung cancer.

SURGICAL COMPLICATIONS

There are three general possibilities; the injury:

- Resulted from a clear departure of accepted standards of care, such as transecting a major nerve or some other operative "misadventure"
- Was mostly likely not due to improper care but a known risk that could occur even with proper care
- Was possibly due to improper care but this would likely be difficult to establish

In these cases, the attorney and LNC must establish the likely mechanism of injury and how proper surgical technique or other care would likely have prevented the complication. Proving such cases almost always requires an outcome that could not occur without a surgeon's or other documented error.

LACK OF INFORMED CONSENT

Specific rules related to informed consent vary by state. In general, physicians, advanced practice nurses, and other providers must discuss with the patient the reasonably foreseeable risks, benefits and alternatives of a proposed procedure or treatment.

The plaintiff must prove that the client did not receive proper informed consent and that she (or in some states a "reasonable person") likely would not have undergone the procedure or treatment had she been properly informed. Find evidence of informed consent discussions in multiple sources: the consent form, the operative note, a hospital progress note and/or the provider's office record.

Plaintiff firms rarely take cases in which the only claim is lack of informed consent because it can be difficult to prove all the required elements of the claim. However, this element may be included in cases alleging other types of improper care.

MEETING WITH CLIENTS

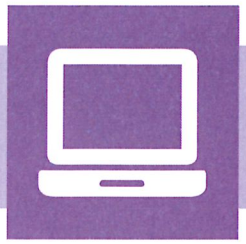
For those claims deemed worthy of investigation, it is very important for the attorney and LNC to meet with clients, and sometimes family members, to review their version of the events and obtain a complete medical, social, educational, and employment history. (See Conklin, et al.) Your standard client questionnaire will be helpful.

The medical history should include:

- Significant underlying medical conditions
- Related family history
- Unrelated hospitalizations
- Name and address of primary care physician(s) back at least 10 years
- Current medications
- The names addresses of all providers who have treated the client for the related injuries
- All hospitalizations for treatment of related injuries
- Any entities that may assert a lien, such as Medicare, Medicaid, workers compensation, and supplemental or ERISA health insurance.

The social history should include:

- Tobacco, alcohol and recreational drug history
- Treatment for substance abuse
- Treatment for mental health issues
- Prior involvement in litigation
- Criminal history
- Educational background
- Employment history



View additional screening memos online at AALNC.org.

- Information regarding dependents
- Social media platforms
- Whether the client is in bankruptcy proceedings (any recovery in a medical malpractice claim would be considered an asset)

In a death case, obtain the following:

- Was an autopsy done? If so, where?
- Has someone been appointed to represent the estate?
- Preliminary assessment of pecuniary loss (e.g., lost wages, pension, etc)

Gather relevant information about liability, causation, and damages and assess the client's personality. The attorney should also explain the investigation process, the general legal requirements in that state for commencing a claim, and the litigation process, including costs. Put a summary of this meeting into the file.

COLLECTING MEDICAL RECORDS

The process for doing this varies. At our firm, the LNC identifies the relevant records/diagnostic films and provides a list of those records (with complete addresses) to the person who generates the letters requesting medical records. Some firms use a records retrieval service. Be sure to have a reminder system to follow up on those records not received timely. Also, an LNC should review the records as they come in to ensure they are complete.

Preliminary review of relevant medical literature (journal articles, medical textbooks, practice guidelines)

This is not exhaustive. It's a means to understand the general conditions, procedures and/or standard of care issues, etc., to help you frame your questions to the medical and nursing expert(s) better.

MEDICAL RECORDS REVIEW AND SUMMARY

It's more efficient to review medical records all at once. This can take from a half hour to many hours, depending upon volume and complexity. While some attorneys still prefer hard copies in tabbed three ring binders, EHR in PDF means that most firms must learn to navigate, bookmark, and highlight digital materials. Many now use an electronic case management system, such as Case Map, to create chronologies, highlight important deposition testimony, and organize case issues. After record analysis, the attorney decides whether to recommend to the clients proceeding with an expert review.

IDENTIFYING EXPERTS

Most states require that an Affidavit of Merit (AOM) to file a medical malpractice complaint. Even if this is not required, it makes no sense to get involved in an expensive and time-consuming claim without a qualified expert opinion that there is a good basis for doing it. A qualified expert can talk you out of getting involved a case you can't win. An unqualified one will likely hold up poorly under intense cross-examination.

The initial steps involved in obtaining an expert review are:

- Identify the specialty (ies). Remember that liability and causation may require different experts.
- Identify potential experts. Most firms maintain a list of experts used in the past. Find new experts via:
  - Looking in the medical literature
  - Experts used in the past
  - Treating team
  - Expert services and individuals (LNCs, physicians) who find experts for a fee
  - Networking
  - Internet searches
- Contact and interview the expert. The expert must be comfortable with the issues, able to do a timely review, and willing to commit to a thorough job. Someone who wants to put his feet up on his desk and pontificate without reviewing the records will not help you. Find out how often the expert has testified and what percentage of his income derives from expert work.
- Research regarding education, training, professional activities (including publication history), clinical appointments, and licensure status (including any history of prior censure). Review the expert's CV and other qualifications. It is also important to retain experts with active clinical practices and to avoid "professional witnesses."

We think it is very important to tell experts you want an objective opinion on the merits. Lawyers can always find an expert to say almost anything, but such a witness will not do well, especially on cross-examination. Make sure that the expert has no personal conflict with any of the defendants. Avoid an expert who testifies only for plaintiffs or only for defense; this could invite inferences of bias.

Sometimes a treating physician will meet with their patient's attorney to give the attorney an "off the record" opinion on the merits. While this can be helpful,

it may be hard to judge if that physician is "circling the wagons," has an axe to grind with a potential defendant, or is so sympathetic to the patient as to have lost objectivity. Providing off the record opinions can be helpful, but be cautious. It is easy to give an opinion knowing it will not be subject to scrutiny. Remember that many medical and nursing providers are not knowledgeable about legal standards.

PACKAGE TO EXPERT

Send an organized package of materials to the expert. This will take the expert less time to review thoroughly and therefore cost you less. It doesn't make sense to pay an expert to organize records or, worse, to worry that the expert has missed something. We typically send an organized set of bookmarked EMR (hard copies if the expert is not comfortable with digital records), relevant diagnostic imaging on CD, a summary of the facts, and a list of questions for the expert to consider. We may also include a time line or chronology for reference.

Anything an attorney sends to an expert may be discoverable, especially anything that the expert relied upon in forming opinions. Do not send a letter to an expert that appears to be "leading" the expert to form certain opinions, or a timeline including editorial comments. Letters to experts should be factual and timelines/chronologies should include only excerpts from the medical records, not comments that suggest the direction of the desired opinion.

CONFERENCING WITH EXPERT AFTER REVIEW

The attorney must understand the facts, medical issues, relevant anatomy and physiology, and standard of care/causation issues before the conference. Depending upon the complexity of the issues, this discussion can take 30 minutes to more than two hours. Ask for the basis for the opinions to make sure that it will hold up under cross- examination.

Some attorneys record and transcribe these conferences. Others summarize the substance of the expert's opinions.

SUMMARY

An attorney must consider the strength of the expert's review on both liability and causation, whether the damages (assuming liability) will offset the cost of litigation, and how a particular client is likely to be perceived by a jury in deciding to proceed with a suit.

Effective screening is critical to obtaining favorable outcomes. It is a methodical process involving immediate rejection of nonviable claims and thoughtful analysis of those claims deemed to be worthy of investigation. Skilled LNCs play a crucial role in assisting attorneys to screen and investigate potential medical malpractice cases effectively.

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Stephen G. Schwarz, has been the managing partner of Faraci Lange, LLP since 1995. He focuses his legal practice on personal injury and business litigation, including medical malpractice, serious auto accident cases, product liability and toxic tort and environmental contamination cases in both state and federal courts. He has been awarded Martindale-Hubbell's highest rating and is listed in the personal injury law, medical malpractice and product liability sections of the The Best Lawyers in America directory. Stephen has been named Best Lawyers Lawyer of the Year in Product Liability Litigation and in Personal Injury Litigation. He has also been selected to be listed under personal injury law in the Super Lawyers directory every year since 2007 and has been listed as one of the Top 50 Super Lawyers in Upstate New York. He can be reached at sschwarz@faraci.com.

Elizabeth Zorn, RN, BSN, LNCC joined the Faraci Lange law firm (Rochester, NY) in 1995, providing medical expertise and research in defense of medical malpractice and other personal injury cases.

A board certified legal nurse consultant with more than 30 years' experience in the legal field, Elizabeth is an active member of the American Association of Legal Nurse Consultants (AALNC), The American Association for Justice and the Monroe County Bar Association. In April of 2013, Elizabeth was named President of the American Association of Legal Nurse Consultants and represented the AALNC at a discussion about health care at the White House in 2012.

She wrote a chapter for AALNC's LNC Principles and Practice, 2nd (2003) and 3rd (2010) editions, several modules in AALNC's LNC Online Course, several JLNC articles, and edited AALNC's "Getting Started in Legal Nurse Consulting." She has served on many national AALNC committees and presented at professional and educational programs and webinars for attorneys and nurses. She has mentored multiple LNC interns at her law firm over the past 12 years.She is also currently serving on AALNC's Scope & Standards and Revised Online LNC Course Committees. From 2010 to 2014, Beth served on the AALNC board of directors. She can be contacted at elzorn@faraci.com.

Test Your Case Screening Skills

You're an in-house LNC in a med-mal firm, and your secretary took these notes from phone calls and passed them along. You decide: Reject or investigate? Take a minute to jot down your thoughts, then check the answers on page 43.

Test Your Case Screening Skills

Elizabeth Zorn, RN, BSN, LNCC

Case 1: "Surgeon removed her appendix in June 2009. He bruised her bladder and severed an artery (she has operative report). She has been sick ever since the June 2009 surgery. Her PCP sent her for 3 or so CT scans- medical group did studies and found infection in body and found an abscess from a piece of the appendix that was left inside her (found about a week and a half ago). Thurs has to go for another imaging study- not sure what- they are going to put dye in her body and she had to do an enema. She is on pain pills- Dilaudid and oral antibiotics. They are talking about surgery. She has been sick for two years. She was admitted to hospital about 1.5-2 wks ago for 5 days or so. She didn't have much information for me. Says that the pain pills 'have her all over the place.' She called another law firm but they had a conflict and referred her here."

Case 2: "Patient underwent lap gastric bypass in March 2008. By May, she was having trouble keeping any food or medications down, was trying. She had dizziness, muscle weakness, visual changes, seen and went home from the ED in mid-May 2008. Got inability to walk, short term memory loss and severe metabolic disturbances. Back in the ED late May 2008. Sat in the ED for 2 or 3 days without seeing surgeon or a neurologist. Finally a neurologist admitted her to the ICU, but no diagnosis for several days, severe thiamine deficiency that by then caused severe, permanent cognitive and functional deficits. She is in her 30s, in a nursing home, unable to walk, with severely diminished vision and short term memory loss which appears to be permanent."

Case 3: (online firm inquiry): "I was wondering if I had a case. I went to the ER a few nights ago with pain in my belly button. After many hours of sitting in the ER room waiting, the doctor came back and said I was just fat and I had an ulcer, so I left. A few days later the pain got worse so I went to see my aftercare doctor. He said the CT scan report showed that I had an umbilical hernia that needed surgery. So the first doctor didn't want to do his job and sent me out with something that could've killed me.

Check your answers on Page 43.