Liability Lessons for Legal Nurse Consultants Part One: An Analysis of Claims Involving Legal Nurse Consultants

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Legal Nurse Consultant Liability, Claims, Risks, Malpractice, Negligence, Lawsuit, Risk Reduction

Legal nurse consultants (LNCs), like members of the healthcare field, must be aware of potential areas of professional liability exposure and employ risk management principles in their practice. This two-part series offers LNCs the opportunity to identify common LNC liabilities, assess their own consulting practice, and apply this knowledge as a means of engaging in risk reduction. In Part One, an overview of actual cases and claims involving LNCs will be offered to highlight the common areas of potential LNC liability, and key "take-aways" will be presented for LNCs to apply to their own consulting practice. An in-depth case study will be provided in Part Two which offers a closer look at an actual lawsuit involving alleged LNC negligence and discusses the principles of risk reduction learned therein.

Introduction

It is judicious for all nurses, regardless of their specialty, to critically analyze their practice to identify and correct potential liability risks or exposures. As such, legal nurse consultants (LNCs) must also be cognizant of ways in which they can improve their consulting practice and mitigate their risk of liability. Engagement in risk reduction through education, awareness, and practice modification is essential in the contemporary legal climate. By reviewing actual claims involving LNCs and analyzing them for lessons applicable to one's own practice, a LNC can engage in effective risk reduction.

Overall, the liability risk assumed by practicing as an LNC is very low. In examining the associated risk factors, there are three features of legal nurse consulting practice that may increase one's risk. First, LNCs who offer expert opinions are at higher risk of being sued than those who work behind the scenes. This is due to the gravity that expert opinions carry in medical-legal cases. Second, LNCs who are independent consultants are at higher risk than those who work in-house for law firms and insurance companies due to the vicarious liability of the latter's employer. Third, it is intuitive that LNCs who work full time in this specialty practice are at higher risk than those who work part time simply due to the volume of work being performed. The more work a LNC does, the more exposure he/she has to potential claims of negligence. However, the overall exposure of LNCs remains small. It is prudent, though, for LNCs to be alert to common liability risks, as such awareness and resultant practice modification can further reduce this potential exposure.

The claims and cases referenced in this article were obtained from three sources. First, legal research was conducted for published state and federal cases that contained the terms "legal nurse consultant," "legal nurse consulting," "legal nurse," or "nurse paralegal." This search yielded 75 cases. Of those, 18 cases addressed potential legal liability of LNCs. Four additional cases were referenced in the original 18, bringing the total number of pertinent cases to 22.

The second source of LNC claims was Nurses Service Organization (NSO), an insurance provider that offers professional liability coverage to nurses, including LNCs. NSO reviewed the common risks associated with the LNCs insured through the organization and supplied that information for the purposes of this article.

Third, the authors are aware, through informal sources, of additional claims, potential claims, and disputes involving LNCs and have shared that information hereto.

The liability risks related to legal nurse consulting were identified through an analysis of the information collected from these three sources. In random order, the most common risks are:

- Real or apparent conflict of interest
- Working on a potential case without attorney involvement
- Insufficient and/or unqualified expert affidavit or opinion letter
- Opining outside of the appropriate scope of expertise
- Failure to maintain opinion / improper withdrawal as an expert witness
- Advice and work of behind-the-scenes consultant
- Fee disputes
- Copyright infringement
- Confidentiality violations
- Malicious prosecution

Real or apparent conflict of interest

A conflict of interest is "a situation where one person has information that may potentially be used to influence a case and cause harm, injury, or prejudice to the client" (Sisko, 2010, p. 659). "Legal" conflicts of interest impact attorneys and their ability to continue representation of a client should opposing counsel argue that by virtue of a relationship with a particular expert or consultant, the attorney has access to "inside" information they would not normally be entitled to during the discovery process. "Personal" conflicts of interest may impact a consultant's ability to objectively opine on the merits of the case in which, for example, one of the named parties is a friend or acquaintance of the consultant.

Screening for real or apparent conflicts of interest is one of the first things that LNCs must do upon receiving a potential work assignment. Furthermore, this process is necessary for compliance with the American Association of Legal Nurse Consultants' (AALNC) Code of Ethics and Conduct, which asserts that "Financial or other relationships that may give an appearance of or create a conflict of interest will be disclosed" (AALNC, 2009, p. 1).

An example of this liability risk is evident in the Louisiana matter *In re Granier* (2005). A judge received public censure for hiring his girlfriend, a registered nurse (RN), as an independent LNC to review and summarize medical records for cases in his court and for authorizing payment from a judicial expense fund to pay for a seminar at which she obtained "legal nurse consulting credentials." While only the judge received a reprimand in this matter, the nurse should have recognized the conflict of interest and declined the work.

Take-away: LNCs must screen for any potential or actual conflicts of interest upon receipt of a new assignment. If any such conflict exists, the LNC must immediately disclose this to the attorney-client, and the assignment may need to be declined.

Working on a potential case without attorney involvement

Persons who are contemplating any type of medical-legal claim are seeking legal services, which mandates the advice and counsel of an attorney. The authors are aware of instances in which LNCs have been asked by patients or their families to evaluate potential medical malpractice claims. The independent LNC should never, under any circumstances, evaluate a potential claim for the lay public without an attorney being involved. LNCs should always work in conjunction with an attorney. If the statute of limitations or some other regulatory deadline or requirement expires while the case is being evaluated by the LNC, the LNC could be sued for malpractice and the unauthorized practice of law.

Take-away: The LNC should never agree to evaluate a case without an attorney being involved. If directly approached by an individual patient or family to screen a case for merit, the LNC should instruct each requester to contact an attorney.

Insufficient and/or unqualified expert affidavit or opinion letter

When a LNC is asked to prepare and sign an expert affidavit or opinion letter that will be affixed to a complaint, the LNC must honestly assess his/her qualifications to do so. In order to ensure qualification and compliance, the LNC must be familiar with the statutory requirements for the state in which the case is being filed. Despite the anonymity in the initial report, the LNC must be able to stand solidly behind the work product and opinions. The LNC's reputation and the longevity of his/her consulting career are at risk if the requisite standards are compromised to fulfill the short-term needs of an attorney-client.

In *Patenaude v. Norwalk Hospital et al.* (2010), the administrator of the decedent's estate alleged a wrongful death from aspiration pneumonia and a bowel obstruction and named the hospital and general surgeon as defendants. Attached to the complaint was a good faith opinion letter authored by an undisclosed healthcare provider, although the letterhead on the document referenced a legal nurse consulting company. The author opined on deviations from the standard of care as to both the hospital and the physician. The hospital filed a Motion to Dismiss stating that the good faith certificate did not satisfy the statutory requirement of being written by a similar healthcare provider. Plaintiff responded by filing a proposed amended complaint with an affidavit signed by the plaintiff's attorney. This affidavit asserted that the author of the good faith opinion letter was an RN who, through experience and training, was familiar with the nursing care of post-operative patients such as the decedent. Because the Motion to Dismiss was already pending, the court could not consider the amended complaint before ruling on the motion. The court described that the opinion letter attached to the original complaint did not identify the medical specialty of the author, thereby preventing the determination of whether the author was a similar healthcare provider. Furthermore, it did not state that the author was familiar with the standards of care for any particular medical specialty. Lastly, it did not identify whether the alleged negligence involved nursing care. The court found that the opinion letter was insufficient and granted the Motion to Dismiss.

The following year, plaintiff filed another suit against the hospital (*Patenaude v. Norwalk Hospital,* 2012) using an RN-authored opinion letter that was nearly identical to that of the earlier action. The only variation was the addition of a paragraph addressing the author's qualifications. However, this new content failed to address the state's statutory requirement of active clinical practice or teaching within the five-year period prior to the date of the alleged incident, and it did not address whether the author had been certified, trained, or experienced in any medical specialty. Due to the

insufficiency of the good faith opinion letter, the defendant again filed a Motion to Dismiss, which was granted.

Similar issues related to the expert affidavit are demonstrated in *Ledesma v. Shashoua et al.* (2007). In this action, plaintiff appealed a lower court decision granting the defendant certified registered nurse anesthetist's (CRNA) Motion to Dismiss. This dismissal was based on the plaintiff's failure to provide an expert report that complied with the applicable requirements under state law. The two expert reports in question were written by RNs, one a certified operating room nurse and the other, a certified legal nurse consultant. Both reports addressed the standards of care applicable to RNs or circulating nurses, not to CRNAs, and one opined on proximate causation. These two reports were deemed inadequate, because they failed to identify the defendant anesthetist at all. Without explicitly naming the defendant, the reader was left to "make an educated guess as to whose actions the expert is complaining." Furthermore, the court determined that only a qualified physician could render expert opinion testimony on causation in this case, which alleged an intraoperative nerve injury to plaintiff's arm due to incorrect intravenous access placement and improper placement and monitoring of her arm. Therefore, plaintiff was unable to meet her burden of proof with regards to the defendant CRNA. The Appellate Court affirmed the district court's judgment.

Similarly, in *Bell v. Hospital of St. Raphael* (2012), plaintiff/administratrix appealed a trial court decision granting the defendant's Motion to Dismiss, which was based on plaintiff's failure to show that the RN who authored the opinion letter was a similar health care provider. The RN opined on the ways in which the hospital failed to meet the standard of care in the emergency department and concluded that these deviations "led to a hemorrhagic stroke and [the decedent's] untimely death." To support its Motion to Dismiss, the hospital filed an affidavit of its vice president/chief medical officer/chief quality officer. This physician stated that, at the time of the incident, care of patients in the emergency room was managed by either a physician or physician's assistant. The trial court stated that an RN was not necessarily precluded from authoring the opinion letter, because the allegations were broad. However, the court noted an absence of information concerning the author's qualifications related to licensure, training, and experience. Therefore, the opinion letter failed to demonstrate whether or not the RN was a similar healthcare provider. The Appellate Court agreed that the opinion letter did not indicate whether the RN's qualifications were appropriate for statutory purposes, and the judgment was affirmed.

In *Royal v. Mancuso et al.* (2010), a licensed practical nurse (LPN) was named as a defendant in a medical malpractice action. She filed a Motion to Dismiss claiming that the author of the opinion letter, an RN, was not a similar healthcare provider as statutorily required. The opinion letter failed to reveal the author's licensure status, education, training, or experience, and the court could not infer whether the author was a similar enough healthcare provider to meet the statutory requirements. The Motion to Dismiss was granted.

Take-away: LNCs need to be familiar with the statutory requirements for authoring expert affidavits / certificates of good faith in the state(s) in which they work. Knowledge of the essential components of these documents is also important to ensure that all required content is addressed. It is imperative that LNCs limit their opinions to their expertise in particular practice areas, standards of care, and, when appropriate, causation and not opine outside of their clinical qualifications and specialty.

Opining outside of the appropriate scope of expertise

When asked to serve as a nurse expert, the LNC must only accept cases involving clinical areas and specialty knowledge in which he/she has expertise. This holds true whether the nurse is asked to opine on liability and/or causation elements.

As previously mentioned, the LNC must be familiar with the specific statutory requirements for experts in the state in which the case has been filed. Generally speaking, it is requisite for the liability expert to be a similar healthcare provider to the defendant. The nurse expert's education, training, licensure, and experience should be in the same specialty as the defendant, and the nurse should be clinically active in that field. Deviating from this scope may expose the LNC to liability of his/her own. It would be in violation of the AALNC Code of Ethics and Conduct which states that "The legal nurse consultant does not purport to be competent in matters in which he or she has limited knowledge or experience" (AALNC, 2009, p. 1-2). Furthermore, the Scope and Standards of Practice for legal nurse consulting cautions LNCs to "confine testimony to the specific area of expertise possessed" (AALNC, 2006, p. 15).

In *Cleveland v. USA* (2006), plaintiff's nurse expert opined that a physician assistant deviated from the standard of care in failing to obtain a chest x-ray and failing to diagnose congestive heart failure (CHF). In her opinion, if the decedent had been treated for CHF by the physician assistant, his subsequent demise could have been prevented. The defense objected to the nurse's admission as an expert witness and argued that, as a nurse, she was unqualified to testify as to the standard of care owed by a physician assistant. The court agreed and excluded her testimony, and the case resulted in a defense verdict. The plaintiff appealed, challenging the exclusion of the nurse expert's testimony. The Appellate Court affirmed the trial court's judgment, stating that a nurse is "not qualified to testify as to a physician's standard of care or the standard of care governing a physician assistant who stands in the place of the treating physician."

A similar issue existed in *Hebert v. USA* (2009). In this case, plaintiff's nurse expert opined that a medical resident violated the standard of care by allowing a patient to walk with a foreign object lodged in her throat. During her

deposition, however, the nurse stated that LNCs "don't testify on physicians. We can only testify to our expertise in nursing." The defense filed a Motion for Summary Judgment (MSJ) stating that plaintiff failed to identify an expert to provide testimony concerning physician negligence. Without this testimony, plaintiff could not meet her burden of proof, and the MSJ was granted.

In addition to liability testimony, the LNC also needs to be cautious to avoid opining outside of his/her area of expertise in causation testimony. The LNC has the responsibility to decline an assignment that calls for testimony that exceeds his/her specialty knowledge-base. Some states have permitted qualified RNs to testify on causation on specific issues, such as pressure ulcers, wound/ostomy care, and infusion therapy (*Gaines v. Comanche County Medical Hospital et al,* 2006; *Barton v. USA,* 2008; *Guardia v. Lakeview,* 2009; *Richardson v. Methodist Hospital,* 2002). The attorney-client should determine what may be allowed under the particular state's rules.

Take-away: LNCs should be aware of the boundaries of their expertise and should opine only within those limits. Adherence to the Code of Ethics and Conduct (AALNC, 2009) and to the Legal Nurse Consulting: Scope and Standards of Practice (AALNC, 2006) is highly recommended.

Failure to maintain opinion / improper withdrawal as an expert witness

The liability risk associated with failing to maintain one's opinion or improperly withdrawing as an expert witness is illustrated in an NSO claim that involved a LNC's withdrawal as an expert witness. The LNC provided an attorney-client with favorable preliminary opinions that were based solely on attorney's iteration of the case facts. However, after receiving and reviewing the medical records, the nurse found no evidence to support the allegations and refused to sign the affidavit or otherwise participate in prosecuting the defendant. Due to difficulty securing payment from the attorney-client, the LNC sued for services rendered, and the attorney countersued for failure to maintain her expert opinion.

Take-away: A LNC should never offer opinions or agree to be an expert prior to actually reviewing all pertinent medical records. As soon as an LNC realizes that he/she cannot support a case, further involvement in the case should be declined. Legitimate and timely withdrawal as an expert will give the attorney an opportunity to obtain additional reviews before statutory deadlines loom.

Advice and work of behind-the-scenes consultant

But for claims related to fee disputes, it is extremely rare for a case or claim to involve a behind-the-scenes consultant, as these consultants practice under the direction of the attorney, who is legally responsible for evaluating the basis for a consultant's opinions. That being said, the following two cases illustrate that the actions of such LNCs can be subject to scrutiny as well.

In *Collett v Steigerwald* (2007), a legal malpractice claim was brought against an attorney who filed a medical malpractice case involving a delay in the diagnosis and treatment of breast cancer. The attorney had the matter reviewed by an LNC who reported that the medical malpractice claim was unlikely to be successful based, in part, on the decedent's failure to undergo a recommended biopsy procedure and the difficulty in proving proximate causation. After researching the medical literature, the LNC prepared an addendum to his report which conveyed that some of the literature caused him to question several of his original conclusions and identified potential areas of further research. Based on the problems initially identified by the LNC, the attorney recommended against proceeding with the case. The plaintiff agreed, and the action was voluntarily dismissed. The subsequent legal malpractice claim included allegations that the attorney failed to have the mammogram films reviewed by a qualified (physician) expert and failed to prosecute several treating physicians in the medical negligence case. Claims against these providers were now time-barred by the statute of limitations. Due to the applicable statute of limitations, the defendant attorney's Motion for Summary Judgment was granted by the trial court, and this judgment was upheld by the Appellate Court.

During the depositions of two of plaintiff's experts in *Stanton v. University Hospitals Health System* (2006), it was acknowledged that both experts had been assisted by a nurse paralegal for plaintiff's counsel in the preparation of their reports. The defendant sought to depose the nurse paralegal, and plaintiff's counsel moved for a protective order. The trial court denied the protective order but limited the inquiry to specific questioning regarding the sole issue of how the expert reports were generated. Plaintiff appealed, but the Appellate Court upheld the judgment.

Take-away: Even though behind-the-scenes LNCs practice under the direction of an attorney, they still have exposure and are accountable for generating opinions and work products that are of the utmost quality.

Fee disputes

Billing concerns are the most likely reason for a dispute between a LNC and an attorney or the attorney's client. Oftentimes, situations involving fee disputes have underlying issues related to other liability risks discussed in this article.

For example, NSO handled a claim regarding a LNC who was hired by plaintiff's counsel to provide expert witness testimony. The LNC grew concerned with how plaintiff's counsel was pursuing the case and decided to remove herself as an expert. A dispute developed between the LNC and plaintiff's counsel over services rendered, and plaintiff's counsel demanded a return of fees.

Another NSO claim involved a nurse who provided legal nurse consulting services for plaintiff's counsel in a medical malpractice case. The plaintiff's estate filed a suit against

both the attorney and the LNC for overcharging of legal fees inclusive of the LNC's consultation services.

The authors are aware of another claim in which a LNC was asked to review a case for merit. After reviewing the initial records, the LNC realized that it was not a case she could support. However, the attorney kept sending her more records, asking her to "dig deeper." The LNC was still unable to support the case and declined to be an expert. The attorney sued the LNC for the fees he had paid her, which were approximately $5,000. When she contacted the liability carrier for her consulting practice, she was advised that her policy does not cover fee disputes with attorney clients. Thus, she hired her own counsel to fight the matter. The claim against her was ultimately thrown out but only after the LNC spent $2,500 in legal fees defending the claim.

Take-away: Transparency in fees and fee schedules contributes to the prevention of billing disputes. Sending invoices at regular intervals, instead of a lump sum at the conclusion of a case, will also help the LNC avoid issues with payment. Also, in the last example above, the LNC should have definitively declined further involvement in the case as soon as she determined she could not support plaintiff's claims related to the nursing care.

Finally, for independent LNCs who purchase professional liability insurance for their consulting or expert work, it is essential to determine the details of the coverage, that is, specifically what it does (and does not) cover. Adherence to the principles of risk reduction discussed in this article will also minimize situations that can lead to fee disputes.

Copyright infringement

Another potential area of LNC liability is copyright infringement. An example of this can be found in *Medical-Legal Consulting Institute v. LNC Education Associates et al* (1998). Plaintiff alleged copyright infringement of 11 protected works which were course materials for LNC educational programs, and judgment was entered against 2 of the 3 defendants. These two defendants had each attended no more than two of plaintiff's seminars several years before they developed their own LNC educational materials. Both had access to the plaintiff's subject works but discarded any of plaintiff's seminar materials prior to planning their own educational program. The majority of both the plaintiff's and defendants' written material contained a "compilation of facts, data, and information generic and common to the legal and medical professions," which was provided in outline form. The court found that the "defendants' accused work had substantially similar, and sometimes identical, verbiage as the protected work." In addition, the order and manner in which the information was laid out was nearly identical. The defendants' work, according to the court, satisfied the "intrinsic test," in that a lay person would subjectively appreciate the similarities between the two materials (Hervey, 2007).

Take-away: LNCs should not plagiarize or violate copyright protection. The Code of Ethics and Conduct calls for LNCs to abide by all local, state, and federal laws and maintain "standards of personal conduct that reflect honorably upon the profession" (AALNC, 2009, p. 2).

Confidentiality violations

As nurses, LNCs are acutely aware of privacy laws and the need to protect patient confidentiality. This obligation translates into the legal nursing specialty as the AALNC Code of Ethics and Conduct charges LNCs with protecting client privacy and confidentiality (AALNC, 2009).

In *Thiery v. Bye et al.* (1999), a client brought a legal malpractice claim against an attorney, law firm, and the employed nurse investigator. The defendant attorney had represented the plaintiff in a personal injury suit. After settlement, he contacted the plaintiff for permission to release her medical records for use by the nurse investigator as a teaching tool for a legal nurse consulting class at a local college. The plaintiff was assured that the records would be redacted prior to distribution, but they were not. The plaintiff also filed a separate suit against the nurse and the college that employed her to teach the LNC course.

Take-away: LNCs must maintain patient confidentiality and strictly adhere to all privacy laws.

Malicious prosecution

Malicious prosecution is defined as filing a lawsuit for an improper purpose and without grounds ("Malicious," 2010). As illustrated in the following NSO case example, malicious prosecution is typically alleged in conjunction with other claims.

A LNC was requested by an attorney to provide an opinion regarding the actions of an urologist in a medical negligence case. The LNC opined that the urologist was negligent and signed an expert affidavit as such. The suit against the urologist was ultimately dropped. Claiming emotional distress, the urologist filed suit against the attorney, his practice, and the LNC for malicious prosecution, bad faith, fraud / misrepresentation, and civil conspiracy. A LNC was hired as a standard of practice expert to review the liability of the defendant LNC. The consultant LNC opined that the defendant LNC acted within the scope of legal nurse consulting practice, because a nurse expert "just does what the attorney tells her to do." The consultant LNC was clearly incorrect in her review of this matter, as the defendant LNC improperly opined on the standard of care owed by a physician.

Take-away: One of the potential implications of engaging in risky or improper practice is being sued for malicious prosecution. As previously discussed, nurse experts must be aware of and adhere to the state's statutory requirements for certificates of merit as well as evidentiary requirements related to expert qualifications and testimony. In addition, the LNC should be aware of and follow the legal nursing specialty's ethical guidelines and scope of practice.

Summary

The Legal Nurse Consulting: Scope and Standards of Practice states that "The legal nurse consultant evaluates one's own nursing practice in relation to professional practice standards and guidelines, relevant statutes, rules, and regulations" (AALNC, 2006, p. 30). While LNCs were named as defendants in only a few of these sample cases, all of them illustrate actual or potential LNC liability exposures and therefore hold invaluable lessons for LNCs of all experience levels. LNCs should evaluate their own practice in light of these common liability risks and apply this knowledge by making any necessary practice modifications to reduce their potential risk. Through the application of the liability lessons discussed in this article, prudent LNCs can improve their consulting practice and mitigate their risk of liability.

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