Liability Lessons for Legal Nurse Consultants Part Two: A Case Study with Risk Management Strategies

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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 was discussed to highlight the common areas of potential LNC liability, and key "take-aways" were presented for LNCs to apply to their own consulting practice. An in-depth case study is 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

To provide legal nurse consultants (LNCs) with an understanding of potential areas of risk exposure in this specialty practice of nursing, Part One of this two-part series reviewed summaries of actual cases and claims involving LNCs to illustrate these areas, and it offered key "take-aways" for LNCs to apply to their own practice. These principles of risk reduction are further explored in this Part Two article through the examination of an actual lawsuit involving a LNC.

Professional liability claims may be asserted against nursing professionals working in a myriad of specialties, including legal nurse consulting. This case study involves a LNC who provided advice as well as written work products to an attorney-client.

Case Summary:

The insured was an associate's degree prepared registered nurse who had recently completed her training and certificate course as a LNC. She then advertised her availability to the legal community for screening medical malpractice cases for "merit". She was engaged by an attorney-client to review the medical records of a client he represented in a medical malpractice action. The attorney-client had managed a small number of medical malpractice cases but had never taken such a case to trial. Neither had the attorney ever engaged the services of a LNC.

The patient had undergone unsuccessful abdominal surgery for removal of a mass. The mass had been identified pre-operatively by both a computed tomography (CT) scan and magnetic resonance imaging (MRI) but could not be found by the surgeon during the operative procedure and was, therefore, not removed. The patient suffered additional postoperative complications, including the need for additional surgery and sought to sue the surgeon and the hospital for negligence.

The LNC accepted the assignment from the attorney-client to review the client's medical records and provide her written findings. Following her review, she provided the attorney with a written statement that the surgeon and the hospital were both negligent in the patient's care. She cited the surgeon's failure to have copies of the CT and MRI films available in the operating room and the LNC further cited his failure to obtain the assistance of another surgeon when he was unable to locate the mass. She also noted the hospital's failure to have appropriate procedures in place to ensure the patient's care and safety. She included a statement in her report that if litigation were pursued, a physician expert witness would be required to medically certify that the surgeon acted outside the standard of care.

The attorney-client had not previously utilized the services of a LNC. In addition to requiring the LNC to review the medical records and provide a written assessment of her findings, he asked her to sign a certificate of merit. The certificate of merit was statutorily required when filing a medical malpractice action to verify that malpractice had occurred. Because of the LNC's recent entry into the profession, she was unclear about her authority to sign the certificate and initially declined. The attorney and his paralegal repeatedly urged the LNC to sign the certificate of merit, and she eventually agreed to sign the document but did not date it and did not have her signature witnessed.

Approximately three months later, the attorney-client's paralegal contacted the LNC and after considerable reassurance, convinced her that she indeed was authorized to

sign the certificate of merit. The attorney further coerced her into backdating the document to the date she had originally signed it and submitted her written assessment of the case. The attorney filed the case utilizing this backdated certificate of merit signed by the LNC. This issue became a major factor in the case as the court disallowed the plaintiff's cause of action against the surgeon, in part, because the certificate of merit was not signed by a physician and was improper.

The patient sued the attorney and the LNC for negligence. The surgeon subsequently sued the LNC, her attorney-client and his law firm, alleging that they had engaged in "malicious prosecution, fraud, and civil conspiracy." He further alleged that the LNC had acted outside her scope of practice and inflicted severe emotional distress upon him. The latter allegation pertained to her written report and opinion that the surgeon had breached the standard of care when, as alleged by the surgeon, she was not qualified to provide either a legal or medical opinion regarding the medical standard of care.

Because the surgeon asserted malicious prosecution, in order to successfully defend the LNC, it became necessary to prove that the surgeon had, indeed acted outside the standard of care. A physician expert was engaged and stated that the surgeon and hospital had breached the standard of care by: 1) failing to have the patient's radiographs in the operating suite; and 2) not obtaining/providing assistance in the operating room when the known mass could not be located. The expert further stated that had he been asked, he would have signed the certificate of merit for the lawsuit against the surgeon.

The LNC then sued her attorney-client for repeatedly misleading her regarding her authority and for coercing her into signing and then backdating the certificate of merit. Her attorney-client subsequently entered into a cross-claim against his own LNC, stating she had misrepresented herself as competent to render legal opinions in medical malpractice matters. However, in his deposition testimony, the attorney stated that the LNC recommended consultation with a physician expert if he planned to take the case to trial. Clearly, neither the LNC nor the attorney was certain of the applicable statutory requirements for the certificate of merit or the LNC's scope of practice, representing the primary cause for the subsequent litigation.

Several motions were filed by the multiple parties. The court refused the motion to dismiss the LNC from the surgeon's case. She sought a settlement, but the surgeon's attorney would not agree to a reasonable settlement amount. Court-ordered mediation of the surgeon's case against the LNC was unsuccessful for the same reason.

Eventually, the surgeon's claim against the LNC was settled for a five-figure amount. The LNC and her attorney-client dropped their cross-claims. The attorney-client settled the surgeon's claim against him and his firm with payments on behalf of himself, his law firm, and his paralegal. The settlement amounts were confidential and are not available. Any settlement amounts awarded to the patient by the surgeon or hospital are unknown.

Indemnity Settlement Payment: Low five-figure range

Legal Expenses: Low six-figure range

The indemnity payment reflects only the payment made on behalf of the LNC to the surgeon. Expense payments reflect the cost for engaging the physician expert, court costs and legal fees to defend the surgeon's case against the LNC as well as managing the cross-claims between the nurse legal consultant and the attorney-client.

Resolution

The LNC was deemed to have acted within her scope of practice in her review of the medical records and issuance of her findings. In the state where the incident occurred, only a physician was qualified to sign a certificate of merit. Therefore, by signing the certificate of merit, she transcended the scope of her practice. Further, she backdated a legal document and also signed the legal document outside the presence of a state-required notary public.

Risk Management Comments

The LNC was unclear regarding her scope of practice. She accepted an engagement with an attorney who had never previously worked with a LNC and who was insufficiently experienced in the management of medical malpractice litigation. She used some questionable legal terminology in her written summary of the patient's records, but her opinions were within her area of clinical experience. She was unclear regarding her authority to sign the certificate of merit and did not verify her authority before signing the document. Finally, she backdated the document which she knew to be improper.

Risk Management Recommendations

1. Know and adhere to the American Association of Legal Nurse Consultants' (AALNC) Legal Nurse Consulting: Scope and Standards of Practice (AALNC, 2006).
2. Know and adhere to AALNC's Code of Ethics and Conduct (AALNC, 2009).
3. Ensure the attorney-client is qualified and experienced in the type of case for which the LNC has been requested to work.
4. Clarify the specific roles of all members of the attorney-client's team prior to accepting an assignment, including the roles of the LNC, the paralegal/legal assistant, the legal secretary, and the attorney.
5. Ensure that the attorney-client will provide adequate legal support and supervision to all members of the team.
6. Solicit information from the attorney-client about his or her expectations related to the LNC's work product/advice, including whether the attorney-client desires the nurse to serve as a testifying expert.
7. Know and adhere to the applicable state/federal statutes related to expert qualifications in the state in which the LNC works.

8. Seek an objective legal opinion or contact the American Association of Legal Nurse Consultants for assistance if asked to perform a task that is previously unknown to the LNC or is in any way unclear regarding its appropriateness within the LNC's scope of practice.

Valuable insight can be gained from reviewing real claims involving actual or potential LNC negligence. By learning and applying the risk management lessons discussed in this two-part series, the LNC can strive to minimize his/her liability exposure.

References

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