Review Course

Medical Malpractice

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The educational content contained in this webinar is current and accurate and contact hours will be awarded through December, 2015.
Speaker Introductions

Elizabeth Zorn

Julie Dickinson
Conflict of Interest Disclosure

Elizabeth Zorn and Julie Dickinson certify that, to the best of their knowledge, no affiliation or relationship of a financial nature with a commercial interest organization has significantly affected their views on the subject on which they are presenting.
Content Areas of the Examination

- Medical malpractice (27-31%)
- Personal injury (19-23%)
- Product liability/toxic tort (10-14%)
- Workers' compensation (12-16%)
- Risk management (5-9%)
- Life care planning (4-7%)
- Criminal/forensic (1-4%)
- Admin health law/regulatory compliance (4-8%)
- Elder law (3-6%)
## Schedule for Webinar Series

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<td>Rosie Oldham, Catherine Beasley</td>
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<td>Webinar #9</td>
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<td>Life Care Planning, Medicare Set-Asides</td>
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<td>Licensure Investigations, Regulatory Compliance</td>
<td>Julie Dickinson, Catherine Jordan</td>
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Objectives for Today’s Webinar

- Analyze the LNC role in screening and investigating potential medical malpractice claims.
- Outline the role of an LNC during the discovery phase of a medical malpractice claim.
- Evaluate the role of an LNC in the adjudication of a medical malpractice claim.
Case Study
Gentamicin Case Study: Cast of Characters

• Plaintiff: Casey Jones
  • 42 years old, married, father of 3 boys
  • PMH: IDDM
  • Hobbies: family, athletics

• Defendants:
  • Lewis Regan, DPM
  • Pharmacist
  • VNS homecare nurses
  • David Sanchez, MD (PCP)

All names have been changed for confidentiality purposes.
Gentamicin Case Study: Chronology of Events

2/96: Mr. Jones began treating with Dr. Regan for diabetic ulcer on right foot.

2/96 to 8/21/96: Dr. Regan treated the ulcers with debridements and multiple courses of Cipro. No C&Ss were obtained during this time.

8/21/96: First culture obtained. Grew gram + bacteria

9/13/96: Second culture obtained. Grew gram + bacteria. Dr. Regan prescribed Cipro and Dicloxacilin, even though the sensitivities showed that the bacteria were resistant to both.
Gentamicin Case Study: Chronology of Events

9/24/96: Dr. Regan spoke with Dr. Sanchez. Mr. Jones’ liver and kidney function tests were WNL. Received the okay to start Mr. Jones on IV medication.

<table>
<thead>
<tr>
<th>Infection:</th>
<th>Gentamicin Dosing:</th>
<th>For Mr. Jones: (91 kg ideal body weight)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Serious</td>
<td>3 mg/kg</td>
<td>273 mg max daily dose</td>
</tr>
<tr>
<td>Life-threatening</td>
<td>5 mg/kg</td>
<td>455 mg max daily dose</td>
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</table>

9/26/96: Dr. Regan prescribed Gentamicin 1g IV QD x 10 days.
Gentamicin Case Study: Chronology of Events

9/27/96: Gentamicin begun IV.

9/28/96: VNS recorded a baseline BP of 120/84.

9/30/96: Blood work ordered at insistence of VNS.
  • Gentamicin peak level: 20 (6-10)
  • Gentamicin trough level: <0.5 (0-2)

10/2/96: Third culture obtained. Grew gram + bacteria.

10/4/96: Tx day #8. Dr. Regan decided to extend tx beyond 10 days.

10/7/96: VNS recorded a BP of 132/88.
Gentamicin Case Study: Chronology of Events

10/9/96: Tx day #13. Dr. Regan documented that the Gentamicin tx would be continuing for a minimum of 8 weeks. VNS and Dr. Sanchez were aware of this plan.

10/11/96: Dr. Regan orders weekly blood work, beginning on 10/14.

10/14/96: Blood work:
  - Gentamicin trough level: 1.6 (0-2)
  - BUN: 18 (6-22)
  - Serum creatinine: 1.1 (0.4-1.5)

10/15/96: Tx day #19. First documented complaint of dizziness, though Mr. Jones reported this symptom several times before. The dizziness was severe and continual.
Gentamicin Case Study: Chronology of Events

10/16/96: Dizziness and lightheadedness prevented Mr. Jones from attending his appointment with Dr. Regan, who noted that pt “might be coming down with the flu.”

10/18/96: VNS recorded BP of 160/96, n/v, being off-balance, dizziness. “Using structural supports r/t dizziness.”

10/19-20/96: Mr. Jones paged doctor covering for Dr. Regan. Reported lightheadedness, nausea, appearing drunk, falling down. Covering doctor prescribed Antivert.
Gentamicin Case Study: Chronology of Events

10/21/96: Mr. Jones reported to Dr. Regan that he was so dizzy, he couldn’t walk. Dr. Regan stopped Gentamicin for one day but ordered 500 mg daily starting the next day. VNS questioned whether these new orders were related to Gentamicin toxicity.

10/22/96: VNS recorded BP of 170/110 and notified Dr. Regan.

10/23/96: Dr. Regan recommended that Mr. Jones see Dr. Sanchez and ordered Gentamicin to be restarted “as we cannot stop it as it has not been long enough.” Mr. Jones contacted Dr. Sanchez, told him it was difficult to get to the office due to his symptoms, and was advised to wait another week to see if his symptoms changed.
Gentamicin Case Study: Chronology of Events

10/24/96: VNS felt Gentamicin should be d/c’d but could not reach Dr. Regan.

10/25/96: Tx day #26.

Dr. Regan returned call to VNS. Agreed not to continue IV Gentamicin until Mr. Jones saw Dr. Sanchez later this day. Dr. Regan reiterated that he did not want to stop Gentamicin.

Dr. Sanchez saw Mr. Jones, d/c’d Gentamicin, ordered blood work, and requested neurology and vascular surgery consultations.
Gentamicin Case Study: Chronology of Events

10/25/96 (con’t): Dr. Regan saw Mr. Jones and wrote a letter to Dr. Sanchez expressing concern that the Gentamicin had been stopped. He explained to Mr. Jones that “he has only been on the Gentamicin half the recommended time.”

Blood work:
- Gentamicin trough level: 8.3 (0-2)
- Serum creatinine: 2.9 (0.4-1.5)

11/8/96: Blood work:
- BUN: 70 (6-22)
- Serum creatinine: 7 (0.4-1.5)

Blood pressure remained significantly elevated.
Gentamicin Case Study: Chronology of Events

11/15/96: Dr. Sanchez first reviewed the 10/25/96 blood work (21 days later) and advised Mr. Jones to go to ED immediately. 
Dx: acute renal failure most likely due to Gentamicin
Blood work:
  • BUN: 74 (6-22)
  • Serum creatinine: 5.5 (0.4-1.5)

7/30/97: Mr. Jones sought out a neurology consultation for his persistent and debilitating balance problems.
Dx: marked bilateral vestibular loss caused by Gentamicin toxicity.
Role of LNC in Screening and Investigating a Case for Merit
Proper Case Screening Is Essential

- Non-meritorious or even equivocal claims are vigorously defended by the insurance carriers.
- Medical malpractice claims are very time-consuming and expensive claims.
- Plaintiff firms do not make money on non-meritorious cases.
- Firm reputation tied to proper case screening.
Reasons for Outright Rejection of Potential Claim - Conflict

Legal conflict (e.g. the firm represented the potential defendant in a current or prior matter)

Personal conflict (e.g. the potential defendant is a friend or treating doctor of someone at the firm)

Conflict related to general personal injury practice (e.g. orthopedic doctors who treat the firm’s auto, slip & fall clients)
Reasons for Outright Rejection of Potential Claim - SOL issues

Different SOL rules for:
- Medical malpractice
- Wrongful death
- Minor children
- Mentally impaired
- Is there a discovery exception which extends the SOL?
- Is there a continuous treatment exception which extends the SOL?
Reasons for Outright Rejection of Potential Claim - other

- Wrongful life/birth - no cause of action
- Potential defendant has immunity
- Cannot establish “duty” between the plaintiff and the potential defendant
Cannot Meet Burden of Proof re Liability or Causation

Elements of negligence claim

• Duty (usually inherent)
• Departure from accepted standards of care
• Damages (sufficient to offset the cost of litigation)
• A causal link between the negligence & the harm
Reasons for Outright Rejection of Potential Claim - Insufficient damages

Cases in which the cost of litigation may exceed the recovery include those in which the client:

- Sustained only a minor injury
- Has an injury causing no permanent pain or significant functional limitation
- Suffered only a brief period of pain & suffering or none at all (plaintiff or decedent)
- Limited financial loss (eg, lost wages)
Review - Assessment of Damages

- Physical/emotional pain & suffering
- Functional limitations
- Economic loss
- Loss of enjoyment of life
- Loss of consortium ~ spouse
- Medical expenses
- Out-of-pocket expenses (co-pays, mileage, etc)
- Jury verdict searches - prior awards for similar injuries in same state and especially same venue
- States that have enacted tort reform ~ caps on pain & suffering awards
Economic Factors Impacting Settlement Negotiations

Are there any liens? (Medicaid, Medicare, workers compensation, third party health insurance)

Has the client filed for bankruptcy?

Medicare Set-Asides - established from a portion of a settlement to pay future medical expenses that would otherwise be covered by Medicare
Review - Assessment of Damages

• Does the potential economic recovery (assuming negligence) offset the cost of litigation?
• Are there significant permanent damages which impact the quality of the injured person’s life and/or ability to work?
• Is the client already disabled due to a pre-existing condition?
• Did the negligence aggravate a pre-existing condition?
• Is there “gross” negligence or misconduct?
• Are there any liens?
• Is the client involved in or contemplating bankruptcy proceedings?
Types of Cases Which Can be Problematic for the Plaintiff

- Cosmetic surgery cases
- Certain psychiatric cases
- Cases in which the client has a litany of complaints about every nurse and doctor who cared for him
- Clients who are non-compliant or otherwise partially responsible for their injuries
- Clients with short life expectancy not caused by negligence
Types of Cases Which Can be Problematic for the Plaintiff

- Cases in which the primary issue is a “he said (doctor)/she said (patient)”

- Cases in which the medical records do not support the client’s version of the facts

- A case already reviewed and rejected by another firm

- Long, complicated courses of treatment with multiple providers, ending in poor outcome
Complication of Surgery Cases

• Clear error (surgical misadventure)
• Most likely not due to error (common risk that can occur in the absence of negligence and/or no “red flags” in the record)
• Possibly due to error but may be difficult to prove this

Must establish likely mechanism of injury and how proper care would have prevented the injury.
Lack of Informed Consent Cause of Action

- Physicians (and other providers performing procedures/ordering courses of treatment) have a duty to discuss with the patient the reasonably foreseeable risks, benefits and alternatives of a procedure or course of treatment.
- The plaintiff must prove that the client did not receive proper informed consent AND that he or she (or in some states a “reasonable person”) likely would not have undergone the procedure had they been properly informed.
Lack of Informed Consent - Evidence of Informed Consent Discussions

- Evidence of the substance of the informed consent discussion is found in multiple places (consent form, operative note, hospital progress note, office record)

- Most plaintiff firms generally do not take cases in which the ONLY claim is lack of informed consent.
Medical Provider Told the Client to Call a Lawyer

- Most commonly occurs in the setting of a poor and/or unexpected outcome not resulting from malpractice
- Most medical providers do not understand the proof or other legal standards related to malpractice claims
- Oftentimes these same providers are unwilling to speak with the client’s lawyers about the claim
- Occasionally, comments are the result of acrimony between two providers
- Sometimes the client has misunderstood what the medical provider told them.
Factors Impacting Successful Resolution of Plaintiff Claims

- Strength of proof issues on liability, causation and damages
- How a jury will likely perceive both the plaintiff(s) and the defendant(s)
- Egregious conduct by defendant lessens the likelihood of trial and increases settlement amount
- Case venue (e.g. urban vs rural settings)
- Cooperation of treating physicians in establishing causation and damages
Factors Impacting Successful Resolution of Plaintiff Claims

• The Judge - is he/she prepared, knowledgeable about case facts and in control of the courtroom

• Legal decisions re motions made by counsel

• Quality of expert testimony

• Competence, preparation, organization and work ethic of managing attorney and his/her team
LNC Role In Screening Potential Medical Malpractice Claims

Is it likely worthwhile to obtain and review the relevant medical records?

After reviewing the relevant medical records, it is likely that an expert review on the merits will be favorable?
Researching Standard of Care Issues

- Peer reviewed journal articles
- Authoritative nursing and medical textbooks
- Clinical guidelines promulgated by professional medical and nursing organizations
- Governmental agencies (FDA, CDC)
- Facility policies & procedures
- The Joint Commission
- Equipment manuals
- Job descriptions
- Drug inserts
Researching Standard of Care Issues

- Federal statutes and regulations (such as those pertaining to nursing homes)
- State statutes (state practice acts for nurses and physicians)
- State regulations (health department)
- State administrative health codes/regulations
- Case law decisions and administrative rulings
Researching Causation Issues

Is it more likely than not that proper care and treatment would have:

- Prevented death
- Decreased morbidity
- Increased length of disease free survival
- Necessitated less invasive treatment
- Prevented the surgery complication
- Improved the functional outcome
Researching Causation Issues

Literature research examples

• Incidence of known complications of a surgical procedure
• Methods of preventing complications during surgery
• Statistics related to treatment options and chances of disease free survival at different cancer stages
• Statistics related to odds of success with a particular treatment
Researching Causation Issues

• Did improper care aggravate a stable pre-existing condition?

• Are any of plaintiff’s alleged complaints solely the result of a pre-existing condition?
Expert review(s)

- Identify appropriate specialties needed for liability and causation opinions
- Send very organized package of records and letter setting forth facts and list of questions for expert to consider.
- Carefully question the expert for the basis for his or her opinions
LNC Role In Screening & Investigating Potential Medical Malpractice Claims

• What are the strengths of the case?

• What are the weaknesses?

• How is the case likely to be defended?

• Is the potential economic recovery sufficient to offset the cost of litigation?
LNC Role In Screening & Investigating Potential Medical Malpractice Claims

• Sometimes your most valuable service to an attorney is to discourage them from taking cases that are going nowhere!

• That being said, it is very important to take extra care when evaluating those claims with catastrophic injuries.

• The “devil is in the details”
Intake Information in Gentamycin Case

- Long term gentamycin treatment generally contraindicated
- Married, working male with two minor children
- Gentamycin induced ototoxicity
- Gentamycin induced nephrotoxicity
- Referred to us by another attorney
Additional Information from Initial Client Interview

- Significant functional limitations from ototoxicity, impacting ADLs, work and recreational activities
- Neuroophthalmologist told him ototoxicity likely permanent.
- Insulin dependent diabetic with gentamicin induced renal problems and new onset high blood pressure
- Told he may need kidney transplant as a result of kidney damage
Initial Medical Literature Research

- Proper care and treatment of diabetic foot ulcers
- Gentamycin therapy - indications, dosage calculations, duration, monitoring of peak/trough levels and potential side effects
Identification of Health Care Experts

Medical Malpractice cases often require multiple experts!

Gentamicin case
- Podiatry
- Infectious Disease
- Pharmacology
- Nephrology
- Internal Medicine
- Home health care nurse
Role of LNC during Discovery Phase
Role of the LNC during Discovery Phase

1. Understand the goal of the discovery phase.
2. Assist with 5 instruments of discovery.
3. Identify sources of potential information.
Role of the LNC during Discovery Phase

1. Understand the goal of the discovery phase.

   Gather information
   - Identify key elements
   - Establish support

- Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense
Role of the LNC during Discovery Phase

1. Understand the goal of the discovery phase.

Jones v. Regan et al:

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<th>Not relevant:</th>
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<td>Divorce records</td>
</tr>
<tr>
<td>Employment records</td>
<td>Son’s school records</td>
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<tr>
<td>Tax returns</td>
<td>Marital counseling records</td>
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</table>
Role of the LNC during Discovery Phase

2. Assist with five (5) instruments of discovery.

1. Interrogatories (bills of particulars)
2. Requests for Production
3. Depositions
4. Independent Medical Exams
5. Requests for Admission
Role of the LNC during Discovery Phase

- **Discovery Instrument #1: Interrogatories**
  - From opposing party:
    - Act as liaison for the client
    - Assist with drafting answers
    - Track deadlines
  - To opposing party:
    - Assist with drafting questions
    - Track deadlines
    - Review answers and note any objections
Role of the LNC during Discovery Phase

- **Discovery Instrument #1: Interrogatories**

  Jones v. Regan et al: Mr. Jones to Dr. Regan

- Education and training (related to podiatry)
- Licensure (which states, any investigations, any actions)
- Board certification
- Employment history (as a podiatrist)
- All malpractice insurance he carries
- Other malpractice claims against him
Role of the LNC during Discovery Phase

- **Discovery Instrument #1:** Interrogatories

  Jones v. Regan et al: Dr. Regan to Mr. Jones

  - HCPs prior to the alleged incident
  - HCPs who treated him for the alleged injuries
  - Ever had symptoms similar to those alleged
  - Fully recovered from the alleged injuries
  - Any permanent impairment from the alleged injuries
Role of the LNC during Discovery Phase

**Discovery Instrument #2: Requests for Production**

- **From opposing party:**
  - Act as liaison for the client
  - Assist with compiling requested materials
  - Track deadlines

- **To opposing party:**
  - Assist with drafting requests
  - Track deadlines
  - Review and analyze documents produced and note any objections
  - Track items “to be produced”
  - Work with attorney to determine if supplemental requests are needed
Role of the LNC during Discovery Phase

- **Discovery Instrument #2: Requests for Production**

  Jones v. Regan et al: Mr. Jones to VNA

  - Complete medical record of Mr. Jones
  - Complete billing record of Mr. Jones
  - Policies and procedures related to:
    - Administration of IV antibiotics
    - Physician notification of abnormal VS, blood work, exam findings
Role of the LNC during Discovery Phase

- **Discovery Instrument #2: Requests for Production**

  Jones v. Regan et al: Dr. Regan to Mr. Jones

  - Complete records from HCPs prior to the alleged incident
  - Complete records from HCPs who treated him for the alleged injuries
  - Any photographs or videotapes pertaining to alleged incident
Role of the LNC during Discovery Phase

- **Discovery Instrument #3: Depositions**
  - **Same-side Deponent:**
    - Assist with witness preparation
    - Assist with any questions
  - **Opposing-side Deponent:**
    - Assist with preparing questions
  - **Either Deponent:**
    - Attend deposition to suggest follow up questions or a particular line of questioning
    - Assess deponent as a witness
    - Prepare summary of deposition
Role of the LNC during Discovery Phase

• **Discovery Instrument #3: Depositions**

Jones v. Regan et al: depo prep of Mr. Jones

• Understand the question.
• Answer only what was asked.
• Tell the truth. You’re under oath.
  • It is okay to say “I don’t remember” or “I don’t know.”
• Be careful about assumptions and words such as “never” and “always.”
• Be cooperative. Don’t argue.
• Correct any mistakes.
Role of the LNC during Discovery Phase

• **Discovery Instrument #3: Depositions**

  Jones v. Regan et al: Dr. Regan

  • His experience and training in treating foot ulcers
  • His experience and training in prescribing antibiotics
  • Purpose of C&S and its role in the prescription of ATBs
  • At the time in question, his understanding of:
    • Gentamicin dosing and duration of tx
    • The s/s of ototoxicity and nephrotoxicity
  • Risk of nephrotoxicity in diabetic patients
Role of the LNC during Discovery Phase

• **Discovery Instrument #3: Depositions**

  Jones v. Regan et al: Mr. Jones

  • Compliance with diabetic medication regimen
  • Frequency of foot ulcers
  • Compliance with foot care regimen
  • Compliance with prior antibiotic medication regimens
  • Compliance with administration of IV Gentamicin
  • Limitations from foot ulcers on participation in sports
  • Prior hearing or balance problems
  • Prior kidney or blood pressure problems
Role of the LNC during Discovery Phase

**Discovery Instrument #4: Independent medical exams**

- **Defense:**
  - Locate and act as liaison for practitioner to examine plaintiff
  - Work with both counsel to arrange IME

- **Plaintiff:**
  - Attend and document IME
  - Submit report detailing the IME
Role of the LNC during Discovery Phase

- Discovery Instrument #5: Requests for Admission
  - Assist with drafting requests
  - Track deadlines
Role of the LNC during Discovery Phase

• **Discovery Instrument #5: Requests for Admission**

  Jones v. Regan et al: Mr. Jones to Dr. Regan

  • Do you admit or deny that dizziness, unsteady gait, nausea, and vomiting are signs and symptoms of ototoxicity?

  • Do you admit or deny that Mr. Jones had signs and symptoms of ototoxicity on or about October 19, 1996?
Role of the LNC during Discovery Phase

3. Identify sources of potential information that will likely support and give credence to your attorney-client’s legal position.

- Interrogatory responses
- Requests for Production (medical records and other)
- Deposition
Role of the LNC during Discovery Phase

3. Identify sources of potential information.

Jones v. Regan et al: Mr. Jones’ deposition

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3 at that time. In 1995, I was seen at Community Hospital for some problem with my foot.
Role of LNC in the Adjudication of a Claim
Role of LNC in the Adjudication of a Claim

- Settlement
- Alternative Dispute Resolution
- Trial
Role of LNC in the Adjudication of a Claim

- Settlement
  - Assist with preparation of settlement brochure / demand package
Role of LNC in the Adjudication of a Claim

- Settlement: Jones v. Regan et al

Demand Package:
- Opening:
  - We are writing to propose settlement negotiations.
  - It is in everyone’s best interest to resolve this claim early and save considerable resources.
  - We outline below our understanding of the facts and departures.
- Enclosures:
  - Medical records
  - Background information on Gentamicin
Role of LNC in the Adjudication of a Claim

• Settlement: Jones v. Regan et al

Demand Package:
• Standards of Care related to Gentamicin:
  1. Gentamicin is used only when clearly indicated and safer alternatives are not available.
  2. Proper dosing is critical.
  3. Protracted courses of Gentamicin must be avoided whenever there are alternatives.
  4. Patients who must be on high doses or prolonged courses of Gentamicin require close clinical observation and monitoring of renal, auditory and vestibular (balance) function.
  5. If the patient develops signs or symptoms of toxicity, Gentamicin must be stopped immediately.
Role of LNC in the Adjudication of a Claim

• Settlement: Jones v. Regan et al

Demand Package:
• Case Facts
• Liability:
  1. Gentamicin was the wrong drug.
  2. Both the 1,000 mg dose and 26 day course were medically unjustifiable and extremely dangerous.
  3. Monitoring was grossly deficient.
  4. Persistent signs and symptoms of developing Gentamicin toxicity were either not recognized or ignored.
  5. Lack of informed consent
• Injuries
• Conclusion
Role of LNC in the Adjudication of a Claim

- Alternative Dispute Resolution (mediation, arbitration)
  - Assist with drafting mediation position statement
  - Identify and prepare exhibits
  - Attend ADR with attorney
Role of LNC in the Adjudication of a Claim

- Alternative Dispute Resolution (mediation, arbitration)

**Jones v. Regan et al:** Identify & prepare exhibits for Mr. Jones

**Gentamicin trough**

**Gentamicin peak**

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Role of LNC in the Adjudication of a Claim

- Alternative Dispute Resolution (mediation, arbitration)

Jones v. Regan et al: Identify & prepare exhibits for Mr. Jones

**BUN**

**Creatinine**
Role of LNC in the Adjudication of a Claim

• Trial (pre)
  • Participate in pretrial discussions with attorney regarding motions in limine
  • Identify and prepare exhibits
    • Identify what exhibits may help the jury to understand the complex concepts that will be presented
    • Prepare the exhibits
    • Have witnesses approve the exhibits they will be using during their testimony to demonstrate a point
Role of LNC in the Adjudication of a Claim

• Trial (pre)

  Jones v. Regan et al:

  • Motions in Limine:
    • Ex: If Dr. Regan had a prior action on his license, his attorney may try to prevent that from coming before the jury.

  • Identify and prepare exhibits
Role of LNC in the Adjudication of a Claim

• Trial (pre)
  • Aid in the preparation of witnesses
    • Explain what will take place at trial
    • Ensure witness has a clear understanding of the theory of the case
  • Liaison for witnesses
    • Work with attorney and witness to schedule the witness for trial testimony
    • Maintain contact with witness as needed throughout trial
Role of LNC in the Adjudication of a Claim

• Trial (during)
  • Be familiar with the applicable state or federal requirements pertaining to medical expert testimony

Legal Rulings on Medical Expert Testimony
  • *Frye v. United States* (1923)
  • *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993)

FRE 702: Testimony by Expert Witnesses

FRE 802: Hearsay Rule
Role of LNC in the Adjudication of a Claim

- Trial (during)
  - Be prepared to perform a wide variety of tasks
  - Assist with the presentation of evidence
  - Keep track of which exhibits are offered into evidence, objected to being admitted, or withdrawn.
  - Take detailed and accurate notes of testimony and note additional areas for examination by the attorney
  - Analyze witness testimony and identify any inaccuracies
Role of LNC in the Adjudication of a Claim

• Trial (during)

Jones v. Regan et al: Identify inaccuracies in testimony

  • Defense LNC:
    • Mr. Jones at trial: “I never rescheduled any appointments with Dr. Regan.”
    • Mr. Jones at depo: “I can’t say that I didn’t reschedule appointments...”

  • Plaintiff LNC:
    • Dr. Regan at trial: “Ototoxicity is a SE of Gentamicin, and I therefore instructed Mr. Jones to notify me if he developed nausea or vomiting.”
    • Dr. Regan at depo: “I don’t give my patients specific side effects, but I tell them to call if there is anything that they’re concerned about.”
Role of LNC in the Adjudication of a Claim

- Trial (post)
  - Assist with preparing bill of costs (if applicable)
  - Assist with post-trial juror interviews
Role of LNC in the Adjudication of a Claim

• Trial (post)

Jones v. Regan et al: Juror interviews

• What was the most convincing piece of evidence in your opinion?
• What did you think of Atty. Smith’s style of questioning?
• How credible did you find Dr. Regan and why?
Sample Questions from LNCC® Practice Exam
Sample Questions: Medical Malpractice

In selecting a physician expert witness, an LNC will look for a physician that

a. Only testifies for plaintiffs
b. Holds a law degree
c. Is board certified in the contested area of clinical practice
d. Derives a substantial part of his income from testifying
Rationale:

Professional credentials, such as certification in the specialty, reflect the highest level of expertise and knowledge of the appropriate standard of care.

Rationale:

a. Only testifies for plaintiffs: If a plaintiff hires an expert who only testifies for plaintiffs, defense counsel will argue that this expert’s opinions are not objective, but biased towards plaintiffs.

b. Holds a law degree: Clinical experts are hired only based upon their clinical credentials and experience. Legal credentials are not only unnecessary, but can be problematic if opposing counsel tries to argue that the expert’s opinions are based upon knowledge of legal strategy instead of being purely clinical.

d. Derives a substantial part of his income from testifying: Experts who derive a substantial portion of their income from doing expert work are portrayed as professional witnesses, also known as hired guns or experts who will say anything for a fee from the attorney hiring them.
Sample Questions: Medical Malpractice

To preserve the statute of limitations, the plaintiff LNC may assist the attorney in preparing a

a. Complaint
b. Motion for protective order
c. Request for admissions
d. Request for production
Rationale:

**Statute of Limitations**: specific period of time between an occurrence and the filing of the lawsuit

**Complaint**: the original or initial pleading by which an action is commenced

Rationale:

b. Motion for protective order: A motion for protective order is filed during discovery when seeking to preclude discovery by opposing counsel of certain documents or information.

c. Request for admissions: Request for admissions are written statements of fact concerning the case which are submitted to an adverse party and which that party is required to admit or deny.

d. Request for production: Request for production is a formal written request compelling a party to produce documents or other items subject to discovery rules.
Sample Questions: Medical Malpractice

Forty-four-year-old Charlene Cook underwent a total abdominal hysterectomy. Two days after hospital discharge, she called the surgeon to report her wound had separated. She was seen and home health wound care was ordered. Several days later the home health nurse noted increased drainage and a slight elevation in Ms. Cook’s temperature. Oral antibiotics were prescribed.
Sample Questions: Medical Malpractice

Her symptoms persisted and three days later the drainage had a foul odor. The nurse noted a small piece of blue material extruding from the wound. Ms. Cook was admitted to the hospital and a sponge was surgically removed. Ms. Cook was able to return to work eight-weeks after her initial surgery. Ms. Cook’s attorney filed suit with claims for damages including lost wages, pain and suffering and medical costs. A complaint is filed naming the surgeon, hospital and home health agency as defendants.
Sample Questions: Medical Malpractice

In interviewing the home health nurse, it is essential for the defense LNC to determine if

a. Records accurately reflect the time and content of all calls to the surgeon’s office
b. Records were ever left in the plaintiff’s house, unattended

c. Nurses were present in the plaintiff’s house all the hours they documented

d. The home health nurses spoke to anyone else about the case
**Rationale:**

“In preparation for the initial interview with a health care provider defendant (HCPD), the LNC should prepare a list of questions covering areas such as:

- Clarification of the HCPD’s charting”

Rationale:

b. Records were ever left in the plaintiff’s house, unattended

c. Nurses were present in the plaintiff’s house all the hours they documented

d. The home health nurses spoke to anyone else about the case

None of these answer options likely have any bearing on the liability of the visiting nurse or the surgeon.
Sample Questions:  Medical Malpractice

The defense LNC understands the hospital’s liability is not disputed because the case involves

a. *res ipsa loquitor*
b. Delayed onset of symptoms
c. Antibiotics obtained from their pharmacy
d. Several defendants
Rationale:

*Res ipsa loquitur*: the thing speaks for itself; the mere facts provide information supporting negligence

Rationale:

b. Delayed onset of symptoms
c. Antibiotics obtained from their pharmacy
d. Several defendants

None of these answer options would impose automatic liability on the hospital.
Sample Questions: Medical Malpractice

The plaintiff LNC will expect Ms. Cook’s settlement to be

a. Significant because the defendants accepted liability
b. Significant because the case involves several defendants
c. Relatively modest because she was beyond child-bearing years
d. Relatively modest because there was little residual damage
Rationale:

“The monetary value of any claim is based on the perceived value of the plaintiff’s injuries. . . Permanency of an injury and impairment in ability to work or engage in activities of daily living must all be considered in determining damages.”

Rationale:

a. Significant because the defendants accepted liability: Settlement amounts are based primarily on an analysis of the harm caused by the negligence, regardless of whether or not the defendant disputes liability.

b. Significant because the case involves several defendants: When there are multiple defendants, this does not increase the settlement award given to the plaintiff. Instead, the total amount of the award is divided up among the defendants, usually based upon an agreement among the defendants as to their respective liability.

c. Relatively modest because she was beyond child-bearing years: The fact that she was beyond child bearing is of no importance in assessing damages in this case.
Sample Questions: Medical Malpractice

Alan Judd, a 58-year-old male, had an aortic valve replacement with repair of an ascending aortic aneurysm. Mr. Judd experienced post-operative hemorrhaging and an emergency surgery was performed. He received 17 units of blood products. Eight months later, Mr. Judd was diagnosed with hepatitis C. He believed the hepatitis C was contracted from the blood transfusion so he contacted an attorney.
Sample Questions: Medical Malpractice

After identifying all blood product unit numbers, the plaintiff LNC should determine

a. Risk factors for which blood donors were screened
b. Where the blood was donated and collected
c. The identity of the nurses who administered the blood
d. State requirements for blood unit testing
Rationale:

“The LNC identifies all records needed for the managing attorney and medical/nursing expert(s) to render an opinion about the merits of the case.”

Rationale:

a. Risk factors for which blood donors were screened  
c. The identity of the nurses who administered the blood  
d. State requirements for blood unit testing

Prior to identifying the relevant state requirements for blood unit testing and investigating the risk factors for which blood donors are screened at a particular facility, the first step in the investigation would involve identifying where the blood was donated and collected. The identity of the nurse who administered the blood is not likely relevant to the initial investigation.
Sample Questions: Medical Malpractice

The medical director of the lab at the time of the incident is now retired. To obtain the medical director’s testimony regarding the incident, the plaintiff LNC will assist in preparing a

a. Request for *sub rosa*
b. Motion *in limine*
c. Writ of *certiorari*
d. Subpoena *duces tecum*
Rationale:

**Subpoena *duces tecum***: A process by which the court commands a witness to produce at trial some document or paper in his possession or control that is pertinent to the issues of a pending controversy.

Rationale:

a. Request for *sub rosa*: Latin for “under the rose”; A technique of investigation that uses videotape surveillance of a plaintiff or claimant; carried out by a private investigator for the defense.

b. Motion *in limine*: A pretrial motion that requests the court to issue an order which prevents an opposing party from introducing or referring to potentially irrelevant, prejudicial or otherwise inadmissible evidence until the court has finally ruled on its admissibility.

c. Writ of *certiorari*: A decision by the Supreme Court to hear an appeal from a lower court.
References


QUESTIONS???

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