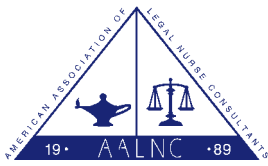


The Journal of
**Legal Nurse
Consulting**

Volume 15 ▲ Number 1 ▲ Winter 2004

Forensics Issue

- ▲ The LNC's Role in Defending Law Enforcement Officers
- ▲ Use of LNCs in Cases Involving Drivers Under the Influence of Alcohol
- ▲ Role of the LNC in the District Attorney's Office
- ▲ The LNC and the Innocence Project
- ▲ Looking for Information Outside the Medical Record
- ▲ Setting Legal Nurse Consulting Fees
- ▲ APA Format: A Tool for the LNC



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The Journal of Legal Nurse Consulting

Purpose

The purpose of the Journal is to promote legal nurse consulting within the medical-legal community; to provide both novice and experienced legal nurse consultants (LNCs) with a quality professional publication; and to teach and inform LNCs about clinical practice, current legal issues, and professional development.

Manuscript Submission

The Journal accepts original articles, case studies, letters, and research. Query letters are welcomed but not required. Material must be original and never published before. A manuscript should be submitted with the understanding that it is not being sent to any other journal simultaneously. Manuscripts should be addressed to JLNC@aalnc.org.

Manuscript Review Process

Submissions are peer-reviewed by eminent professional LNCs with diverse professional backgrounds. Manuscript assistance can be provided upon request to the editor. Acceptance is based on the quality of the material and its importance to the audience.

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Television's Influence on the Forensics Field



The popularity of such weekly TV shows as *CSI*, Court TV's *Forensic Files*, and three varieties of *Law and Order* has skyrocketed the public's interest in criminal law and forensic matters. This frenzy of activity has generated much conversation among LNCs. Programs have popped up at colleges and universities for nurses interested in forensics, and attendance had grown by leaps and bounds. Behind all the hype is the reality that many, if not most, LNCs already practice some type of forensic nursing. Dorland's Illustrated Medical Dictionary (2002), a source often used by nurses, defines the word forensic as "pertaining to or applied in legal proceedings."

The American Nurses Association, in collaboration with the International Association of Forensic Nurses (IAFN), defines forensic nursing as "the application of the forensic aspects of health care combined with the bio-psychological education of registered nurses in the scientific investigation and treatment of trauma and/or death related medical legal issues" (IAFN, 1991). In the Standards of Practice for Forensic Nursing, published by the American Nurses Association, LNCs are included as a job title of those who practice in forensic areas.

There has been much discussion on list serves regarding how the various boards of nursing and the American Nurses Association view legal nurse consulting. Perhaps the role of each LNC is to educate the public and peers concerning the critical role nurses play in assisting with litigation of cases to protect patient rights, in medical malpractice, personal injury, and complicated matters such as product liability and toxic tort cases.

In practicing forensic nursing, LNCs rely on their medical expertise to assess medical care, analyze medical literature, and educate the consumer, plaintiffs, defendants, judges, and juries. Without the expertise provided by nursing professionals (i.e., LNCs), justice, veracity, and autonomy would be denied those who enter our legal systems. Our practice areas are expanding by leaps and bounds and as LNCs we have a responsibility to be in a leadership role of the widening scope of practice available to nurses.

To foster further discussion and facilitate education on this expanded role for LNCs, this Winter issue of the *Journal of Legal Nurse Consulting* is dedicated to forensic issues. Included is an introduction to the Innocence Project, two manuscripts providing insight into the LNCs role in criminal defense matters, and an overview of the role of an LNC in the Attorney General's office. Nurses and particularly LNCs contribute priceless insight into the science behind injury and the technology of forensics such as DNA. The attorney's need to interpret cutting-edge technology, comprehend complicated medical issues, and portray the underlying scientific foundation in legal proceedings makes the LNC particularly valuable as a member of the medico-legal forensic team. So I invite you to grab a cup of coffee, prop yourself in a comfortable chair, and indulge your fantasy for excitement and suspense as you read about this new frontier for LNCs.

A handwritten signature in cursive script that reads "Lynda Kopishke".

P.S. Don't forget to keep those manuscripts coming. Writing is sharing and helps us all grow! The *JLNC* also needs ongoing articles for the following columns:

- **Better Business:** Share your resources for managing an independent practice.
- **Working World:** Investigate unique opportunities to expand the role of legal nurse consulting.
- **Book Review:** Critique of your favorite LNC text.
- **Q & A:** Pondering a question regarding LNC practice? Submit it to the column generators, the Greater Detroit Chapter of AALNC.
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The Legal Nurse Consultant's Role in Defending Law Enforcement Officers

Stephen W. Cogar, JD

KEY WORDS

Law Enforcement, Misconduct, Medical Record Review

Since many lawsuits against officers and their agencies involve personal injury or death, inevitably medical records and testimony play a key role in the outcome. Lawyers often find it difficult to do a complete or comprehensive review and interpretation of medical records. This article is intended to discuss the role of the legal nurse consultant (LNC) in police misconduct litigation, and to provide information intended to enhance the relationship between the LNC and lawyers.

Introduction

The advent of around-the-clock news coverage, immediate satellite feeds, and the Internet have provided us with unprecedented and timely access to events occurring in all corners of our country. One needs only to view these sources to understand that the media thrives on stories that combine human interest with sensationalism. As a result, they avidly follow the high risk activities of law enforcement officers in search of the sort of excitement that attracts both an audience and advertising revenue. Inevitably, the media happens upon incidents where they and others believe that police officers have acted inappropriately. Thus, allegations of police misconduct are frequently the subject of television news casts, newspaper headlines, magazine articles, and Internet news services. Flowing from this notoriety has been a general increase in lawsuits accusing police officers of excessive force, false arrest, and improper vehicular pursuits. This increase in litigation has been fueled in part by the litigious nature of our society and is exacerbated by the adversarial nature of many citizen/police encounters.

Unfortunately, law enforcement agencies are viewed by plaintiff's attorneys as "prime targets" with "deep pockets" because they generally have ample insurance coverage. Since many lawsuits against officers and their agencies involve personal injury or death, inevitably medical records and testimony play a key role in the outcome. Lawyers often find it difficult to do a complete or comprehensive review and interpretation of medical records, including expert reports, because of esoteric medical jargon, poor handwriting or copies, and a general unfamiliarity with diagnosis and treatment methodologies. This article is intended to discuss the

role of the legal nurse consultant (LNC) in police misconduct litigation, and to provide information intended to enhance the relationship between the LNC and lawyers.

Common Lawsuits and Understanding the Issues

In order for the LNC to be most effective, they should have a basic understanding of the common causes of action filed by plaintiffs. The predominant contention in police misconduct litigation normally focuses on allegations that an officer used excessive or unnecessary force during an encounter with a citizen. Although officers are legally entitled to employ a reasonable amount of force to affect an arrest, that legal entitlement often does nothing to convince the person who is the object of the pepper spray, baton, stun gun, or firearm that the force was justified. In cases where a citizen is seriously injured or killed during an arrest, vehicular pursuit, or other encounter with an officer, a lawsuit accusing the officer is likely.

Police officers may be sued in federal or state court. In federal court, a citizen may sue for alleged violations of a citizen's civil rights pursuant to 42 U.S.C. §1983¹. This code section allows for a citizen to receive monetary damages. A companion section, §1988, allows for the payment of attorneys' fees when a plaintiff substantially prevails in their lawsuit². This section alone often prompts plaintiffs' attorneys to file lawsuits in federal court. In state court, a citizen may sue for torts which may include assault, battery, outrage, intentional infliction of emotional distress, false arrest, and loss of consortium. These lawsuits typically seek monetary damages for, among other things, medical bills, burial expenses, pain, and suffering.

1. 42 U.S.C. § 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
2. 42 U.S.C. § 1988(b): In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. 1681 et seq.), the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), or section 13981 of this title, [1] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

Where the LNC Can Help

When a plaintiff seeks monetary damages for injuries or death, the success of their case as well as the amount of damages is often predicated on the information gleaned from medical records and depositions of medical providers. Although not an exhaustive list, the LNC can assist the lawyer in the defense of a police misconduct case in the following areas:

Recognizing Prior Existing Conditions that May Lead to an Injury: Often a citizen/police encounter may result in a complaint of injury that stems from a prior condition or injury. The LNC may be able to determine from the medical records that a plaintiff was not injured by police misconduct, but rather as an unintended consequence of appropriate conduct. For example, a plaintiff may suffer from a disease that causes an innocuous and appropriate police procedure, such as a one-leg stand field sobriety test, to result in a complaint of a knee or ankle injury.

Plaintiffs may also inflict injuries to themselves or have others do so in order to create evidence that they can use to convince a medical provider that they have been beaten by the police. For example, in one case a plaintiff suffered from dermatographism, which allowed him to create bruise-like welts on his body simply by squeezing his skin. Following an interview by police officers at his home, the plaintiff presented at his local hospital complaining of having been beaten by the officers. The medical records generated as a result of his treatment vividly described the bruise-like welts on his face as well as his allegations that the officers had struck him several times. The medical providers were concerned by the plaintiff's allegations and felt it necessary to include several photographs depicting the plaintiff's "injuries" in his chart. The plaintiff subsequently revealed during a deposition that he had the ability to bruise himself and that he had received medical treatment for the phenomena in the past. The defense lawyer, with the assistance of a skilled LNC, was able to obtain enough information on dermatographism to formulate a cross-examination strategy that would severely damage the plaintiff's credibility before a jury.

Identifying Expert Witnesses and Acting as a Liaison: The LNC, after reviewing a plaintiff's medical records, may be asked to locate experts pertaining to the case. For example, in cases where the allegation involves a permanent eye injury due to the use of pepper spray, the LNC may be asked to find an expert witness who can testify that the spray typically does not cause such an injury. Also, the LNC may serve as an intermediary between the expert and the lawyer with respect to defining the key issues and attendant questions for depositions of the plaintiff's experts.

Lawyers often do not possess the expertise required to formulate pertinent questions using the appropriate medical terminology, which could reduce the value of the information received both from written interrogatories and discovery

depositions. Moreover, the LNC can provide important support by summarizing an expert's initial findings and communicating them to the lawyer in order to facilitate case analysis, a determination of case settlement value, and the lawyer's defense strategy. Finally, the LNC may catalog and forward the plaintiff's records and any tissue or other samples to the defense lawyer's expert for analysis, and deal with discovery requests in this regard made by the plaintiff.

Interpreting Medical Hieroglyphics: Medical records contain multiple abbreviations, acronyms, and esoteric medical shorthand. When this jargon is coupled with illegible handwriting and substandard copies, it is often impossible for the lawyer to understand the substance and meaning of the records. The LNC, through training, experience, and sheer perseverance, is better equipped to interpret these "medical hieroglyphics." In doing so, the LNC can illuminate essential information required by the lawyer such as a plaintiff's chief complaint, their allegation as to how the injury occurred, the medical provider's diagnosis, and the course of treatment.

Moreover, the LNC can provide a summary to the lawyer indicating the names and areas of practice of a plaintiff's medical providers who they feel should be deposed. In addition, the LNC can advise the lawyer if they believe that a plaintiff's records appear to be complete. Often in civil discovery, medical records are either purposefully or inadvertently omitted from disclosures required by the rules. Although recordkeeping varies from provider to provider, it is often a simple matter for the LNC to determine that a diagnostic test was ordered but that no report was included in the records provided by a plaintiff. For example, a plaintiff may be attempting to hide adverse information such as a positive tetrahydrocannabinol (THC)³ result or a high blood alcohol level, which may be contrary to prior testimony they have given either in a criminal trial or deposition.

After reviewing and interpreting the medical records, the LNC may also recommend that an independent medical examination be conducted due to perceived departures from the standard of care or other discrepancies.

In addition, the LNC can determine, by comparing discovery responses to the records, that the injuries alleged are not substantiated by the medical provider's findings. For example, in one case, a plaintiff alleged that he was kicked 10 to 15 times in the genitalia by an officer, leading to permanent impotence. However, his medical records, including those generated by an emergency department just hours after the arrest, contained no mention of the injury. Similarly, the LNC may be able to determine that a plaintiff's injury is so minor that the officer may be immune from liability under the "de minimis injury" application of the doctrine of qualified immunity.⁴ For example, if a plaintiff's discharge instructions require no follow-up treatment and involve only over-the-counter pain relievers, it is likely that any injury

3. Tetrahydrocannabinol is the main active ingredient in marijuana.

4. De minimis non curat lex - Latin: a common law principle whereby judges will not sit in judgment of extremely minor transgressions of the law. It has been restated as "the law does not concern itself with trifles".

suffered by the plaintiff was deemed to be minor by the attending physician. The law generally does not allow a plaintiff to recover damages if little or no harm results from his interaction with an officer.

Finally, the LNC may be able to determine if the plaintiff's records contain information that would describe an alternative explanation for the plaintiff's injury. In one case, a plaintiff claimed that he was kicked and punched in both ears by an officer during an arrest which caused permanent, severe hearing loss. The LNC was able to determine by reviewing the plaintiff's medical records that the plaintiff had been involved in an explosion that had significantly damaged his hearing nearly 40 years prior. Also, that the plaintiff's hearing was no worse after his arrest than it was before his encounter with the officer. This type of information can be used by a lawyer to effectively damage a plaintiff's credibility in front of a jury.

Explaining the Effect of Medications: When a plaintiff's medical records indicate that they are taking prescription or other medications, the LNC should identify and explain what effect the medication may have. For example, certain medications may diminish a plaintiff's ability to perceive or recall the events in question, which could bring into question the veracity of their account. In one case, a plaintiff claimed that he did not hear the repeated knocking and shouting by police officers who were attempting to serve a warrant at his residence because his medication made him extremely drowsy. He later claimed that he fired at the officers because he did not know that they were police officers. Also, a plaintiff may be made dizzy and caused to fall by certain medications, leading to injuries not attributable to an officer's actions. Moreover, some medications may make a person susceptible to excessive bruising or bleeding.

Finally, the LNC can assist the lawyer in understanding how certain controlled substances affect a person's disposition. For example, an officer may claim that a plaintiff was "out of control" and was "fighting viciously" in an attempt to avoid arrest. The LNC may be able to corroborate the officer's account by discerning notations in a plaintiff's medical records stating that measurable amounts of PCP or other drugs with similar effects were present in a plaintiff's system at or near the time of their arrest.

Identifying Impeachment Information: Impeachment is the process of damaging a plaintiff's credibility in front of a jury in hope of establishing enough doubt in the minds of the jurors to find in favor of the officer. The LNC may find an abundance of information in a plaintiff's medical records that will assist the lawyer in developing an effective cross-examination of the plaintiff. This information may also be helpful to the lawyer in developing questions for the plaintiff's deposition. Sometimes, a plaintiff will be truthful with a medical provider concerning what transpired between them and an officer. Sadly, it is just as likely that a plaintiff will provide a self-serving and untruthful account of the event in order to either enhance their defense in the criminal case, or

create documentation in anticipation of a lawsuit.

When a plaintiff initially tells the truth and later recants in order to substantiate the allegations in their lawsuit, the inconsistent statements provide persuasive impeachment material for the lawyer. In cases where a plaintiff lies, they will often have difficulty remembering the details of their past stories and will tend to alter their account as the case progresses. The LNC can assist the lawyer in impeaching a plaintiff's testimony at trial by identifying inconsistent statements made by a plaintiff as documented in their civil complaint, their medical records, and in their deposition. For example, in one case a plaintiff at trial claimed that he was struck approximately 12 times in the ribs and back by an officer wielding a metal baton, causing blood in his urine, long-term back pain, and physical disability. Surprisingly, the LNC determined that the plaintiff's emergency room records generated an hour after his arrest indicated that he told the medical provider that he was struck only in the head by the officer. Further, that the plaintiff made no complaint of back pain or blood in his urine. In addition, the plaintiff stated in his deposition, which was taken nearly three years after the arrest, that he was merely "poked" two or three times in the back by the officer. Again, by synthesizing these inconsistent statements for the lawyer, the LNC can provide extremely effective impeachment material that can significantly impact the plaintiff's believability at trial.

Finally, the LNC should communicate any admission of drug use attendant to medical diagnosis and treatment discerned during their review of a plaintiff's medical records. Those admissions may be used by the lawyer to impeach the plaintiff's credibility as a witness if the drug or drugs impair their ability to perceive or remember the complained of events.

Analyzing the Standard of Care and Determining if Treatment was Appropriate: The LNC may determine from their review of the medical records that the method of treatment either caused or exacerbated a plaintiff's injury. When this occurs, the lawyer may wish to bring the medical provider into the lawsuit in an attempt to remove or limit his client's potential monetary exposure in the case. Although determining the standard of care is most often the province of an expert in the particular medical field at issue, the LNC may be able to determine that rudimentary procedures were not followed by the medical provider. For example, if a plaintiff's chief complaint was that they were having difficulty breathing, the records should reflect that their oxygen saturation level was determined. Similarly, if a plaintiff's oxygen saturation is low, the records should indicate that oxygen was administered and in what amount.

Lastly, the LNC can determine if emergency room discharge instructions are consistent with the plaintiff's diagnosis. If the plaintiff was a patient in a busy emergency room, he may have received incorrect instructions or instructions pertaining to another patient's condition, which may result in a claim for higher monetary damages due the plaintiff experiencing a longer and more painful recovery.

Conclusion

The legal nurse consultant can play a vital role in assisting a lawyer who is preparing to defend a police officer in a lawsuit where the plaintiff is alleging personal injury or death. By reviewing and interpreting the plaintiff's medical records, the LNC can often discern inconsistent statements by the plaintiff, pre-existing medical conditions, alternate causes for the plaintiff's injuries, or poor care by the plaintiff's medical providers. Moreover, the LNC can assist the lawyer in both determining the medical issues pertinent to a case and by formulating deposition and cross-examination questions relating to those issues. By co-mingling their expertise and working as a team, the LNC and the lawyer will be capable of providing a zealous and competent defense for the police officer embroiled in litigation.

Stephen W. Cogar, Esquire, retired from the West Virginia State Police after 25 years of service and attaining the rank of Captain. While with the State Police, Cogar served as a field officer for 16 years, as General Counsel, as Director of the Professional Standards Section, and as the Director of Training and Commandant of the State Police Academy. He is a licensed attorney in West Virginia and serves as an Adjunct Professor of Police Science for Marshall Community and Technical College training primarily at the West Virginia State Police Academy. Cogar is an acknowledged expert and conducts training in a variety of law enforcement related topics including police power, authority and discretion, the criminal justice system, civil liability, constitutional law, laws of arrest, laws of search and seizure, laws of evidence, police pursuits, internal affairs, criminal law, and officer as a witness. Cogar is an internationally published author and has written three books; "The West Virginia Law Enforcement Fieldbook," "The Officer as a Witness - Scenario-Based Case Studies," as well as a book of short stories, poems, and cartoons entitled "A Tale of Two Stinkpots."

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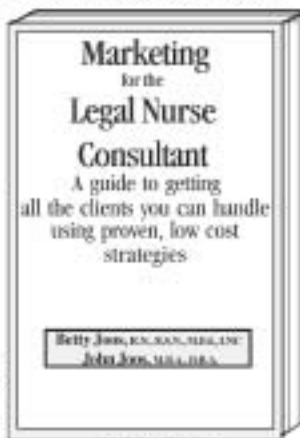
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Use of Legal Nurse Consultants in Cases Involving Drivers Under the Influence of Alcohol

Kathleen Schmalz, EdD RN CHES

KEY WORDS

Drinking and Driving, Alcohol Consumption, Beverage Control Laws, Court Ruling, Sanction, Rehabilitation, Blood Alcohol Content, DUI Laws, Minimum Drinking Age, Alcohol or Other Drug Use (AODU), Injury, Wrongful Death

Despite a trend toward adopting legislation designed to reduce the risks of accidents involving drinking and driving, issues such as lowering the legal blood alcohol content (BAC) limit and applying rehabilitative versus punitive sanctions on offenders to reduce recidivism remain controversial. Recognition that drinking and driving is a major cause of highway fatalities has generated research into three key areas: 1) the effects of alcohol on driving ability; 2) the effects of alcohol on accident risk; and 3) the effects of setting legal BAC limits. There is evidence that expert witnesses can be key to the outcomes of cases involving drinking and driving, but expert knowledge often coexists somewhat uneasily with assumptions of "common knowledge" about alcohol. A legal nurse consultant may represent a credible expert in the complex realm of drinking and driving in criminal and civil law.

In 1936, Norway introduced the first per se law: a law that makes it a criminal offense in itself to drive with blood alcohol content (BAC) over a percentage set as the legal limit (Mann, 2002). Since the first legislation was enacted, a key theme in the quest to reduce what has come to be recognized as a major cause of death and injury in numerous countries — the hazardous mixture of drinking and driving — has been determining the appropriate level for setting the legal limit. Research into this question has been conducted primarily along three lines: 1) research on the effects of alcohol on the skills and acuity needed for safe driving; 2) research on the effects of alcohol on the risk of accidents; and 3) research on the impact of setting legal limits or lowering them to a specific level.

The Legal Controversy

Despite a global trend toward reducing the legal limit — as low as 0.02 in Sweden and 0.05 in many European countries — efforts to reduce the BAC limit in the United States a "mere two points" from 0.10 to 0.08 has generated considerable controversy (Voas, 2001, p. 1701). On one side, led by the hospitality industry, those who oppose lowering the legal limit cite evidence of the high BACs typically reported for drivers in fatal collisions. The point is perfectly valid: the median BAC of drivers in alcohol-related collisions is 0.162; 77.5% have BACs exceeding 0.10. Representatives of the hospitality industry argue that it is more important to impose stiffer penalties on drivers who are unquestionably intoxicated than to lower the legal limit, which could lead to the apprehension of "social drinkers" rather than "hard-core" drunk drivers (recalcitrant offenders who repeatedly drive under the influence [DUI] and have high BACs) (Voas, 2001). (Note: In some states such as New Jersey, the violation is referred to as DWI - Driving While Intoxicated.)

On the opposite side, safety advocates point to studies that have documented reductions in alcohol-related driving fatalities after the BAC limit had been reduced to 0.08 (Voas, 2001). They also contend that harsher sanctions for repeat DUI offenders is a misguided priority; repeat offenders account for only 11% of drivers involved in highway fatalities. This argument is strengthened by research on the effects of alcohol on drivers' skills and abilities. From a scientific standpoint, the Swedes have the right idea. A BAC of 0.02, or even lower, is all that is needed to impair a driver's ability to focus attention on two or more visual stimuli (Hingson, Heeren, & Winter, 1999). At 0.05, drivers begin to experience impairment in visual perceptions, eye movement, glare resistance, information processing, reaction time, and an array of tasks related to steering and vehicle operation. A driver's risk of being involved in a fatal accident almost doubles with each 0.02 increase in BAC and the risk is exacerbated for drivers under age 21.

In keeping with the facts stated above, the following nurses were interviewed regarding the collection of blood specimens obtained from persons under arrest by law enforcement for driving while intoxicated (DWI) or driving under the influence of drugs (DUID). Jean Gordon, MSN FNP, (personal communication, August 7, 2003) has worked in the emergency department for over 22 years and presently is working at a Level I trauma center in New York City; Ellen Ruja, MSN, (personal communication, August 6, 2003) Emergency Department nurse for over 32 years, for the past six years works as a nurse manager in a Level I trauma center in the southeast; and Mary Papagano, RN, (personal communication, August 3, 2003) is an Emergency Department nurse for over 20 years working in a emergency department in a small community in the northeast.

Ruja describes the types of behavior that would indicate that the person might be under the influence of alcohol or drugs. During the screening the patient will be asked questions related to alcohol such as history of alcohol abuse or frequent drinking, past medical history, and reason for coming to the emergency department. The patient may exhibit the inability to follow simple commands such as sit on the chair — stares and can't comprehend the questions asked, slurred speech, unsteady gait, slow to arouse to responses, and/or has the presence of an alcoholic beverage on his breath. Papagano adds that the patient may have red eyes (blood-shot), can't keep eyes open, may be obnoxious, and use vulgar language.

According to Gordon, patient confidentiality must be maintained at all times. Patients brought to the emergency department for collection of specimens are triaged to the appropriate area and then registered. The patient is assessed by the team (RN and MD) and, if warranted, the physician writes an order for the collection of the specimen(s) and other diagnostic tests. The RN documents her findings on the trauma checklist. In Papagano's facility, observations are documented in the triage notes, which are hand written.

Gordon states that the law enforcement officer will ask the RN to draw blood on the conscious person under arrest. The law enforcement officer will bring in a "blood specimen" kit. Written consent is received. After the nurse draws the blood, the specimens are handed to the law enforcement officer. There should not be a break in the chain of evidence. Documentation will vary according to state. All three nurses stressed that the skin be prepped with providone iodine solution (betadine), allowed to dry and that no alcohol, acetone or other volatile reducing agent be used.

Each state should have established guidelines for the collection of evidence. The University of Texas Medical Branch, Nursing Practice Standards, has clearly outlined their policy and procedures in their document "*Collection and Release of Blood and Urine Specimens Obtained from Persons Under Arrest for DWI or DUID for Law Enforcement Agencies.*" The document can be found at <http://wahoo.utmb.edu/policy/nursing/search/03-33.pdf>. According to the Emergency Nurses Association (ENA), "The performance of forensic procedures is a component of emergency nursing practice." The emergency nurse is responsible for collecting and preserving the evidence collected in the emergency room and may ultimately testify as an expert witness in medical-legal investigations (ENA, 2003).

Legal Complexities: Two Examples

The incidence of drivers under age 21 involved in DUI accidents brings up another legal issue: the liability of an establishment for serving alcoholic beverages to underage customers who are subsequently involved in a vehicle crash. In a recent case, restaurant chain Chevys, Inc. paid \$1.5 million as part of a pretrial settlement in a \$25 million wrongful death lawsuit brought by the parents of a 20-year-old

college student who was killed after leaving the restaurant when the car he was riding in crashed into a pole (Liddle, 2003). The accident was not unusual; single vehicle nighttime crashes represent the most common vehicle fatality linked with alcohol consumption (Hingson et al., 1999). What was unusual, according to legal sources, was Chevys' rapid settlement and contribution of \$50,000 to an alcohol awareness program at California State University, Sacramento, where the victim had been enrolled (Liddle, 2003). The Sacramento restaurant, where witnesses stated that restaurant employees routinely failed to ask for identification prior to serving alcohol, had its liquor license suspended for 30 days, with an additional 30 days suspension stayed for a year and additional penalties contingent on any additional violations of beverage control laws. The 20-year-old driver had a BAC of 0.20. He was charged with vehicular manslaughter, gross negligence, and DUI.

Regarding Chevys' settlement and contribution, the plaintiffs' attorney commented, "It is rare for a business to respond to a situation like this in such a positive way," adding that the restaurant's actions in contributing to alcohol education "should set a standard for the industry" (Liddle, 2003, p. 4). The standard has yet to be set, and Chevys' response is indeed rare. However, certain aspects of the case set it apart from most alcohol-related accidents. Not only did the case involve underage drinking, but additionally, a number of witnesses (including some of the five minors who had been in the car) stated that the restaurant repeatedly served alcohol without asking for proper identification. Second, the driver's BAC was more than double the 0.08 legal limit for California.

Most prospective cases involve drivers who are above legal drinking age and, often, whose BAC is within legal limits, yet whose driving is still impaired. Asking for proper identification from young adults in legal compliance is relatively straightforward. The question of whether a server can recognize signs of intoxication based on training given restaurant and bar staff, and is therefore liable for serving a customer, who then gets into an accident, can be a particularly thorny issue (Levi & Valverde, 2001). The legal system has upheld the liability of an establishment for injuries resulting from an accident involving an intoxicated customer who had been served drinks (Feigenson, 2000). However, Levi and Valverde (2001) cite a number of cases in which hospitality staff and management, police, liquor license inspectors, and other observers reached different conclusions about whether or not a person showed signs of intoxication based on their own observations.

Of particular interest to the nurse serving as a legal nurse consultant or testifying expert in cases involving drinking and driving, is a Toronto case, *Re Texas Pit Restaurant* (1994). The liquor licensing board "appeared particularly interested in evidence corroborated by hard science," in this case a forensic toxicologist (Levi & Valverde, 2001, p. 832). Highlighting the intricacies of alcohol-

related legal cases, the hearing was held to determine whether the victim, a pedestrian, had appeared intoxicated at the restaurant before being hit by a police car outside. The board accepted the testimony of three witnesses: a taxi driver who claimed that the man appeared intoxicated, a police officer who provided hearsay testimony of the man's intoxication, and above all, the toxicologist whose expert testimony corroborated the reports of the other two.

Levi and Valverde (2001) give special attention to *People v. Ojeda* (1990), a California appeals case that has been used as a precedent. In an interesting twist the court excluded police evidence on the grounds that: "the administering police officer could neither be credited as a lay witness (his vision was too experienced for that designation) nor as an expert witness (his vision was not properly disciplined by the scientific method)" (Jasanoff, 1998, p. 723). At the same time, the appeals court accepted police evidence related to the results of the horizontal gaze nystagmus (HGN) test, in which subjects are asked to track an object with their eyes in order to reveal any involuntary movement. Although the court raised some question of the test's scientific value, acceptance of the test results affirmed the status of the police officer as an experienced observer although not a scientific expert.

The Legal Nurse Consultant as Expert

In summarizing their analysis of legal decisions regarding liquor licensing and drunk driving, Levi and Valverde (2001) note that on the surface, knowledge of alcohol and its effects on the human body and capabilities appears to be viewed as lay knowledge as opposed to expert knowledge. However, they contend that the issue demands closer scrutiny: "But if we look more closely at the particular ways in which evidence is introduced and authorized in the context of drunkenness and intoxication, we can see that the legal complex deploys a form of common knowledge that is said to exist beyond any form of expert, lay, or trade knowledge" (p. 841). Common knowledge refers to what the public is *expected* to know about alcohol. The role of the expert witness is frequently to corroborate it, as in *Re Texas Pit Restaurant*, where the board decided that expert knowledge gave added weight to common knowledge.

Expert testimony can be crucial in cases where it is necessary to determine whether a driver was impaired despite a BAC below the legal limit, especially for accidents that occurred before the current limit was introduced, or in cases where BAC results are deemed inadmissible evidence. In Canada, for example, judges are required to examine what evidence there is of the defendant's BAC in such cases only in conjunction with evidence that the client exhibited signs of impairment, or with expert testimony that can associate the BAC evidence to the state of the defendant at the time the offense occurred (Levi & Valverde, 2001).

Feigenson (2000) observes that in accident cases, "jurors are inclined to think of accidents as melodramas" (p. 88). Briefly stated, from a melodramatic approach, the "bad guy"

is the cause of the accident; the focus is on the "good guy"—the victim, and his or her suffering; and the good guy should win while the bad guy "gets his or her comeuppance" (p. 89). A repeat DUI offender with a BAC of 0.20 is a "bad guy" from the point of view of the jury or the law. However, as numerous cases illustrate, the distinction is rarely so clear. An expert witness may be called upon to corroborate (or refute) police or eyewitness accounts of the driver's behavior or provide evidence demonstrating that a driver's skills and acuity can be impaired at BACs below the legal limit. In fact, outside of the courtroom, a legal nurse consultant might choose to act as an advocate for lowering the legal BAC to 0.08 in states where it is currently 0.10.

The legal nurse consultant might also play a key role in determining the "comeuppance" of the driver who has been convicted of DUI by the court. Court sanctions for DUI offenders are derived from different perspectives on what motivates people to drink and drive and what can be done to prevent recidivism and can be divided into four categories: 1) Penalties such as fines and incarceration, which are assumed to act as deterrents to DUI; 2) Education programs, based on the assumption that drivers drink and drive due to lack of knowledge about the consequences; 3) Alcoholism treatment programs, based on the rationale that many DUI offenders have problems with alcohol abuse or dependence; and 4) Incapacitating sanctions such as license suspension and vehicle impoundment (Voas & Fisher, 2001).

It should not be surprising to health professionals that rehabilitative approaches, namely education and treatment, produce superior results to punitive measures in reducing recidivism (Voas, 2001; Voas & Fisher, 2001). Court-mandated treatment programs have demonstrated effectiveness in reducing recidivism among DUI offenders. The most effective models combine education, treatment, and probation, and extend for six months or longer. A legal nurse consultant is in an excellent position to provide research-based evidence on what measures are most effective for reducing recidivism.

It is equally essential to be well-versed in the court procedures used in sentencing DUI offenders. Since most DUI cases are settled through plea-bargaining, the courts have implemented measures for pretrial hearings, pretrial programs, and pre-sentencing (Voas & Fisher, 2001). Although DUI is a criminal offense, civil proceedings such as wrongful death lawsuits are not uncommon. In some jurisdictions, DUI cases (particularly those involving repeat offenders) are heard in drug courts; some drug courts are structured to handle DUI cases exclusively while others hear all types of alcohol or other drug use (AODU) cases.

Implications

According to Levi and Valverde (2001), legal issues regarding alcohol consumption exist in a realm where lay knowledge, common knowledge, and expert knowledge converge and often conflict. Current trends including raising the

minimum drinking age to 21, lowering legal BAC limits, establishing drug courts for DUI, and employing multimodal rehabilitative/probationary approaches for reducing recidivism among DUI offenders demonstrate research conducted along all three lines outlined by Mann (2002) is having an impact on the way the public views drinking and driving. Despite assumptions of "common knowledge," a majority of drivers are unaware of the extent of impairment related to different levels of alcohol consumption (Hingson et al., 1999).

An expert who understands both the physiological and legal ramifications of drinking and driving, and whose professional background includes skills in communicating scientific data to make it easily accessible to the listener, may be ideally suited to negotiate the complexities of litigation involving drivers under the influence of alcohol.

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The LNC and the Innocence Project

Lisa M. Schwind, RN Esquire and Lynda Kopishke, MSN RN CLCP LNCC

Eighteen years ago, Eddie Joe Lloyd, watched as his life was taken from him when he was convicted of the brutal murder of a 16-year-old girl in Detroit Michigan. While hospitalized in a psychiatric facility, Lloyd sent the police several suggestions on how to solve various murders. He thought he was helping the police solve a crime. Little did he know he would be convicted of one of those murders.

Police visited Lloyd in the hospital and interviewed him several times. The police allowed Lloyd to believe he was confessing in order to get the real murderer to come forward. The police provided Lloyd with details of the crime not included in public releases. These descriptions included disclosure of clothing and jewelry worn by the victim and crime scene information specific to the date and time of the crime. The written and videotaped confessions presented to a jury, persuaded jurors to take only an hour to deliberate and return with a verdict of guilty for first-degree felony murder in May 1985.

At the sentencing, Judge Leonard Townsend was frustrated that he could only sentence Lloyd to time in jail rather than to the death penalty, based on Michigan's repeal of the death penalty. Lloyd served 18 years in jail, while all of his appeals failed. In 1995, Lloyd contacted Innocence Project, asking for testing of biologic evidence related to the crime. After many years, with the assistance of Innocence Project students and in cooperation with the County Prosecuting Attorney's Office, evidence was found. Forensic Science Associates completed testing on a green bottle and a piece of paper stuck to the bottle, both of which contained spermatozoa. Michigan State Crime Lab repeated the testing and additionally tested an anal swab slide taken at the time of autopsy, which was previously reported as lost. All of the evidence tested matched each other, but excluded Lloyd as a contributor.

The United States Attorney for the Eastern District of Michigan called for a federal investigation into the police officers that interviewed Lloyd. The Governor convened a commission to recommend changes in police investigation and interviewing techniques. Lloyd's case illustrates the need for caution in imposing capital punishment and underscores the work of the Innocence Project movement (www.innocenceproject.org).

The Innocence Project Origin

The origins of the Innocence Project movement begin with the Innocence Project at the Benjamin N. Cardozo School of Law – Yeshiva University. This program began as part of a clinical program at the law school. Barry Scheck and Peter Neufeld founded the legal clinic in 1992. The program has now become an independent non-profit legal clinic. The

goal of the Innocence Project is to identify cases where post conviction DNA evidence could prove innocence.

As of February 24, 2004, 142 inmates have been exonerated based on work done by the Innocence Projects associated with the Innocence Project Network. There are three international Innocence Projects, two located in Canada and one in Australia. The United States has 79 projects functioning to assist inmates in sorting out the complicated process of determining what evidence should be available for testing, petition the courts for testing and supporting the application process for exoneration. These projects exist within law schools, schools of journalism, independent nonprofit entities, as well as agencies which offer legal services to the indigent. The State of Delaware has the only Innocence Project existing entirely within a Public Defender's Office, and not associated with another group. This program was founded in January 2000.

Several key themes have emerged from the work of Innocence Projects. Based on the first 81 exonerations, types of offences included four assaults/battery, 18 kidnappings, 21 homicides, 26 robberies, and 70 rapes (www.innocenceproject.org/causes/dna.php, accessed 1/28/04). Of the first 70 exonerated inmates the most common factors leading to wrongful conviction fell into 12 categories (www.innocenceproject.org/causes/index.php, accessed 1/28/04):

- Two DNA and six other forensic inclusions at trial that violated the judicial process
- 15 false confessions by inmates
- 16 informants or snitches who provided false testimony
- 17 incidences of false witness testimony
- 21 errors in microscopic hair comparison matches
- 23 incidents of bad lawyering
- 26 episodes of defective or fraudulent science
- 34 cases of prosecutorial misconduct
- 38 cases of police misconduct
- 40 cases of erroneous serology inclusion
- 61 incidents of mistaken identification

Based on the statistics in the first few years of the Innocence Project, legislation is pending in many jurisdictions to prevent further wrongful convictions.

Legislation and the Innocence Project

The Innocence Protection Act (IPA) of 2003 was introduced in the 107th Congress, in October 2003. It is part of a larger bill called the *Advancing Justice Through DNA Technology Act* which passed the House of Representative in November 2003 and is pending in the Senate. The purpose

of this legislation is to grant any inmate convicted of a federal crime the right to petition a federal court for DNA testing. Additionally this bill encourages states to preserve evidence and make post-conviction testing available (www.innocenceproject.org/causes/index.php, accessed 1/28/04).

Twenty-five million dollars in funding would become available under the IPA to help states pay for post conviction DNA testing. The proposed program will be named ***Kirk Bloodworth Post-conviction DNA Testing Program***, which is named for the first death row Innocence Project exonerated client, Kirk Bloodworth (www.innocenceproject.org/causes/index.php, accessed 1/28/04).

Many states have enacted statutes that more easily enable inmates to reopen their cases after the statute has run. Typical state statutes allow new evidence to be considered from a range of six months to two years post trial. New statutes are allowing the reopening of cases many years after conviction due to the implementation of DNA technology. Further legislation needs to be passed on the state level to facilitate this process.

The Legal Nurse Consultant and the Innocence Project

Legal nurse consultants (LNCs) have the unique skills needed to assist Innocence Project offices. LNCs possess the knowledge to review medical documentation to determine what specimens were obtained during medical procedures or at the time of the victim's autopsy. Researching scientific issues, identifying potential expert witnesses, and organizing data relative to Innocence Project goals makes the LNC a positive addition to the investigation team. Innocence Project offices have little funding and are open to experienced RNs and LNCs volunteering to assist in this project. This provides an excellent opportunity for the new LNC to get experience in the legal field as a consultant. Learning to work within a law firm and expanding a knowledge base in both civil and criminal law allows the LNC to grow professionally and to add this experience to a resume or curriculum vitae. A list of Innocence Project offices is included on the next few pages for those interested in contacting a local office for more information. The national Web site, www.innocenceproject.org, is also a good starting place to understand the dynamics and nuances of this project at least one reporter has titled a, "new civil rights movement" (6/6/02 Dallas Morning News/Associated Press).

In the State of Delaware LNC interns work with the director of the project, a nurse attorney, at the Office of the

Public Defender, allowing the Innocence Project to review applications in an efficient manner. Several cases have been completed, both with positive and negative outcomes for the defendants.

One particular case, originally investigated by an out-of-state Innocence Project, was closed when the agency failed to find the necessary slides to review for the defendant. The defendant made application to the Office of the Public Defender Innocence Project for a state-based review. The LNC intern and nurse attorney in the Delaware state project were able to unearth slides taken from the examination of a rape victim in 1990. In this case, the nurses' knowledge of local health care practice and hospital mergers was instrumental in finding evidence to evaluate this case. An outcome is not reportable at this time as the evidence in this case is still undergoing DNA testing.

In addition to gaining professional experience, the LNC volunteering for an Innocence Project program provides community service. Working within the various projects educates attorneys regarding the skills and roles of LNCs in criminal cases. With positive outcomes, the LNC has the opportunity to reflect on the personal contribution of protection for an individual's civil rights and walks a path set by the framers of our constitution.

Lisa M. Schwind, RN, Esquire, Forensic Services and Education Coordinator, is a nurse attorney working in the Office of the Public Defender's Office in the State of Delaware. Schwind is the Director of the Innocence Project for the State of Delaware and is a much sought after speaker on DNA testing, forensic issues and Innocence Project updates. Schwind is an adjunct professor at Widener University Legal Education Institute, where she teaches a class on Introduction to Forensics. She can be contacted at Lisa.Schwind@state.de.us.

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Innocence Project Offices

Note: Many Innocence Project offices cover multiple states and, therefore, are listed under multiple state headings.

ALABAMA

Alabama Innocence Project
P.O. Box 230723
Montgomery, AL 36123

ALASKA

Innocence Project Northwest
Professor Jackie McMurtrie
University of Washington Law School
1100 NE Campus Pkwy.
Seattle, WA 98105
206/543-5780
jackiem@u.washington.edu

ARIZONA

Arizona Justice Project
Larry Hammond/Osborne Maledon
2929 North Central Avenue, 21st Floor
Phoenix, AZ 85012-2794

Professor Andy Silverman
University of Arizona School of Law
Tucson, AZ 85721

Northern Arizona Justice Project

Robert Schehr, Chair
Department of Criminal Justice
P.O. Box 15005
Flagstaff, AZ 86011-5005

Professor Robert Bartels
Arizona State University College of Law
Tempe, AZ 85287

Arizona Attorneys for Criminal Justice
8100 East Indian School Road, Suite 5 East
Scottsdale, AZ 85251

ARKANSAS

Arkansas Innocence Project
Robert Lightfoot
P.O. Box 322
Cherry Valley, AR 72324

CALIFORNIA

Northern
Professor Robert Weisberg
Stanford Law School
Nathan Abbot Way at Alvarado Row
Stanford, CA 94305

California Innocence Protection Program

Office of the Public Defender
555 7th Street, 2nd Floor
San Francisco, CA 94103

Northern California Innocence Project

874 Lafayette Street
Santa Clara, CA 95050
408/554-1945

Southern California Innocence Project

Professor Justin Brooks
California Western School of Law
225 Cedar Street
San Diego, CA 92101-3046
619/525-1485
jpb@cwsu.edu

Western State University Law School
Criminal Law Practice Center
1111 N State College Boulevard
Fullerton, CA 92831

COLORADO

Colorado Innocence Project
P.O. Box 2909
Denver, CO 80201-2909

Rocky Mountain Innocence Center

Jensie Anderson, President
358 South 700 E., Box 235
Salt Lake City, UT 84103

CONNECTICUT

New England Innocence Project

Kristin Cronin, Coordinator
Testa, Hurwitz & Thibault
125 High Street
High Stree Tower
Boston, MA 02110

DELAWARE

The Innocence Project
Office of the Public Defender
Lisa M. Schwind, Director
Carvel State Building
820 French Street, 3rd floor
Wilmington, DE 19801

DISTRICT OF COLUMBIA

The Innocence Project of the National Capital Region

Misty Thomas, Project Director
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Washington College of Law
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FLORIDA

The Innocence Project
Nova Southeastern University
Shepard Broad Law Center
Professors Catherine Arcabascio, Carol Henderson
3305 College Avenue
Ft. Lauderdale, FL 33314
954/262-6174
arcabascioc@nsu.law.nova.edu

Wrongful Convictions Project

University of Miami Law School
1331 Miller Drive, Room 385
Coral Gables, FL 33146

GEORGIA

The Georgia Innocence Project
730 Peachtree Street, Suite 705
Atlanta, GA 30308

IDAHO

Innocence Project Northwest
Professor Jackie McMurtrie
University of Washington Law School
1100 NE Campus Pkwy.
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Idaho Innocence Project

College of Law
University of Idaho
Moscow, ID 83843

Rocky Mountain Innocence Center

Jensie Anderson, President
358 South 700 E., Box 235
Salt Lake City, UT 84103

ILLINOIS

Center for Wrongful Convictions

Professor Lawrence Marshall
Professor David Protes
Northwestern University School of Law
357 East Chicago Avenue
Chicago, IL 60611
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INDIANA

The Innocence Project

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IOWA

Midwest Innocence Project

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The Innocence Project

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Innocence Project Offices

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KENTUCKY

Kentucky Innocence Project

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Department of Public Advocacy
P. O. Box 555
Eddyville, KY 42038

University of Kentucky Innocence Project Externship

Roberta M. Harding, Professor of Law
University of Kentucky College of Law
209 Law Building
Lexington, KY 40506-0048

LOUISIANA

Innocence Project New Orleans

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636 Baronne Street
New Orleans, LA 70113

MAINE

New England Innocence Project

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MARYLAND

The Innocence Project of the National Capital Region

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Baltimore, MD 21202

MASSACHUSETTS

New England Innocence Project

Kristin Cronin, Coordinator
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125 High St.
High Street Tower
Boston, MA 02110

MICHIGAN

Michigan Innocence Project

The Thomas Cooley Law School
300 S. Capitol Avenue
Lansing, MI 48933
577/371-5140

MINNESOTA

Innocence Project of Minnesota

Ed Butterfoss
Hamline University School of Law
1536 Hewitt Avenue
St. Paul, MN 55104

MISSISSIPPI

Innocence Project New Orleans

Emily Maw
636 Baronne Street
New Orleans, LA 70113

MISSOURI

Midwest Innocence Project

Ellen Suni, Professor of Law
University of Missouri at Kansas City
1-407 Law Building
5100 Rockhill Road
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MONTANA

Innocence Project Northwest

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Idaho Innocence Project

College of Law
University of Idaho
Moscow, ID 83843

Rocky Mountain Innocence Center

358 South 700 East, B235
Salt Lake City, UT 84102

NEBRASKA

Midwest Innocence Project

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University of Missouri at Kansas City
1-407 Law Building
5100 Rockhill Road
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NEVADA

Rocky Mountain Innocence Center

358 South 700 East, B235
Salt Lake City, UT 84102

NEW HAMPSHIRE

New England Innocence Project

Kristin Cronin, Coordinator
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125 High Street
High Street Tower
Boston, MA 02110

NEW JERSEY

The Innocence Project

Centurion Ministries
221 Witherspoon Street
Princeton, NJ 08542

Rutgers University School of Law Innocence Project

123 Washington Street
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NEW MEXICO

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Role of the LNC in the District Attorney's Office

Beryl R. Gamiel, BSN RN

Since the early 1970s, nurses have been used in the role of consultants and expert witnesses, usually in nursing malpractice cases. As the cost factor became more apparent, nurses' role in the legal system expanded, and their expertise became more valued. The role of the legal nurse consultant (LNC) was born.

It was only a matter of time before LNCs expanded their role into criminal law. As LNCs, nurses' roles are many and varied. They define and identify issues pertaining to deviation from standards of care, prepare medical timelines, conduct medical literature review searches, interpret medical records information, assist at trial, and conduct client interviews. In this article, I will review the opportunities for LNCs in the Attorney General's office (AG).

The State of Delaware Department of Justice has several divisions. All prosecute crimes against the state of Delaware. Unlike most other states, the AG's office in Delaware handles both civil representation and criminal prosecution.

The Criminal Division is responsible for the prosecution of criminal cases. This includes cases before the Superior Court, the Court of Common Pleas, and Family Court. It provides legal assistance to law enforcement agencies, and maintains a Victim/Witness Assistance Program.

The State Prosecutor, who is appointed by the Attorney General and reports to her through the Chief Deputy Attorney General, manages the Criminal Division. A county prosecutor heads each of the three county offices. New Castle County has multiple units within the office. These include the Felony Trial Unit, the Sex Crimes Unit, Domestic Violence Unit, Career Criminals Unit, the Drug Unit, and the White Collar Crime Unit.

The Appeals Division of the Department of Justice provides legal advice to law and law enforcement agencies and handles prisoner litigation in both state and federal courts.

The Civil Division provides legal services to all branches of state government. The State Solicitor, appointed by the Attorney General, oversees this division. It acts much as a private law firm.

The Fraud and Consumer Protection Division protects the public from unfair and/or deceptive business practices.

The Administrative Division provides operational support to the Department of Justice employees.

As of this date, the State of Delaware has a freeze on new hires, and there are currently no LNCs employed in their office. The Public Defender's Office (PD) does employ LNCs as contractors and currently has a grant position for a forensic nurse. The role of the LNC in the AG's office would parallel that of one in the PD's office. The difference

would be dependent on unit assignment and role definitions. In speaking to employees at the Department of Justice, there were many areas they would find an LNC useful.

A big area in both the PD's and AG's office where LNCs are already used is the SANE, or Sexual Assault Nurse Examiner. These nurses are called to hospitals when an assault victim comes in. They offer comprehensive forensic evidence collection, along with compassionate care for the victim. Evidence has shown, according to the International Association of Forensic Nurses (IAFN) Web site, that with thorough documentation of evidence corroborating a victim's statement, more successful prosecutions, especially in non-stranger assault cases, have occurred.

Just as in civil cases, the LNC reviews medical records for the victims of crimes. The LNC functions as a resource for interpretation of medical records, as well as performing literature searches, developing demonstrative displays and consulting on trial strategies. The LNC can provide the attorney with timelines and chronologies identifying key medical issues. An LNC can look at medical history and determine risk factors, underlying health issues, possible history of abuse from unexplained injuries, and so forth.

The AG staff while being interviewed, reported that doctors, even those who were involved in a case, do not like to look through medical records, or testify to a jury about things other than their specific role. The job of a medical/nursing professional in a trial may very often extend to providing expert fact testimony. This can include such things as basic anatomy and physiology and results of injury to a body part or system. Nurses are especially suited for this role given their understanding of the medical system and their ability to teach patients, family and community members.

The LNC could also be called upon as an expert witness to describe the victim's injuries in terms of serious versus non-serious, thus supporting the level of assault allegations. An understanding and collaboration with the attorney regarding legal definitions relating to injury, is crucial for success in this area.

The LNC can play an important role in evaluating evidence presented at trial. This includes all three types of evidence; testimony, physical, and scientific. Within these types, there is direct and indirect evidence. The LNC can not only assist in the evaluation of evidence to be presented at trial, but also evaluate the chain of custody and track the admissibility of each piece of evidence.

The LNC can provide assistance with interpreting forensic evidence, such as autopsy reports, injury patterns, the type of death (suicide, homicide, etc.), and method of

death. This requires further education in forensic nursing for accurate application of these skills. A death investigation course and a SANE course will be most helpful for the LNC who desires to increase knowledge in this area. Understanding the role and application of DNA to evidence collection allows the LNC to assist the attorney in understanding scientific evidence. Ongoing training through attendance at DNA programs within the scientific community will be crucial to keep up to date on this rapidly changing technology.

Nurses in the criminal courts system have particularly good skills suited for cases of child abuse, elder abuse, or domestic violence. Nurses are viewed as patient advocates by most of the public, and a feeling of safety and non-judgment may help expedite gathering of evidence. The LNC can also review records for unexplained or poorly explained injuries or long histories of “clumsiness” resulting in injuries that may actually be abuse.

LNCs may act as a liaison between the trial experts and attorney, often providing additional materials to educate the attorney on the subject.

Salaries for LNCs in the forensic arena are difficult to quote given that this is relatively new territory for nurses. State systems have experience with nurses in public health settings. State employment offices will need to be educated regarding the skill set of LNCs in the forensic area. Contractual work with both the AG and PD office is paid comparable to civil contractual work.

In conclusion, there are many opportunities for LNCs to stretch their skills into the criminal field. Additional training may be required, and a different mindset may be needed for LNCs to understand their advocacy role in a forensic setting.

Beryl R. Gamiel, BSN RN, currently practices as a school nurse. She is enrolled at Wilmington College in New Castle, Delaware, in the Legal Nurse Consulting Tract of the MSN program. Her goal is to work as an intern this summer in the AG’s office and to expand the role nursing plays in criminal law.

Resources for the LNC

- **State of Delaware Attorney General Web Site:** This site includes many definitions and a general flow of the criminal legal arena:
www.state.de.us/attgen/
- **National Association of Attorneys General Web Site:** This site provides a list of Web site and AG offices in each state: www.naag.org
- **International Association of Forensic Nurses Web Site:** This site provides information for SANE nurses: www.iafn.org
- **National Association of Criminal Defense Lawyers Web Site:** This site provides information and a listing of state public defender’s offices:
www.nacdcl.org

Looking for Information Outside the Medical Record

*Laura A. Conklin, MSA BSN RN ONC CWS LNCC
AALNC Greater Detroit Chapter*

As a legal nurse consultant, you spend a lot of time reviewing medical records looking for issues that may have caused an injury, determining when an injury occurred, and what may have been contributing factors in the case. The patient situation you are reviewing did not occur in a vacuum. There are simultaneous events occurring that may have impacted your patient's outcome. This information may or may not be in the patient's medical record. Knowing where to look will assist the legal nurse consultant in completing a thorough review and assisting the plaintiff or defense attorney in the trial preparation process. Let's look at some of the common areas where you can find information outside the medical record.

The Operating Room

There is always a lot of action in and around an operating room (OR). If you are reviewing a wrongful death case where the patient died in the operating room, you may want to know what else was going on at the time. A good place to start would be the "Boarding Book," which lists all cases to be done that day. There is also a "Case Schedule Board," which keeps a running account of what's going on in the operating room at any given moment. This usually gets erased as events unfold and would not be available for a timely review. However, staff on duty when the incident occurred may be able to shed light on the recordings and activities of that day. Were there other complicated cases going on simultaneously, causing a drain on human resources that were not available to assist in your patient's emergency? Was the staffing adequate for the type of procedure? Were complications anticipated and the needed equipment readily available?

Equipment issues are always a source of potential problems. During a relatively low risk procedure such as a colonoscopy, if the monitor failed just as the physician is clipping a polyp, and inadvertently the colon, this could easily lead to life threatening complications that may not be obvious at the time. Are videotapes or photos of the procedure available? Was all the equipment in proper working order? Are preventative maintenance records kept and available? Equipment failure does contribute to negative outcomes. Did the staff know how to operate the equipment? While this seems like an obvious question, there may have been new staff members that were not adequately trained or supervised. Another scenario could be an OR nurse was pulled from one specialty to another where familiarity with instruments and the procedure may be lacking.

Is the surgeon's personality such that staff's anxiety level

is so high that mistakes often occur? This information will come out during OR staff interviews. Were there previous complaints made against this surgeon? Often this record can be obtained from the state licensing board or state medical society. Has there been any disciplinary action against the surgeon in that particular hospital?

The Morbidity and Mortality Committee reviews all negative patient outcomes. Since this committee is protected under the umbrella of Quality Assurance and Peer Review, getting information may not be easy. Depending on how much information you already have, it may not be necessary to pursue committee minutes. How often has Risk Management interacted with this particular surgeon or other members of the OR staff? Knowing that there has been some contact will lead to other discovery issues.

Let's look at the Anesthesia Department and their potential contribution to negative outcomes. Was there an anesthesiologist tending to the patient during the operation? While a name may appear on the medical record, was the anesthesiologist there for the whole procedure or just the induction of the anesthetic. If the patient was monitored by a CRNA, what was this individual's competency level? Was help obtained in a timely fashion? Did the anesthesiologist's name appear on several records simultaneously? What was the level of supervision?

Looking at anesthesia equipment issues, when was the last time the equipment was calibrated? By whom? Their qualifications? There should be preventative maintenance records kept and available. Was the equipment cultured and when? Microbiology logs may reveal a potential problem that was not addressed.

The area of informed consent may also disclose a potential dilemma. The whole concept is based on the premise that everyone has the right to determine what will be done to his or her own body. Alternative treatment, repercussions of delayed or missed treatment and potential for complications need to be discussed and understood by the patient. While some of this information may be found in the medical record, there may have been written information given to the patient that is not part of the record. Was the patient able to understand this information? Were his/her questions answered? By whom? What happened after the incident occurred? Did anyone speak to the patient's family and explain what happened or was there evidence of an attempt to cover up the situation. Information such as this may be obtained from family members.

Obstetrics and the Delivery Room

Like the OR, the delivery room offers similar situations where information may not be easily accessible in the medical record. It is important to remember that often there are separate “mother” and “baby” records. Physician office records can be a source of information on the pregnancy and potential anticipated problems. Other information such as monitor strips, both mom’s and baby’s, may not be a part of the medical record. Was the monitoring equipment functioning properly? When was it calibrated last and by whom?

Look for policies and procedures that may spell out what to do in emergency situations and who is responsible for what. What about staff competences? These records may be found in Human Resources Department individual records or in the Education Department. Patients in a healthcare setting come with the expectation that they will be cared for by competent individuals. The same holds true for staffing guidelines. Was adequately trained staff available? Daily staffing sheets will reveal who was on duty at the time of an incident. A monthly schedule may not be as accurate since staff will often change days, trade days or be called in to cover an absence.

The Emergency Department

The Emergency Department is a virtual haven for litigation. Patients are treated for signs and symptoms presented with little or no consideration for past medical history. Granted often there is no time to go into details regarding past experiences, as the focus is to treat the presenting emergency and save a life. Information on allergies or previous problems may not be available from the patient or known by the accompanying friend or relative.

Emergency Medical System (EMS) transport records from the scene will identify how fast help arrived, what was done at the scene and the condition of the patient when help arrived. Often it is important to know who was the first responder at the scene and what was done. A police report may or may not have the needed details, as it often does not focus on healthcare issues.

The Pharmacy Department

Logs kept in the pharmacy will indicate when medication was ordered, received in the pharmacy, filled, by whom, and finally delivered to the unit for administration to the patient. Patients often do not know of drug allergies unless they are exposed to certain drugs. A careful record of known allergies, drug interactions and adverse events are kept in the pharmacy, as are records of dispensed narcotics and I.V. fluids.

Not all prescriptions are filled by a licensed pharmacist. Often pharmacy aides are used to assist with the task of filling prescriptions. All prescriptions, however, need to be checked by a licensed pharmacist before leaving the pharmacy. If a drug related incident occurred, who filled the script and was it properly labeled? Were there any side effects or potential drug-to-drug interactions that were not brought to the caregiver’s attention? This information has a potential bearing on a case.

Finance Department

While this may not be an obvious spot to look for information on a case, you can bet that if there is no charge for a particular test, most likely it was not done. Missed diagnosis based on lacking information will have an effect on treatment options and expected outcomes. Noting the dates of charges and the dates recorded in the medical record for tests, medication, etc. may or may not correspond. Here is an area that you will find a host of information on what was billed and not necessarily the care that was delivered. How are missed doses of medication recorded? Did this have an impact on the outcome of care? Is there notation in the medical record of such occurrence; if not, why not? Was the physician notified?

Conclusion

I’ve listed only a few areas to explore to find additional information that may help you as a legal nurse consultant provide the best possible assistance for the attorney client. This by no means is an exhausted list. Networking with colleagues will reveal other possible sources of valuable information. Attending professional meetings, seminars and American Association of Legal Nurse Consultants chapter meeting will also increase your exposure to a variety of information gathering options.

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Setting Legal Nurse Consulting Fees

Mary A. O'Connor, PhD RN

Negotiating legal nurse consulting fees can be easy or difficult. Advanced knowledge and preparation of what the legal nurse consultant (LNC) requires should make the process clearer.

Fees are always debatable. One nurse advised me to never charge too low because you “aren’t very experienced.” One new LNC was going to charge \$10 per hour because she didn’t know the legal part of the job. She didn’t consider that she was bringing her nursing knowledge to the position, not legal knowledge, and she had considerable nursing experience.

Independent LNCs charge \$60 to \$100 per hour for case review. The rate is determined by the amount the individual LNC believes is fair compensation and how much is needed to stay in business. As business owners, many who work out of their homes, LNCs must pay all their own state, local and federal taxes, purchase and maintain equipment, and other business expenses. Start up costs for the home office range from \$3,000-\$5,000.

Another way to determine the LNC hourly fee is to double one’s base pay. Most independent LNCs are working “overtime,” that is, they may work a 40 hour week in a clinical position. Therefore, doubling the primary base pay takes into consideration time and one half for overtime and the additional amount needed to cover taxes.

Some LNCs charge varying amounts for different types of work, charging less for organizing records than for reviewing the medical record, medical research, and writing the report. This can become a bookkeeping nightmare. To avoid this breakdown of charges for different types of work, charging one flat fee per hour makes calculating bills easier. The calculations may include driving to and from the attorney’s office, but that is the individual LNCs decision. Actual amounts for additional expenses such as parking and long distance phone calls are added to the hourly totals of the bill.

LNCs should charge a minimum amount for reviewing records, however, and this is individually determined. A fair minimum amount for case review is \$150-\$250.

Legal nurse consultants who testify as experts charge \$100-\$150 per hour for review and report preparation. Fees for testifying at depositions and in court range from \$800-\$1,000 per day, with a minimum of \$400-\$500 for less than a half day’s testimony.

The salary survey conducted by the American Association of Legal Nurse Consultants (AALNC) (Compensation Survey, 1999) summarizes consulting fees from 1998. These are depicted in Table 1. Thirty-six percent of the consultants surveyed reported a base salary less than \$30,000 while another 36% ranged from \$31,000-50,000. The remaining salaries ranged from \$51,000 to over \$100,000. Variables in base salary include highest educational degree, years of experience, urban/rural and practice settings.

A very good way to ensure payment is to request a retainer of \$500 when the records are sent. Time spent reviewing the case is deducted from the retainer, and if less time is spent reviewing the case than the amount of the retainer, the difference is reimbursed. If more consulting time is spent than is covered by the retainer, the LNC has two options. Interim bills may be submitted prior to completing additional work, or the final bill is submitted with the final report. Attorneys are accustomed to this type of payment to medical experts, and this should not be a problem. If the attorney expresses that it is a problem, LNCs should beware of providing work for this law firm because there is no guarantee that payment will be obtained after the work is completed.

LNCs shouldn’t be shy about asking for their fees. Negotiating fees for the new LNC is something that nurses don’t do routinely. Consulting is a business with expenses, not the least of which is the salary. Most LNCs experiences in nursing are in non-profit healthcare organizations that are pinching pennies during this managed care era. Legal nurse consultants must adopt a different mind set when working in the legal field. Law firms are “for profit” businesses and, as

Table 1. 1998 Average Hourly Rate

Consulting Area	Range	Median	Mean	Mode
Professional LNC	\$14-200	\$70	\$69	\$75
Paraprofessional duties	\$7-757	\$50	\$57.79	\$75
Expert testimony	\$2-500	\$150	\$147.34	\$150
Support services	\$3-150	\$45	\$50.12	\$75

AALNC's Compensation Survey Results (1999)

such, attorneys understand the small business owner's need for cash flow! Bills submitted should be payable upon receipt, and a second request should be sent after two weeks if unpaid. Three months of unpaid debt for small business owners can result in the business folding.

Legal nurse consultants working in law firms in full or part-time positions make varying amounts. Legal nurse consultants should request, at minimum, the same salary as staff nurses with equal years of experience. LNCs try to rationalize accepting lower pay, because the work is Monday through Friday, 9:00 a.m.-5:00 p.m., but this is unsound reasoning for accepting lower pay. First, the job rarely turns out to be a 40-hour workweek. Secondly, LNCs are in their own job category and should be compensated for the specialized knowledge they bring to the firm and to the attorneys. LNC's education and experience are valuable components to assist attorneys in preparing and winning cases. Unlike secretaries or paralegals, the lawyers cannot step in and do legal nurse consultants' work. LNCs shouldn't accept classification by the law firm as a "nurse paralegal." Paralegal education is geared to legal research, which cannot replace LNCs' expertise!

In addition, new LNCs should contact their AALNC local chapter as they go through the negotiating process. It is helpful to gain support and information from colleagues in the field who work in the area.

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APA Format: A Tool for the LNC

Kathleen C. Ashton, PhD APRN BC and Eileen M. Croke, EdD MSN RN ANP LNCC

Writing for publication is a rewarding experience, but can be a tedious process from generating an idea, gathering data, through putting it on paper following a journal's submission process. Editors have established specific guidelines based upon the type of work (e.g., journal article, empirical research report) submitted for publication. Guidelines promote uniformity of writing style allowing editors and reviewers to give more time for content review. In health care disciplines, such as nursing, the American Psychological Association (APA) writing style is used most frequently. Writers who adhere to this format will be able to communicate in an accepted, clear, and persuasive manner.

The American Psychological Association has become a leader in providing the means of standardizing manuscripts so that the content can be compared and evaluated for the possibility of publishing. The Publication Manual of the American Psychological Association arose from a 1928 meeting of editors and business managers of anthropological and psychological journals who attempted to simplify the publication process for authors (APA, 2001). Now in its fifth edition, the "APA Manual" has been adopted by nursing, the behavioral sciences and other disciplines as their style guide for publication. As such, it has been instrumental in facilitating communication of new ideas and streamlining the work of editors and publishers. Authors and readers have also benefited from the ability to check out references and delve deeper into content presented in a manuscript.

Beginning researchers and authors may find the manual daunting in its adherence to strict form but seasoned users soon learn the benefits of following an accepted format that seems to become almost invisible. Given the time and effort required to acclimate oneself to using the manual, several resources have been developed to assist the user in preparing one's work according to APA format. With the increasingly widespread use of electronic resources, there have been numerous changes in style that are reviewed in the fifth edition as well as in the online resources. One advantage of consulting the online site over the published text is that updates are available here on an ongoing basis.

Some of the changes in the fifth edition are especially

pertinent to legal nurse consultants; the newest edition has updates on formats for legal and electronic references. For example, a sample citation for a legal case appealed to a state court of appeals follows:

Text citation: *Smith v. Memorial Hospital* (2003)

In explaining the text sample, the structure in APA format is very similar to text citations for other works, except that in a legal citation there is a (v.) indicating versus, between the names of the plaintiff and defense instead of an ampersand (&) symbol. The year of publication then follows in parentheses. Similarly, the reference list citation follows:

Reference list citation: Smith v. Memorial Hospital, 719 S.W.2d 600 (La. Ct. App. 2003)

In explaining the reference sample, this opinion was rendered by the Louisiana Court of Appeals in 2003 and can be found in volume 719 of the *South Western Reporter*, second series, beginning on page 600 of that volume.

Increasingly, papers are written with support from online sources. When checked carefully, these sources can provide the latest information on a topic or give a personal slant not found in traditional references. Responsibility rests with the author to check the online reference just prior to publication since web sites change frequently. Correct APA format includes the date the site was accessed.

Two appendices in the fifth edition of the APA manual are especially noteworthy for the legal nurse consultant. Appendix D is a 14-page guide for referencing legal materials and can be found beginning on page 397 in the hardcover edition. This comprehensive guide is useful not only in publishing articles but also in preparing expert and other reports. Appendix C, beginning on page 387, discusses some ethical standards of publication and is a valuable resource for the novice and expert alike. This section is especially timely in light of the Health Insurance Portability and Accountability Act (HIPAA) regulations that went into effect in April of 2003.

Contained in the new edition is a sample paper with detailed guidelines for each section. The user can easily visualize how to construct a publishable manuscript using this resource. In addition, the cross references provide a handy guide to help manage the task.

Along with following the direction provided in the text, many individuals and organizations have attempted to assist the writer in becoming proficient in using APA format. Included in Table 1 are some online resources set up by academicians and others to amplify and simplify the use of APA format for formal writing.

Table 1. Online Resources

- www.apastyle.org
- <http://www.psychwww.com/resource/apacrib.htm>
- http://owl.english.purdue.edu/handouts/research/r_apa.html
- <http://www.westwords.com/guffey/apa.html>

APA Format: A Tool for the LNC

Agreeably, correct use of APA format requires effort to become familiar with the technique and the nuances. Changes in the fifth edition can be beneficial to the legal nurse consultant in preparing reports and manuscripts. The result of understanding and incorporating these changes is a product that will communicate the author's ideas clearly and support the writer's claims in persuading others.

Reference

American Psychological Association. (2001). *Publication manual of the American Psychological Association* (5th ed.). Washington, DC.

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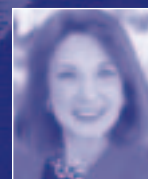
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