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**Legal Nurse**  
*Consulting*



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AMERICAN ASSOCIATION OF  
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### American Association of Legal Nurse Consultants

330 North Wabash Ave.  
Suite 2000  
Chicago, IL 60611  
877/402-2562  
312/321-5177  
Fax: 312/673-6655  
E-mail: [info@aalnc.org](mailto:info@aalnc.org)  
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## PURPOSE

The purpose of The Journal is to promote legal nurse consulting within the medicallegal community; to provide 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](mailto:JLNC@aalnc.org). Please see the next page for Information for Authors before submitting.

## MANUSCRIPT REVIEW PROCESS

We send all submissions blinded to peer reviewers and return their blinded suggestions to the author. The final version may have minor editing for form and authors will have final approval before publication. Acceptance is based on the quality of the material and its importance to the audience.

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## ARTICLE SUBMISSION

*The Journal of Legal Nurse Consulting* (JLNC), a refereed publication, is the official journal of the American Association of Legal Nurse Consultants (AALNC). We invite interested nurses and allied professionals to submit article queries or manuscripts that educate and inform our readership about current practice methods, professional development, and the promotion of legal nurse consulting within the medical-legal community. Manuscript submissions are peer-reviewed by professional LNCs with diverse professional backgrounds. The JLNC follows the ethical guidelines of COPE, the Committee on Publication Ethics, which may be reviewed at: <http://publicationethics.org/resources/code-conduct>.

We particularly encourage first-time authors to submit manuscripts. The editor will provide writing and conceptual assistance as needed. Please follow this checklist for articles submitted for consideration.

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- Put title and page number in a header on each page (using the Header feature in Word)
- Place author name, contact information, and article title on a separate title page, so author name can be blinded for peer review
- Text: Use APA style (Publication Manual of the American Psychological Association, 6th edition) (<https://owl.english.purdue.edu/owl/resource/560/01/>)
- Legal citations: Use The Bluebook: A Uniform System of Citation (15th ed.), Cambridge, MA: The Harvard Law Review Association
- Live links are encouraged. Please include the full URL for each. Be careful that any automatic formatting does not break links and that they are all fully functional.
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## INSTRUCTIONS FOR ART, FIGURES, TABLES, LINKS

- All photos, figures, and artwork should be in JPG or PDF format (JPG preferred for photos). Line art should have a minimum resolution of 1000 dpi, halftone art (photos) a minimum of 300 dpi, and combination art (line/tone) a minimum of 500 dpi.
- Each table, figure, photo, or art should be submitted as a separate file attachment, labeled to match its reference in text, with credits if needed (e.g., Table 1, Common nursing diagnoses in SCI; Figure 3, Time to endpoints by intervention, American Cancer Society, 2003)

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## GENERAL INFORMATION

Acceptance will be based on the importance of the material for the audience and the quality of the material, and cannot be guaranteed. All accepted manuscripts are subject to editing, which may involve only minor changes of grammar, punctuation, paragraphing, etc. However, some editing may involve condensing or restructuring the narrative. Authors will be notified of extensive editing. Authors will approve the final revision for submission.

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**Varsha Desai**  
BSN, RN,  
CNLCP, LNCC

President, AALNC

## A Message from the President

Dear AALNC Members,

**A**s you are reading the Spring Issue of the AALNC *JLNC*, I hope spring is around the corner where you live. Many of us maybe looking back at our New Year's resolutions and thinking, "What happened?" I hope part of your New Year's resolutions included how you can begin, expand, or maintain your LNC education and practice. You can take the LNC online course, take the LNCC review course so you can prepare for the LNCC examination, attend a webinar, get the Legal Nurse Consulting: Principles & Practices, volunteer for a committee, attend your 1st or 10th AALNC Forum or write your first article for the AALNC *JLNC*. There are so many ways you can stay connected and involved with the legal nurse profession!

As I get ready to transition to AALNC Past President, I wanted to thank the AALNC Board of Directors, AALNC Committee Volunteers and the entire membership for their continued support of AALNC and its mission.

Some of the accomplishments from the past 12 months include:

- Streamlining AALNC committees to use our volunteers more effectively and increase committee effectiveness and participation
- Starting the process for the Legal Nurse Consulting: Principles & Practices, 4th edition
- Increasing AALNC awareness through a Gold Standard Digital Marketing campaign, which has increased web traffic to the AALNC Locator, AALNC Webinars and AALNC membership pages.
- Implementing speaking, writing, and webinar partnership opportunities with other nursing associations, DRI, and ABA.
- Increasing AALNC social media visibility
- Developing the AALNC Forum into a "Forum Experience" for increased networking and education opportunities

I look forward to seeing you at the AALNC 2016 Forum in Charlotte, NC. For our first time attendees and new LNCs, I remember attending my first Philadelphia AALNC chapter meeting in 2007 and my first AALNC Forum in 2008, and leave you with this quote:

*You don't have to see the whole staircase, just take the first step. — Martin Luther King, Jr.*

Best,

Varsha Desai BSN, RN, CNLCP, LNCC  
President, AALNC

# Editor's Note

As I write this, there's a flock of robins in the disappearing snow outside and we're looking forward to our annual forum. One of the more interesting topics of discussion is bound to be the ongoing saga of reapplying to the ANA for approval of legal nurse consulting as a nursing specialty. I use the word "consulting" deliberately, because words matter.

First, I researched a bit of history. Working nurses formed the antecedents of the ANA in the 1890s. Over the next two decades, it attracted various state nursing associations, bought the AJN company, helped organize a national organization for public health nursing (dissolved in 1952), affiliated with the National Association of Colored Nurses (which remained separate for nearly 40 years, until 1951), and studied practice, education, and state nursing examiners. As other nursing specialty organizations developed, the ANA incorporated many of them.

Reading the ANA's historical events (<http://www.nursingworld.org/FunctionalMenuCategories/AboutANA/History/BasicHistoricalReview.pdf>) I was struck by how nurses formed the organization and drove it forward based on obtaining validation and recognition for existing nursing practice; the ANA did not lead practice but promoted the abilities and emerging practices already happening, developing a conceptual framework for itself that focused on patient care as it went along. There were already nurses delivering nursing care as public health nurses. There were already black women nurses. There were already nurse midwives. This calls to mind the words attributed to Ledru-Rollin in 1848 and, in various forms, to Gandhi and others: *There go the people. I must follow them, for I am their leader.*

In *Daring to Care: American Nursing and Second Wave Feminism* (2007) Malka notes that before 1960 there were only five nursing specialty organizations. With increased waves of feminism and education in the 70s and beyond, nurses increasingly left the ANA for specialty organizations. The founders could not have foreseen the many nursing specialties we have now— intravenous therapy, addiction, periOperative, life care planning, oncology, pediatric, anesthesia, trauma, wound care, psychiatry, nurse authors and editors, and so many more— or the nearly forty organizations that represent them. Certifications followed, granted by the specialties. The ANA began to grant some specialty certifications in patient care-related areas. However, the vast majority of certifications were and are still developed, granted, and administered by nurse specialty practice organizations, not the ANA.

This brings us to the present. The ANA has historically backed significant codification issues in nursing, notably state registration, education requirements, and the Scope and Standards of Nursing Practice, and a Code of Ethics, which last two are liberally incorporated into many state nurse practice acts. That's great. And there's also the rub.

Not all nurses who use their nursing education and experience to inform their practice are practicing nursing as the ANA historically and presently defines it. (refer to sidebar). If I serve on the



**Wendie Howland**  
MN, RN-BC, CRRN,  
CNLCP, LNCC

Editor, JLNLC



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## Editor's Note

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town board that oversees regulations on septic systems and related topics, I am not diagnosing or treating human responses and the board of registration in nursing has no opinion on what I do; though one could say that I had some advocacy responsibility, I see that as part of good citizenship, informed by my knowledge but not nursing per se. If I teach middle schoolers anatomy as part of my volunteer work on the town STEM advisory committee, my nursing education and experience is surely helpful, but my nursing practice act doesn't tell me how to teach it or evaluate me when I do. As a legal nurse consultant I do not protect, promote, or optimize health, facilitate healing, or alleviate suffering, nor delegate (per the nurse practice act) anything that does. I don't even advocate; in the legal setting, the attorney is the advocate with the license to practice law, and has control over the case.

This is why if I am not giving, delegating, or managing care as per the ANA, the ANA has no relevance to my practice as a legal nurse consultant. I am still a nurse, I have a first-rate nursing education in my head, but as a consultant I do not practice nursing per the ANA definition.



### ANA DEFINITION OF NURSING, 2015

Nursing is the protection, promotion, and optimization of health and abilities, prevention of illness and injury, facilitation of healing, and alleviation of suffering through diagnosis, treatment of human response, and advocacy in the care of individuals, families, groups, communities, and populations.

*If there are standards of practice to be written, legal nurse consultants must be the ones to write them. If there is a specialty practice to be defined and promulgated, legal nurse consultants must be the ones to do it. No one else's definition matters.*

When I teach nursing diagnosis to students I have to emphasize over and over again that they can't "pick" a nursing diagnosis off a list based on a medical diagnosis and then try to cram facts from the individual patient into it to make it fit to plan care. It doesn't work that way. You make a nursing diagnosis based on facts. Assessment first, then analysis, then diagnosis. By the same token, I don't believe we can take the ANA definition of nursing and try to make legal nurse consulting fit into it. The facts are that we are not practicing nursing as legal nurse consultants. We can't choose the ANA diagnosis if it doesn't fit the facts. We can't plan our work based on it. Data first, then analysis, then planning.

Therefore, the experts on legal nurse consulting are ... legal nurse consultants. If there is to be a description of legal nurse consultants' activities, legal nurse consultants must be the ones to lay it out.

If there is to be a conceptual framework to underpin standards, legal nurse consultants must be the ones to define and sculpt it.

If there are standards of practice to be written, legal nurse consultants must be the ones to write them.

If there is a specialty practice to be defined and promulgated, legal nurse consultants must be the ones to do it. *No one else's definition matters.*

Discuss. Have a great Forum!  
See you there!

*Wendie A. Howland*

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# Legal Nursing in the Arts: Book Review

Andrea Perry, RN, MSN, CNL, CEN

Of all the things emergency nurse does, triage is one of the most challenging—and critical. It's complex and rarely straightforward, making a strong clinical foundation crucial. *Fast Facts for the Triage Nurse* supports this foundation for emergency nurses of all experience levels. Recognized by the American Journal of Nursing as one of the 2015 Critical Care-Emergency Nursing Books of the Year, this text covers the gamut of triage requirements. Easy-to-navigate chapters on “red flag” presentations help the emergency department (ED) nurse do triage based on complaint, recognize worst-case scenarios, and anticipate treatment. The ED administrator/educator is not left out—this manual includes sections on triage orientation and precepting, staff safety, and even customer service. This manual is an impressive blend of evidence-based practice and the authors' comprehensive first-hand experience.

Don't miss these key sections:

## **Current Trends Impacting Triage Nursing:**

This section covers topics like changes in urgent care utilization and implementation of electronic medical records. Medical providers will be happy to see discussion of the triage provider role and advanced triage protocols. A balanced review of these topics covers both benefits and concerns.

**Safety:** Violence in the ED is a nationwide concern right now. Sections on patient and staff safety, customer

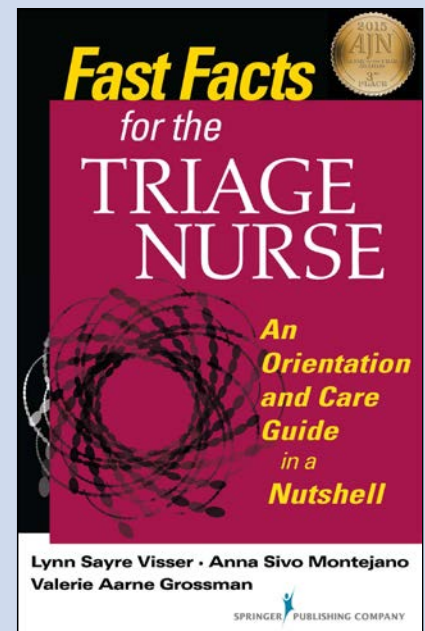
service, and psychiatric emergencies can provide nurses with tools to recognize and prevent some of the most common violence triggers.

**Tips for Success at Triage:** Much of what we learn about triage is on the job, from our co-workers. We've all asked for a second opinion, or shared that “crazy” triage story, and file the information away for the next time we see something similar. This section includes tips from many experienced ED nurses, on topics ranging from clinical decision-making, to communication, to shoe selection for a more comfortable shift.

*Fast Facts* is a must-read for any legal nurse aiming to understand and appreciate the complexity of nurse and medical provider roles in triage. 🍪

## **Andrea Perry, RN, MSN, CNL, CEN**

Clinical Nurse Educator, Emergency Department Sutter Roseville Medical Center, Roseville, California



## **Fast Facts for the Triage Nurse: An Orientation and Care Guide in a Nutshell (2015)**

Lynn Sayre Visser, Anna Sivo Montejano, Valerie Aarne Grossman, Editors.

Springer Publishing, New York NY.

www.springerpub.com

ISBN-13: 978-0826122650

ISBN-10: 0826122655

*Fast Facts is a must-read for any legal nurse aiming to understand and appreciate the complexity of nurse and medical provider roles in triage.*

gut fermenta|



SEARCH

# Gut Fermentation Syndrome and a DUI Law Case Overturned: A Lesson in How To Do a Better Search

David Dillard

**Keywords:** gut fermentation, auto-brewery syndrome, autointoxication, evidence-based practice

*Recently a judge overturned a DUI conviction because the high blood alcohol in the defendant was caused by gut fermentation syndrome. Curiosity caused me to look further into this rare condition. I turned up some interesting lessons in database searching technique for you.*



## WOMAN CLAIMS HER BODY BREWS ALCOHOL, HAS DUI CHARGE DISMISSED

By Sandee LaMotte

CNN, Updated 5:59 PM ET, Thursday December 31, 2015

<http://tinyurl.com/gqys4vr>

(CNN) Imagine being charged with a DUI when it's been hours since you've had a drink, only to later discover that your body brews its own alcohol.

That's what happened to an upstate New York woman when she blew a blood alcohol level more than four times the legal limit. Just before Christmas in Hamburg, New York, a judge dismissed the charges after being presented with evidence the woman suffers from "auto-brewery syndrome."

"I had never heard of auto-brewery syndrome before this case," attorney Joseph Marusak told CNN on the condition his client's identity remain anonymous. "But I knew something was amiss when the hospital police took the woman to wanted to release her immediately because she wasn't exhibiting any symptoms."

"That prompts me to get on the Internet and see if there is any sort of explanation for a weird reading," adds Marusak. "Up pops auto-brewery syndrome and away we go."

"I'm in touch with about 30 people who believe they have this same syndrome," said Panola College Dean of Nursing Barbara Cordell, who has studied the syndrome for years. "They can function at alcohol levels such as 0.03 and 0.04 when the average person would be comatose or dying. Part of the mystery of this syndrome is how they can have these extremely high levels and still be walking around and talking."

### Extremely rare condition

Also known as gut-fermentation syndrome, this rare medical condition can occur when abnormal amounts of gastrointestinal yeast convert common food carbohydrates into ethanol. The process is believed to take place in the small bowel, and is vastly different from the normal gut fermentation in the large bowel that gives our bodies energy.

First described in 1912 as "germ carbohydrate fermentation," it was studied in the 1930s and '40s as a contributing factor to vitamin deficiencies and irritable bowel syndrome. Cases involving the yeasts *Candida albicans* and *Candida krusei* have popped up in Japan, and in 2013 Panola College Dean of Nursing Barbara Cordell documented the case of a 61-year-old man who had frequent bouts of unexplained drunkenness for years before being diagnosed with an overabundance of *Saccharomyces cerevisiae*, or brewer's yeast, the same yeast used to make beer.

## HOW WOULD YOU SEARCH THIS?

You may have never heard of this medical disorder when a case alleging it comes to your practice's office, and need to learn more. Search results for "gut fermentation syndrome" and "auto-brewery syndrome" underscore the importance of including all possible words and phrases when searching. Using synonyms increases search reliability. Below are links to each of these two phrases for this condition; note that results are different for each.

### Gut Fermentation Syndrome:

**Google Scholar:**

<http://tinyurl.com/zkoadpn>

**Google Books:**

<http://tinyurl.com/jgpavvy>

**Google Domain Limited Web Search (PUBMED):**

<http://tinyurl.com/o2u3pkt>

**Temple Summon Search:**

<http://tinyurl.com/j8uf4qv>

Temple Summon gives 24 results:

Newspaper Article (16), Journal Article (5), Magazine Article (2), Transcript (1)]

### Auto-Brewery Syndrome:

**Google Domain Limited Web Search (PUBMED):**

<http://tinyurl.com/o4egupk>

**Google Scholar:**

<http://tinyurl.com/jz7ju53>

**Google Books:**

<https://www.google.com/search?tbm=bks&hl=en&q=%22AUTO+BREWERY+syndrome%22+>

**Temple Summon Search:**

<http://tinyurl.com/hwh7mmg>

Temple Summon gives 141 results

Audio Recording (1), Magazine Article (2), Book / eBook (23), Newspaper Article (75), Book Chapter (1), Reference (1), Book Review (2), Streaming Video (2), Conference Proceeding (1), Transcript (1), Dissertation (1), Web Resource (1), Journal Article (33)

## SAMPLE CITATIONS

### Auto-brewery syndrome in a child with short gut syndrome: case report and review of the literature

**Author:** Dahshan, A

**Journal:** Journal of pediatric gastroenterology and nutrition

**ISSN:** 0277-2116

**Date:** 2001, Volume: 33, Issue: 2, Page: 214

**Jansson-Nettelbladt, E., Meurling, S., Petrini, B., and Sjin, J.**

(2006). Endogenous ethanol fermentation in a child with short bowel syndrome.

Acta Paediatrica, 95(4), 502-504.

### Production of ethanol from infant food formulas by common yeasts

**Author:** BIVIN, W.S.

**Journal:** Journal of applied bacteriology

**ISSN:** 0021-8847

**Date:** 04/1985, Volume: 58, Issue: 4, Page: 355-357

**DOI:** 10.1111/j.1365-2672.1985.tb01473.x

*"The quantities of ethanol produced suggest a possible explanation for patients exhibiting the 'Auto-Brewery Syndrome' and raises interest in the role auto-produced ethanol could have in explaining the etiology of Sudden Infant Death."*

## WHY IS THIS IMPORTANT?

If you ignored "auto brewery syndrome" in your search, Google Scholar would tell you this regarding sudden death:

*"Your search - 'gut-fermentation syndrome' AND ('sudden death' OR 'sudden infant death') - did not match any articles."*

Failure to add synonyms into a search can limit your findings. You'll miss important content. Searching "AUTO BREWERY syndrome" AND ("sudden

death" OR "sudden infant death") in Google Scholar finds 30 results. Furthermore two of these articles are "cited by" from 22 to 25 other articles which may lead to further research studies that discuss this syndrome in conjunction with sudden infant death syndrome. This search will yield you: <http://tinyurl.com/gwfp yok> and include the following:

### Endogenous alcohol production by intestinal fermentation in sudden infant death

P Geertinger, J Bodenhoff, K Helweg-Larsen - Zeitschrift f, 1982 - Springer

... N, Hisamura M, Murao M, Toshida T, Takahashi K (1976) The auto-brewery syndrome m the repeated attacks of alcohol intoxication due to the overgrowth of Candida albicans in the gastrointestinal tract. *Materia Med Pol* 29 : 1-7 4. Geertinger P (1968) Sudden death in infancy. ...

Cited by 22

[PDF] from [hindawi.com](http://hindawi.com)

### Dysautonomia in autism spectrum disorder: case reports of a family with review of the literature

D Lonsdale, RJ Shamberger - Autism research and , 2011 - hindawi.com

... JN Barker, F. Jordan, DE Hillman, and O. Barlow, Phrenic nerve thiamin and neuropathy in

Sudden Death Infants, in Thiamin: Twenty Years of ... at Publisher View at Google Scholar View

at PubMed; H. Kaji, Y. Asanuma, and H. Ide, The auto brewery syndrome: the repeated ...

Cited by 3

[PDF] from [lsu.edu](http://lsu.edu)

### Development of the Neonatal Rat As A Model For Sudden Infant Death Syndrome: Cardiorespiratory Effects of

RW Stout - 2003 - etd.lsu.edu

*... Utilizing weanling gnotobiotic rats, combinations of nasal bacterial isolates obtained from SIDS cases caused sudden death, with lesions similar ... overgrowth of gastrointestinal yeast in a condition known as Auto-Brewery Syndrome (Kaji et al., 1976). ...*

[HTML] from [comprehensivephysiology.com](http://comprehensivephysiology.com)

### Exercise and type 1 diabetes (T1DM)

P Galassetti, MC Riddell - Comprehensive Physiology, 2013 - Wiley Online Library

*... Easy fatigability. Lack of energy. Neck or jaw discomfort. Shoulder pain with a history similar to bursitis and related to activity. The most feared risk of initiating a physical activity regimen is sudden death secondary to an arrhythmia or an ischemic event. ...*

Cited by 24

## VET FOR ARTICLE QUALITY

Search this topic using both phrases in Summon for use for medical or legal cases and to vet for source quality. If you limit the Summon search to journal articles (there are 35), you can then limit them to peer reviewed; 29 are (<http://tinyurl.com/j6pzdtn>). You can then search these article titles, if desired, in Google Scholar to learn what additional sources have cited them.

You can also add "evidence based" to the search in Google Scholar and get this result of three found sources:

*"AUTO BREWERY syndrome" AND ("sudden death" OR "sudden infant death") AND "EVIDENCE BASED"*

### Endogenous ethanol production in patients with Diabetes Mellitus as a medicolegal problem

M Simic, N Ajdukovic, I Veselinovic, M Mitrovic - Forensic science , 2012 - Elsevier



... *Abnormal gut fermentation: the Auto-Brewery Syndrome. ... Endogenous alcohol production by intestinal fermentation in sudden infant death. ... Evidence-based survey of the elimination rates of ethanol from blood with applications in forensic caseworks.*

Cited by 7

#### **Dysautonomia in autism spectrum disorder: case reports of a family with review of the literature**

D Lonsdale, RJ Shamberger - Autism research and , 2011 - hindawi.com

... *as demonstrated in the phrenic nerve of a victim of Sudden Infant Death Syndrome (SIDS ... behavior from yeast presence has been referred to as the auto-brewery syndrome [65], also ... Hillman, and O. Barlow, Phrenic nerve thiamin and neuropathy in Sudden Death Infants, in ...*

Cited by 3

#### **Exercise and type 1 diabetes (T1DM)**

P Galassetti, MC Riddell - Comprehensive Physiology, 2013 - Wiley Online Library

... Sudden death may be more likely to occur when underlying coronary disease is undiagnosed, and undiag-

nosed CAD is particularly common in persons with T1DM who have been living ... A pertinent evidence-based review on screening procedures was published recently ...

Cited by 24

Looking at these results, one might become interested as well in looking at the relationship between this syndrome and diabetes, a chronic illness. Here is a link to what Google Scholar has to offer: <http://tinyurl.com/nlyqocq> (80 results)

A Google Domain Limited Web Search (PUBMED) of these names for this condition in conjunction with diabetes turns up a far greater result, over 600 results.

Temple Summon Search finds only 18 sources in a search of the name of this syndrome, but one source listed in the results uses the phrase "Endogenous ethanol production in patients" in the article title. <http://tinyurl.com/hpga5uu>

#### **Endogenous ethanol production in patients with Diabetes Mellitus as a medicolegal problem**

by Simic, M; Ajdukovic, N; Veselinovic, I; more...

Forensic Science International, 03/2012, Volume 216, Issue 1-3

Searching this new phrase in Google Scholar leads to this link to a set of 14 results that are cited by over 100 more sources.

#### **SUMMARY**

Even though it's considered a rare disease, auto-brewery condition is a serious concern because it's a root cause for increase in number and perhaps earlier onset of long term care cases. This example demonstrates that you might find a great deal more if you use more than one phrase in a search. Using synonyms and keeping phrases to their shortest essential wording will probably yield significantly more. It will also expand your knowledge if you find sources that cite an article or book you decide is very useful in your research. 🍷



**David Dillard, BA, MLS** has degrees in history and library science. He has worked at Temple University Libraries since 1970, first in the Business Library; he moved to Reference and concurrently began to learn bibliographic database searching. He now does collection development for Tourism, Hospitality, Sports Management, Recreation, Therapeutic Recreation, Public Health, Kinesiology, Disabilities, Social Work and Communication Disorders. Dave started sharing information sources and answers to questions on internet discussion groups around 1998 and that has grown to a cottage business. He started a network of public search engine indexed discussion groups and archives for sharing of posts of good websites, bibliographies of sources on a wide variety of topics, and news story summaries with source citations and links to those sources. He is a regular on several nursing specialty lists and is very open to contact from anyone to help with searches on any topic..

# Acquisition of Medical Literature/Information: A Virtual Roundtable Discussion

Curated by Elizabeth Zorn, RN, BSN, LNCC

**Keywords:** medical literature, research, databases, resources

*Medical literature research is an important aspect of most legal nurse consulting (LNC) and nurse expert practice. Attorneys use the results of our medical research to evaluate many aspects of a medical legal tort claim, including standard of care in medical malpractice cases and causation/damages issues in all claims involving physical and/or psychological injuries.*

Over the past 20 years, there has been an explosion of online and other digital resources available to LNCs for doing medical literature searches and obtaining full text information and audio-visual resources relevant to the medical issues in the cases we work on. LNCs must learn to identify resources that are reliable and authoritative, and to manage the costs associated with them.

AALNC sent out a questionnaire asking LNCs and nurse experts about their sources for obtaining full text medical literature and other types of medical information, the costs

associated with obtaining this medical information and whether these costs are passed along to attorney clients. Among the 25 respondents, 12 are independent LNCs, 10 LNCs are employed inhouse, 2 LNCs do both independent and in-house work, and one LNC does medical case management.

## **JLNC: Do you obtain full text journal articles or other medical literature as part of your LNC or nurse expert practice?**

Almost all responding LNCs (22/25) affirmed that they obtain medical literature during the regular course of their work. Only 4 LNCs were equivocal,

responding respectively “try to,” “sometimes if needed,” “rarely” and “not often.”

## **JLNC: What fee-based online resources or data bases do you use to obtain full text journal articles?**

Respondents cited the following fee based resources for obtaining full text articles:

- Professional clinical associations (6 LNCs)
- US National Library of Medicine, including MEDLARS, MEDLINE, PubMed & Healthgate (4)
- UpToDate (5)
- Journal/text publishers (5)

## *LNCs must learn to identify resources that are reliable and authoritative, and to manage the costs associated with them.*

- LoansomeDoc (2)
- JSTOR (1)
- Research Solutions.com (1)
- Lexis Nexis Med Mal Navigator (1)
- CINAHL (EBSCO) (1)

Six LNCs responded that they don't use fee based resources to obtain full text articles due to the cost. Five LNCs responded that they obtain article copies from local university or public libraries, for a small per-page fee or small flat rate via interlibrary loan.

### **JLNC: What free online resources or databases do you use to do literature searches and/or obtain full text journal articles?**

By far, the most frequently cited free resources are those associated with the National Library of Medicine:

- US National Library of Medicine, including MEDLARS, MEDLINE, PubMed & Healthgate (16)
- Google/Google Scholar (9)
- National Institutes of Health (6)
- Journal Publishers (peer reviewed) (5)
- Medscape (4)
- Centers of Excellence (eg, Mayo Clinic) (3)
- Medical libraries associated with medical schools (3)
- National authoritative agencies (eg, CDC) (3)
- Google Books (3)
- FDA (2)
- Web MD (2)
- Clinical guidelines promulgated by professional associations (2)

- eMedicine (2)
- Free access to journal databases based upon alumni status (2)
- State Health Department (1)
- Hospital resources (1)
- Freemedicaljournals.com (1)
- Medmaster.net (1)
- Amedeo.com (1)

### **JLNC: What resources do you use to obtain textbook literature?**

- Purchase text (new or used) (11) – including Amazon, directly via the publisher or professional association, or used textbook vendors such as Half.com or Fetchbook.com
- Borrow from library (5)
- Borrow from colleague (2)
- Google books (2)
- Alumni access to library or online resources (1)
- Medical mobile Apps (1)
- Scribd.com (1)

### **JLNC: Do you rent or borrow textbooks?**

Most (16) LNCs replied that they neither rent nor borrow texts. Six LNCs rent or borrow texts occasionally. One LNC responded “the firm has a contract with New York Academy of Medicine Library and New York University Library to obtain and loan books and articles. The fee is charged back to the case it is being used for.”

### **JLNC: Do you obtain medical literature at a medical library?**

Over half (15) of the LNCs replied that they do obtain literature by visiting a

medical library. The feasibility of doing this likely depends in part upon the availability of a medical library within the LNCs geographical area.

Comments by respondents included:

- With the advent of the internet, I haven't been to a medical library in many years
- I only go to a medical library if it's not cost effective to use online literature retrieval services
- The firm passes the cost to the client in the form of administrative costs
- Have in the past – not as much now

### **JLNC: Do you obtain medical literature via interlibrary loan at a public library?**

Only 4 LNCs responded that they use the interlibrary loan services at a public library to obtain journal articles. 3 additional LNCs responded that they do so “rarely.”

### **JLNC: If you work independently and there is a charge to obtain the literature online or at a library, do you pass this cost along to the attorney?**

Among the independents who responded, five LNCs said they pass along the charges associated with obtaining medical literature and one LNC does not. Several LNCs qualified their answers:

- Depends, have done both
- I would include it in my charges after confirming the attorney wants me to purchase the article
- Yes, it's a cost of doing business
- Depends upon how much research; if only obtain a few articles, this is included in my base rate. If doing a lot of research and obtaining a large number of articles, I would charge for this.
- It depends upon the cost; I do not pass along minor charges but rather, use this as a marketing tool promot-



ing client service. I do pass along major charges

- I will ask my attorney-client if (s) he is willing to pay for acquisition of the article. I also check to make sure they don't already have access to a subscription/membership to some entity that would allow access to the literature at no additional cost.

In-house LNCs have access to paid subscriptions/data bases approved by the firm's partnership. One (presumably) in-house LNC responded "if the firm feels compelled to obtain a particular article/book sometimes they will spend money to obtain it. Funds for research are very limited. Would like to see this expanded within our firm."

#### **JLNC: Do you pay copyright charges for literature you obtain? If so, do you pass these charges along to the attorney?**

7 LNCs responded "yes" to both questions and 7 LNCs responded "no" to both questions. Six LNCs responded that the questions were "not applicable" to their practice. Qualifying comments included:

- Copyright charges are included in the fees for articles obtained via PubMed and LexisNexis.
- This is the reason I don't use that many articles; I am not sufficiently familiar with copyright laws.
- Yes, sometimes we have copyright charges and they are charged back to the client case
- Yes, we pay copyright fees but do not consistently pass the charge on to the attorney
- Copyright charges are part of the cost of purchasing the article directly from the journal. However, if I paid the copyright charges then of course I would pass them on to the attorney as a cost of doing business.
- The attorney must obtain the copyrighted material if used in exhibits.

Otherwise, there is no copyright charge.

- All copyright charges are covered by the attorney-client.

#### **JLNC: Do you utilize instructional videos on You Tube when researching medical topics?**

8 LNCs responded "yes," 8 LNCs responded "occasionally" or "sometimes," and 8 LNCs responded "no" or "rarely."

Commentary included:

- Sometimes, if it shows a procedure that is at issue.
- Instructional videos - not often, but yes when a case involves a surgical or procedural technique
- Very rarely – if so usually for own education.
- Yes, just did it this morning for neonate PICC line insertions.
- Occasionally for unfamiliar procedures, but I check out the source! As an OR nurse for many years, I sometimes see information that I know is not accurate.
- We use instructional videos and You Tube videos for researching topics
- Sometimes I have used instructional videos on YouTube when researching medical topics. I will put a link from a video in my report for the attorney to watch and understand a particular medical topic.
- Rarely for instructional videos; do not consider You Tube reliable
- Rarely, but I have used that type of video to instruct attorneys.
- Yes, especially when I find demonstrations to help attorneys understand.
- I do view You Tube videos for my own learning purposes, and may on occasion refer an attorney to one. I do not typically include them in my work product.

Many thanks to all who took the time to share your experiences and opinions.

We will continue to solicit feedback from legal nurses on a range of issues pertinent to our practice. Thank you to Julianna Clifton at AALNC for compiling the data.

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

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

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



# The Standard of Care: Universal Concept or Mythical Creature?

Peter I. Bergé, JD, PA

**Keywords:** standards of care

*The standard of care (SOC) is the critical element in most professional malpractice cases. Attorneys and medicolegal professionals tend to think of the SOC as a well-defined term, and seek to present irrefutable proofs of an SOC that will make certain that the party on whose behalf they are working will prevail. The concept of the SOC is surprisingly amorphous, and the ultimate judge of the definition and nature of the SOC is usually the group least qualified to make that decision. Readers will decide whether or not the definitive SOC exists and, if so, where to find it.*

## WHAT IS THE STANDARD OF CARE?

“Dr. Schmoie deviated from the standard of care when she ordered two milligrams of epinephrine to be administered by injection to plaintiff, who presented to the emergency department complaining of a mild rash.”

This statement, familiar in form to any reader here, is taken from a medical malpractice claim which was settled without the necessity of filing suit. The claimant, a healthy, vigorous 30ish male who suffered a myocardial infarction as a result of the epinephrine overdose (as documented by the hospital’s cardiolo-

gist) also alleged that the nurse deviated from the standard of care not only by failing to question the prescription for the four- or five-fold overdose, but also by deciding on her own to give that megadose intravenously. Clearly, that was not a case that would inspire much controversy as to its merit. But before

moving on too quickly, what is the “standard of care” (SOC) that’s referred to? More precisely, what does the phrase mean? Is it a uniform concept that is widely agreed on? Or is it an elusive creature, more mythical than real?

Some years ago I decided to search for the universal definition of the SOC, a quest for which took me over the river and through the woods, but (to brazenly mix metaphors) never led me to that particular pot of gold.

Why is such a ubiquitous concept so hard to define? I’ll give some examples.

*In legal terms, the level at which an ordinary, prudent professional having the same training and experience in good standing in a same or similar community would practice under the same or similar circumstances.*

This definition starts off well, and then runs into complications. What does “in good standing” mean in this context, and what does it have to do with the SOC? Do we expect something different from professionals who are not in good standing? The other troubling phrase is “in a same or similar community.” The concept of a community standard of care is generally outmoded, although there may still be some jurisdictions that apply the standard to primary care. The theory is that there would be a different SOC depending on where the practice occurred. By and large, that is a dated idea, as medical knowledge is national (or even international), given the modern nature of major medical journals, texts, and studies. The phrase, “under the same or similar circumstances,” comes close to universal application, at least in concept.

*The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circum-*

*stances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.*

This is a statutory definition. The first phrase, “the prevailing professional standard of care,” is both somewhat circular and redundant. Each party will seek to prove that a different SOC is “prevailing.” Similarly, the question of what is “recognized” is subject to debate. And the term “reasonably prudent” is, in my opinion, an oxymoron. Is there a level at which prudence becomes unreasonable? Once it does, I would argue that it is no longer prudent. Nonetheless, Florida’s definition incorporates two nearly universal concepts: similar circumstances and the prudent, similarly qualified practitioner.

*The standard of conduct that is required to meet the obligation of “due care” is based upon what the “reasonable practitioner” would do in like circumstances.*

The foregoing is probably the closest that we will find to a universally accepted definition, in part due to its brevity and simplicity. It derives from the basic tort law concept that we all have the duty to exercise due care insofar as our actions affect others. An advantage of this definition is that it focuses on the “reasonable” practitioner while avoiding the term “average.” The distinction between “average” and “reasonable” is highlighted by the holding in *Estate of Elkerson v. North Jersey Blood Center*, 342 N.J. Super. 219 (App. Div. 2001). In *Elkerson*, a claim was brought on behalf of a blood transfusion recipient who was infected with hepatitis B virus (HBV) in 1983 and ultimately died of cirrhosis of the liver. The suit alleged that the blood center was negligent in failing to use the available test for HBV core antibody as part of the screening process.

The defense presented testimony to the effect that the industry standard was to use the HBV surface antigen test,

but not to test for HBV core antibody. The trial court held that the ordinary “reasonable and prudent” negligence test did not apply since a blood bank should be considered to be a health care professional, and instead instructed the jury that since the defendant represented that it “possess[es] that degree of knowledge, skill and care which is possessed and used by the average Blood Bank” that “[t]he required knowledge, skill, and care must be judged by the standard practice of blood banking in April of 1983.” *Id.* at 228.

However, plaintiffs had presented testimony from an eminent expert who asserted not only that the HBV core antibody test had been available, and that its use would likely have prevented transfusion of infected blood to the plaintiffs’ decedent, but that he had advised the blood bank industry to use the test prior to that time, and that its failure to employ the test was unreasonable and negligent.

The New Jersey Appellate Division held that “[t]he standard is not what test the average member of the blood bank industry used to screen for the hepatitis B virus in 1983, but what test a reasonable blood bank *should* have used given reasonably available testing alternatives at the relevant time.” (emphasis added) *Id.* at 230. The court further observed that “[e]vidence of the custom or practice of a particular industry does not conclusively dispose of the issue of the proper standard of conduct...” *Id.* at 229, citing *Wellenheider v. Rader*, 49 N.J. 1, 7, 227 A.2d 329 (1967). The *Elkerson* court neatly distinguished between the “average practitioner” standard, and the “reasonable practitioner” standard, pointing out that the former would allow for the majority of practitioners to behave unreasonably, as the majority of blood banks were doing in 1983. The case is worth reading in its entirety as an illuminating example of reasoning regarding this aspect of SOC.

In the end, the universally accepted definition of the standard of care is found only in myth. Readers should familiarize themselves with the relevant case law, statutes, and custom in the jurisdictions where they practice, keeping in mind that whatever definition of the SOC predominates will vary from state to state, area to area, attorney to attorney, and courtroom to courtroom.

## WHERE IS THE STANDARD OF CARE FOUND?

### Learned Treatises

Medicolegal consultants most often look for a publication which definitely establishes the SOC. This may be a textbook (less commonly, as they are often out of date upon publication except in updated online versions), published standards, guidelines or recommendations, studies, review articles, manufacturer's instruc-

tions, course curricula, etc. In order to be admissible, such materials would have to fall under an exception to the hearsay rule. Under the Federal Rules of Evidence (FRE), R. 803, such publications would be considered to be "learned treatises."

*To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.*

The central point is that those materials generally go before the jury only by means of validation through expert testimony. While the FRE have not been adopted by all states, there is likely to be an equivalent rule in those states where they have not. Further, any expert can (and often will) testify that the particular learned treatise being proffered does not establish the standard of care. She may flatly contradict assertions in the publication, and point out that the "standard" held out as being definitive is really only a recommendation, or that it does not apply precisely to the facts of the case. An expert may also present other publications, some appearing equally authoritative, which differ either subtly or starkly from the one being offered by the adversary. The search for a publication that presents incontrovertible and unassailable evidence of the SOC is similarly successful to the quest for a living, breathing pair of unicorns.

### Statute or regulation

To the extent that a given standard of care is set out in legislation, or in regulations developed under such legislation, it will strongly support the position of the party making that argument. Given that SOC's are often fact-sensitive, however, even statutes or regulations may not prove to be an infallible source. At a minimum, it is wise to research case law for decisions that support or contradict a given interpretation of an SOC found in statutes or regulations.

### Judicial notice

Under the doctrine of judicial notice, the court may accept as fact something that "is generally known within the trial court's territorial jurisdiction; or... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." See FRE R. 202 and equivalent state evidence rules. In a civil case, the court may instruct the jury to accept the noticed fact as conclusive. Although it would be unusual,



a court could take judicial notice, on its own initiative or at the request of a party, of a given standard of care.

### Admissions

An admission by a party to the case may establish a given standard of care. This might occur by a direct admission, written or otherwise. If a defendant institution adopts an SOC in its policies and procedures, that adoption could be considered to be an admission. An individual defendant, or a witness whose testimony binds a defendant, can also admit a standard of care through sworn testimony. For example, in a case involving delayed diagnosis of colon cancer, an internist admitted at deposition that the recommendations of the American Cancer Society for screening for colorectal cancer set the standard of care.

An admission may also be obtained through a formal “request for admissions” under the rules of court. In that procedure, one party submits a request that the other party admit a given standard of care. If there is no response within the time set out by the rules of court, the fact is deemed to be admitted at trial. The responding party also might (although usually won’t) admit the SOC.

### Court: the end of the rainbow

When searching for pots of gold, the end of the rainbow is elusive, since in real life rainbows are created by an optical phenomenon that usually doesn’t allow for the end to be located. The pot of gold represented by the standard of care, however, can reliably be found in court. The elusiveness of the element remains, however, because you may find a different pot of gold in every courtroom.

The SOC for a given case is invariably established in court, and it is almost always determined by the people who have the least expertise in the matter:

*Some years ago I decided to search for the universal definition, a quest for which took me over the river and through the woods, but (to mix metaphors) never led me to that particular pot of gold.*

the jury. The mainstay of establishing the SOC is expert testimony. A witness who is qualified by the court as an expert may testify as to what the SOC is according to his education and experience, and using the principles accepted in the professional community. Under some circumstances, that is sufficient basis to establish the SOC. Depending on the rules of court and rules of evidence in the jurisdiction, the expert may be required to support the opinion with learned treatises that demonstrate generally accepted scientific information. If the opinion does not meet the requirements of the jurisdiction (a topic that’s beyond the scope of this discussion), the court may bar the testimony. In any case, *the learned treatises by themselves do not establish the standard of care.* This is worth keeping in mind when searching for that “definitive” article or guideline, which may be nearly as difficult to find as a leprechaun lurking around the corner from the end of a rainbow.

For each expert opinion supported by venerable learned treatises, there is another expert whose opinion contradicts that of the first one, and she will often support that contrary view with impressive publications. All counsel will exhort the jury to believe that their experts are right, and the jury is usually left on its own to decide what the SOC really was, and if defendants followed it. Even if the jury is directed by the court to accept a given standard of care, there is no way to predict whether or not it will do so in its deliberations.

Given that it is the pivotal element in professional malpractice cases, the standard of care is remarkably elusive and ephemeral. The SOC that you painstakingly track down in your pre-suit research will likely not survive to see trial. The SOC that is presented to the jury in this case may not be the one that they accept, and the SOC established by this jury will likely not apply to the next, similar case. In fact, the mythical being that the SOC most closely resembles may be the phoenix. At the end of each trial, an SOC (whether that of the plaintiff, the defense or both) will likely go up in flames, and another will rise from its ashes for the next case. 🍀



**Peter Bergé** is a partner in the litigation law firm of Bendit Weinstock in West Orange, New Jersey, with a focus on medical malpractice. He is a licensed physician assistant (PA) in New York State and has over 30 years of health-care experience. He is a member of the American College of Legal Medicine and the American Academy of Physician Assistants in Legal Medicine. Peter lectures on medicolegal topics at Pace University and to local, regional, national and international healthcare and legal organizations. He has published textbook chapters on medical and nursing malpractice. He can be reached at [pberge.atty@yahoo.com](mailto:pberge.atty@yahoo.com)



# Social Media: It's All About the Conversation!

Annette Powers-Kilburn, RN, MAOM, CLNC

**Keywords:** social media, Facebook, LinkedIn, HIPAA

*Every Sunday morning, my husband and I go to a local village restaurant. Together. This past weekend, the waitress looked at us and said if she didn't know better, she'd think we weren't married to each other. We looked up in surprise and she simply said, "You're actually talking to each other!" Although everyone chuckled, she had a very interesting point. We talk, we look at each other, full in the face, and talk. I invite you to go to a casual restaurant and observe. How many couples do you see that are simply eating, but not talking to each other, almost as if they are tolerating the presence of the spouse? How many families have their cellphones in front of them rather than engaging in conversation with the people sitting right there?*

**S**ocial media is pervasive in our society today. Personally, I get four different emails through my cell phone, 2 work-related and 2 personal. I hate to admit that I also have a few

"essential" games! A part-time clinical position requires me to be on call 24/7. Although staff only occasionally needs me, I carry the phone just in case. I text with family, colleagues, and supervisors.

My husband and I each have our own businesses; mine is an independent legal nurse consulting (LNC) firm. Customers reach us by phone, texting, and email. I have networks across the coun-

try in my specialties through listservs and chat apps (e.g., Instant Messenger and WhatsApp). Of course, there's Facebook with both my personal pages and business page, Myspace, LinkedIn, Twitter, and many I don't use for business or at all like Instagram, SnapChat, Google+, Pinterest, YouTube, Vine, SlideShare, forums, social review sites (e.g., Yelp, TripAdvisor), and social bookmarking sites (e.g., StumbleUpon, Reddit).

I am by no means exceptional. Jeff Turner, founder of RealEstateShows.com and past President of Zeek Interactive, currently President of RealSatisfied, travels the country giving presentations on using social media in the real estate industry. However, his message is relevant to all industries. The message in his, "The Science of Social: Why Social Media is Here to Stay," (2009) at the New Media Convention in Atlanta, was quite simple: If you are not using social media as part of your business, you risk staying mired in the old way of doing business.

## WHY SHOULD WE USE SOCIAL MEDIA?

Whether you are an independent LNC or work in-house for a law firm, your work is about the conversation. You analyze the records, looking for the conversation within that record that tells the story. You read the depositions, a very formalized style of conversation to gather information. You research, create chronologies with words and tables, write reports to provide information to your attorney. The all have a common base, the case.

Social media are just more tools or ways to converse. Bright and interactive tools, to be sure, but just tools! There are many choices for those conversations. Many independent LNCs have their own web pages with matching email accounts. A webpage can present a professional image as long as it

is maintained. Blogs offer a way to publish on particular topics, allowing us to showcase our knowledge and abilities. LinkedIn allows us to post articles, give a brief resumé of our work and achievements, and establish professional connections. Specialty groups on LinkedIn can be public or kept private for more private conversations. Chat groups such as Whatsapp allow quick conversations. Whether for simply sharing a virtual morning cup of coffee, getting support through a tough situation, or asking for advice, business networking is essential. Ultimately, social media are avenues to increased exposure and gaining relevant industry information. Remember, it's all about the conversation!

## LOOKING AT THE PROFESSIONAL GUIDELINES ...

Many employers have social media policies for their employees, whether or not that employee is 'on the clock.' Each new employee should get them, and all staff should review them periodically for changes. One policy from a rural skilled nursing facility was very basic: staff were to say nothing about work, either good or bad. Why? A conversation about a great day at work where people have known their neighbors for years can be uplifting. However, think about the comment about a cranky and unreasonable resident or a death; that's about someone's loved one, and everybody knows who.

Professionalism is critical. It is imperative to know and understand HIPAA (Health Information Portability and Accountability Act) to avoid violating it. One of the most common errors is mentioning identifiable information about a patient. It doesn't have to be the actual name (an obvious HIPAA violation); anything that could lead to identification of the person could be a HIPAA violation.

In 2013, several employees were fired for a picture posted on FaceBook. One off-duty employee took a picture of a woman's backside in the emergency room. His message said simply, "I like what I like." The woman's face was not visible, yet the employer, Spectrum Health, terminated that employee and all employees who commented or 'liked' the photo, including a registrar, a physician's assistant, and a physician. Other examples: identifying the hospital by name (many of us list our place of employment on our Facebook profiles), referring to a particular accident or incident, a comment that links to a news article or an attorney, even commenting on a noncompliant patient or a situation. If those events can be linked to an identifiable person, that is a violation. Plain and simple.

Personal and professional lives are not necessarily separate. A nurse who uses offensive language on Facebook can certainly be considered unprofessional, even if that communication is on a personal page. A nursing student was removed from an associate

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*If you're not using social media as part of your business, you risk staying mired in the old way of doing business.*

degree nursing program for posts he made on Facebook. These included complaints about classmates with testing accommodations, threatening to give someone a hemopneumothorax with an electric pencil sharpener, called another student an inappropriate name, and claiming there wasn't enough whiskey to control his anger. Although he acknowledged that, as a professional, he could be held to standards that govern the nursing profession, he also admitted he didn't "understand the carryover of ethics from the job to your personal life." (Keefe v. Adams). On appeal, the court disagreed, saying that the nursing program had properly "incorporated national established nursing standards."

Social media conversations often demonstrate the disinhibition effect. With fewer constraints, people speak without normal conversation filters. Further, without visual cues for facial expression, we can't interpret body language and gestures that guide the true intent of the message. Without voice inflection, we miss the clues we need to recognize sarcasm, empathy, or anger more accurately.

Desert View Care Center had provided each employee with its social media policy, which was then signed by each employee. An employee made a threatening statement on Facebook

about a patient. What did he post? "Ever have one of those days where you'd like to slap the everloving bat snot out of a patient ...." Although he claimed the post was not a true threat or willful, but a rhetorical statement, the court affirmed the decision that he had engaged in employment-related misconduct. (Talbot v. Desert View Care Center).

### HOW DO YOU CHOOSE WHETHER OR NOT YOU WANT TO USE SOCIAL MEDIA?

Be sure to pay attention to the new shiny social media format, but before you jump into the social media mix, stop and think. Needs are different for networking and for gaining visibility by marketing. Will a particular medium fit your business needs and help you meet your goals?

Demographics in a 2015 Social Media Marketing Industry Report analyzing social media for business were interesting: 58% female, majority were in the 30-59 age range with 40-49 years old being the median, and 52% of the respondents were from the United States. Among self-employed business owners, nearly 60% felt their most valuable tool for content was blogging, although visual content was deemed equally important for most businesses.

There are virtual "doctors' lounges," where physicians share case images to help educate others, share successes (and failures), and ask for input from other physicians and nurses. Three, Figure 1, QuantiaMD, and Daily Rounds for Doctors, are open to nurses (license verification sometimes needed). Figure 1 allows healthcare professionals to share high quality clinical images, basically a library of cases. Daily Rounds allows you to narrow the focus based on specialty (e.g., primary care, pediatrics, radiology, oncology, and cardiology). QuantiaMD serves as a social learning and collaboration platform for physicians.

### IF YOU HAVEN'T ENGAGED IN THE VIRTUAL CONVERSATION YET, WHERE DO YOU START?

Facebook, Twitter, LinkedIn, Google+, YouTube and SlideShare are several top choices for business. Businesses just getting their feet wet in social media most often start with FaceBook, followed by Twitter and LinkedIn. As a business matures, its needs change, so it may add social media such as Google+ and YouTube. New apps and options are appearing quickly. The battle of the "pretty shiny things," as Turner calls it, is to grab our attention. This can be distracting and time consuming! Be aware that social media can be a time sink!





*The key to effective social media use is focusing on the conversation, remembering to listen to the people we seek to engage. If we don't do that, email or comments to a post will be meaningless.*

## SO YOU WANT TO ENGAGE IN THE VIRTUAL CONVERSATION...

Basic guidelines are easy to find for healthcare professionals.

- Know your facility's social media policy. If you are an independent LNC, think about this and write one if you use staff or subcontract. You can get good ideas from other healthcare social media guidelines.
- Understand HIPAA and how to not violate it.
- Think first, post later! Save as a draft and come back to it later. Don't forget that others cannot see your expression, hear your inflection, or understand the sarcasm you intended. Using emoticons to communicate your nonverbal content is fine for social interactions but generally not appropriate for business purposes.
- Not sure about the post? If you have any doubt about whether or not you should post something ... don't!
- Remember that personal postings on Facebook or other sites really do affect your professional reputation.

Look deeper to use social media more meaningfully. The Mayo Clinic has led the way by creating platforms for patients and staff to talk about their experiences. The Clinic developed the Mayo Clinic Center for Social Media, training and exploring social media in healthcare. Their inspiring and insightful suggestions include:

- Use your own business to set the priorities and goals.
- Take the time to learn about the platform. Explore, play with it, ask others how they use a medium and why.
- Don't be afraid to ask for help!
- Each community has mores, and may have formal standards for posting. Take the time to look at the conversations, what is the tone and how the messages are conveyed.
- Plan. How does this fit into your needs? Does it fit into your business? How do you think it should be utilized for best benefit? But don't forget to revisit all this on a regular basis and re-plan, often! (Mayo Clinic, p. 15).

## SUMMARY

Everything LNCs do is about the conversation. We talk to the attorneys, review, write, talk some more, depose, testify, talk some more, write emails, post blogs, exhibit, talk some more, market, and network.

The key to effective social media use is focusing on the conversation, remembering to listen to the people we seek to engage. If we don't do that, email or comments to a post will be meaningless. No technology-supported conversation can replace the face-to-face conversation; technology is just a tool. But, as Jeff Turner says, social media can be a way to make "conversations that make a difference in your organization. ... It is a tool that can transform our businesses into something truly amazing."

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**Annette Powers-Kilburn** has clinical experience in Skilled Nursing Facilities, Long-Term Care, Memory Care, and is clinically active with Developmentally Disabled. She is a Certified RN Trainer through the Ohio Department of Developmentally Disabled. She owns her own independent legal-nurse consulting firm, Powers-Kilburn & Associates. She can be reached at [apowers@powerskilburn.com](mailto:apowers@powerskilburn.com).



# Social Media as a Professional Tool: LinkedIn for the Legal Nurse Consultant

Elizabeth Murray BSN, RN, LNCC

**Keywords:** social media, advertising, LinkedIn, connections, profile

*LinkedIn, launched in 2003, is a well-known website for professionals with over 300 million members worldwide. According to its published information, LinkedIn is a publicly held company with revenue from member subscriptions, advertising sales, and talent/recruiting solutions. LinkedIn can be a useful and free tool for LNCs to improve contacts and networking, and can lead to interesting and lucrative opportunities in the medical-legal field.*

## CREATING A SOCIAL MEDIA PRESENCE

Jumping into social media can be intimidating. Follow these steps to use social media to your business advantage. A free basic account will suffice for most LNCs.

### 1. Create a Profile

Think of your online profile as an enhanced business card. It's an opportunity to tell future colleagues and potential clients everything you'd like them to know. A LinkedIn profile highlights your current and last positions and education. Use each entry to elaborate on your skills in a way that you could never could in a

brief introduction. You can bullet-list specific elements as in a traditional résumé, and it is also easy to add documents, photos, links, videos, and presentations. All material should be accurate, and don't sell yourself short. Add your skills, education, and certifications. When you're finished, click the blue "View profile as" on your profile for a preview, and amend as needed.

Visit "Privacy & Settings" early on. Decide if you want LinkedIn to post all of your new activity, such as profile updates. Be sure your contact information is accurate. Decide who can see your activity feed, and what others see when they view your profile.

### 2. Add a Picture

It's important to use your photo in your profile. This lends credibility and a recognizable face. The fact is, most professionals will not connect to a profile that has no picture. However, it's equally important to use a professional picture. If you don't have a professional business photo yet, be sure to choose a current, good-quality picture of yourself wearing professional attire. Don't chose a picture that is obviously cropped from a vacation shot, party, or your bedroom or living room, and never use a "selfie."

## MAKE CONNECTIONS

Now you're ready to make connections. Click on "Connections" at the

top of the LinkedIn homepage, and you will receive lists of potential connections based on your professional email address book and people with whom your existing connections are associated. Click “Connect” on the profiles of colleagues with whom you would like to be professionally associated. There is nothing wrong with connecting to the receptionist at your dentist’s office or other personal acquaintances, but keep in mind that this site is not a personal social media site. Your recommended connections will be more accurate if you connect with more people in your industry or desired industries.

Clicking “Connect” generates a generic email that states that invites that person to your professional network. Add to the message when appropriate. For instance, when you’ve just met people at a conference or meeting, you could note that you enjoyed meeting them and hope to see them again soon. This helps makes your invitation stand out, making your connection more memorable. If you don’t already know target contacts from emails or common groups, LinkedIn will also ask how you know them.

Always follow up all face-to-face meetings with an invitation to connect on LinkedIn. Use the messaging section to mention your previous discussions and interest. While handwritten notes are still lovely, a gracious private message (written professionally and without spelling and grammatical errors) can help new acquaintances remember you and know how to contact you. If you collect business cards at an event, take the time the next day to connect with each of them individually.

When you connect with others, your news feed will be full of information and posts of interest. Expand your connections and news feed by joining professional groups and following companies with similar interests. Search

for groups with many posts, such as AALNC, and participate in discussions; you could be among the first to hear about available work in legal nurse consulting. Follow companies such as the American Bar Association and LexisNexis to read informative and educational posts about legal writing and news items.

## CONTRIBUTE POSTS OF INTEREST

Post items of interest that you read in the newspaper, professional journals, and professional websites by clicking on the article’s LinkedIn button. Add your own comments or questions about it on your post. “Like” and comment on items of interest that others post.

Your desired audience will associate your face and name with the LNC profession when you post interesting articles and news clips related to the medical, legal, and nursing fields. Keep in mind, however, that this is not Facebook. Do not post personal vacation photos, pictures of your cat, and funny videos of your children. These are unprofessional and reflect poorly on your business. Be very careful about posting commentary on political or religious topics, too, as these can backfire.

## IMPORTANT POINTS TO REMEMBER

- When you view profiles of others using LinkedIn’s basic, free setting, they will see your name and picture. Consider whether you want former or potential co-workers or clients to know that you are checking on them.
- Connections can “endorse” each other for skills; it’s collegial to do this for people you have worked with or know. However, because connections that you have never met will endorse you, many people take the “Skills & Endorsements” section with a grain of salt. You probably don’t want to

rely on it to vet an expert or hire a subcontractor.

- If you have a professional blog, post the link to new blog entries on your LinkedIn and professional Twitter and Facebook pages. By cross-advertising the blog you will increase traffic to your site.
- Frequently re-visit your profile to see how it looks to others, whether it’s current, and what connections have popped up. Respond to messages and new requests for connection in a timely manner.
- Follow LinkedIn’s Professional Guidelines by providing accurate profiles and professional and collegial interactions and posts.

Get out there and connect! Invite former and current colleagues to connect with you and search potential connections. Once you’ve connected, build relationships through posts, comments, and personal messages.

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**Elizabeth Murray, BSN, RN, LNCC** is an independent legal nurse consultant with and owner of Elizabeth Murray Consulting, LLC

a consulting firm in the Northern Virginia/Washington DC area, primarily consulting on defense cases in Long Term Care and Medical Malpractice. Elizabeth is a former US Army Captain, and has extensive experience in adult and pediatric Critical Care and Emergency nursing. She has been working in the legal nurse consulting field for twelve years and currently serves as a Director at Large on the board of the American Association of Legal Nurse Consultants (AALNC). She may be reached at [murraylegalnurse@yahoo.com](mailto:murraylegalnurse@yahoo.com), (703)868-3263



# Networking and Educational Forums for LNCs

Elizabeth Zorn, RN, BSN, LNCC  
 Claudia Caparco, BS, RN  
 Susan Burbank RN, C-REIN (Ret)

**Keywords:** legal nurse consulting, listserv, networking

## LNCExchange

**Number of members:** 1794

**Activity:** Average 355 messages per month

**To subscribe (free):**  
[www.LNCExchange.com](http://www.LNCExchange.com)

**What is LNCExchange?** A free professional networking forum on Yahoo Groups, primarily for legal nurse consultants (LNCs), nurse experts, and other professionals who work on medical legal cases.

**What's its mission?** The essence of legal nurse consulting is analyzing medical issues in the context of the applica-

ble legal standards. Our mission is to advance the specialty practice of legal nursing within the legal and insurance communities through meaningful networking among LNCs, attorneys, nurse experts, and other health care providers.

Our goal is that the shared information will be educational and helpful, challenging legal nurses to learn about

and share the many facets of legal nurse consulting. Our group also provides LNCs the opportunity to network with attorneys, physicians and other professionals who interface with legal nurses. LNCs with all levels of experience, including nurses interested in learning about LNC work, are welcome to join.

As co-moderators for LNCExchange, we support AALNC's mission and goals. It remains the premier professional association for all LNCs, fostering growth and professional standing for LNCs in the nursing and legal professions.

**How did LNCExchange begin?** The original moderators participated on listservs for some time before starting LNCExchange in 2006. We identified a need for a focused, well-moderated group where members are free to offer differences of opinion thoughtfully and respectfully. We also identified a critical need for seasoned LNCs to share information about necessary skills and personal attributes, and the realities of practice.

**What's required to join?** Prospective members must indicate their professional interest in being part of our group so we can screen out spammers or others without legitimate reason for membership.

**What are the membership demographics?** We have members from every US state, the vast majority "behind the scenes" LNCs and/or nurse experts. This includes advanced practice nurses such as nurse practitioners, certified registered nurse anesthetists, and nurse midwives. We have RNs with advanced training and credentials in clinical specialty practice areas such as infusion therapy, wound care, pain management, and life care planning. Finally, we have physicians, attorneys, physician assistants, and even a nurse chiropractor.

**How does LNCExchange serve as an educational forum?** Collectively, the members of our group have a wealth of clinical knowledge, legal knowledge

## *LNCExchange remains the premier professional forum for all LNCs, fostering growth and professional standing for LNCs in the nursing and legal professions.*

pertinent to the types of cases we work on, and knowledge about the analysis and management of medical legal claims. Members share knowledge and experience on analyzing medical legal cases, legal standards and strategy, tips for getting started in LNC work, and skills and personal attributes necessary for success. All nurse experts and many LNCs are clinically active or have very recent clinical experience. Thus, they (and physicians, APRNs, and PAs) can answer clinical questions, including those about standard of care (SOC). We have tried to create a forum that welcomes differing points of view and perspectives, so members can make informed choices about practice and work.

**How can I use this for networking?** Members can identify and network with other LNCs in their own geographical areas and nationwide. Members also post and respond to needs for clinical nursing and medical experts, attorneys who specialize in medical malpractice and personal injury litigation, and LNC job opportunities. A tremendous amount of private networking goes on between members who connect through our group.

**What are some of the common topics?** The most common include SOC issues for particular clinical scenarios; research tips for literature and clinical guidelines; evidence of SOC and causation; relevant legal standards and strategy; and tips for getting started as an LNC, including formal education, mentoring options, and marketing. There have been some very spirited discussions

of past versus new practices in clinical topics and what experts would be appropriate for a given case.

**What are some of the more controversial topics?** Although these do not arise often, one relates to the various course-based LNC "certifications" bestowed, even though the students often have never worked on an actual medical legal case. In our opinion, this is primarily a marketing tactic by relatively expensive for-profit course owners that, unfortunately, dilutes the meaning of certification within LNC specialty practice. Certification is not necessary to practice as an LNC. We believe that to the extent LNCs or those hiring them believe that certification is important, it should be experience-based and recognized by an accrediting body such as the American Board of Nursing Specialties and the American Nurses Credentialing Center. The only legal nursing certification that meets this criterion is the LNCC®.

Another is independent LNCs marketing themselves directly to the public to screen a potential medical malpractice or other medical legal case. If the statute of limitations (or a notice requirement) expires before an attorney is involved, the plaintiff may never be able to bring a claim; this could possibly give rise to a claim against the LNC for unauthorized practice of law. LNCs always have a duty to protect the best interests of the persons seeking legal services. In the case of a potential liability claim, it is to direct the client to immediately seek the advice of a licensed attorney.

### Are there options for viewing the list?

- + “Individual emails,” receiving each message sent to the listserv. Some members who choose this option set up a separate email account just for listserv posts.
- + “Daily digest,” receiving one email per day with all the day’s posts.
- + “No email” or “Special notices,” no emails except for the rare special notice from a moderator. Visit the home web page to view the searchable archived messages (now more than 53,000).

**Are there other member resources and benefits?** Our Home Page has a Files section where moderators and members can upload information on:

- + LNC education and training
- + Setting up an independent LNC practice
- + Marketing tips
- + Screening and investigating medical malpractice cases
- + Identifying and researching potential experts
- + Sample work products: timelines, chronologies, and case analyses
- + Subfolders where LNCs and medical legal experts can upload curricula vitae

We also have a “Links” section that contains the URLs for numerous websites for

- + Business resources
- + Medical literature
- + Clinical guidelines
- + Abbreviations and acronyms
- + Demonstrative evidence
- + Educational opportunities
- + Mentoring programs
- + Job opportunities for LNCs
- + American Association of Legal Nurse Consultants (AALNC) chapter events

**What is involved “behind the scenes” in maintaining and moderating the listserv?** We spend 20 to 30 hours per week attending to listserv matters and interacting with members. This includes reviewing and responding to inquiries sent to the whole group, contacting members privately about adhering to list guidelines, making educational contributions to the group, responding to private communications, speaking with members, screening and approving new members and selected messages, problem-solving computer technology problems, and obtaining feedback from members who unsubscribe.

**What are some of the more important guidelines?** All new members receive a list of “member guidelines.”

Members are required to communicate in a kind and thoughtful way, selecting language that is respectful when disagreeing with another point of view; reasonable minds can differ, and we welcome debate and differing points of view, and we can disagree without being disagreeable. “Flaming,” insults, and foul language are not acceptable. Any material that, in the judgment of the moderators, is harassing, defaming, offensive, abusive, or indecent is not allowed. To keep the group focused, posts must be relevant to medical-legal issues.

We encourage members to compose a concise, informative message, including a subject heading accurately reflecting the main point of the message. This allows members to quickly delete messages they are not interested in reading. We ask that members sign every post with a full signature. We feel this makes it more likely other members will respond to posted inquiries.

**What should not be posted?**

- + Posting detailed case information without the express permission of the managing attorney, who has an absolute right to control the nature of details shared in a semi-public forum

- + “Off-topic” posts, such as jokes, information about charitable causes, holiday greetings, and religious or political discussions
- + Copyright material without permission from the author
- + Discussion of specific hourly rates for independent LNCs or nurse experts, as this could be construed as a violation of Federal anti-trust laws
- + We also encourage members to network privately when exchanging the names and contact information of potential experts.

**Can members advertise their products or services?** Members are permitted to post about their LNC products or services no more than twice per year. This supports members offering and in need of these services without inundating the group with unsolicited advertisements. Non-LNC members cannot join the group with the sole purpose of marketing a product or service to our members.

**What has the feedback been from members?** Since its inception in February 2006, we have received very positive and regular feedback. The new LNCs often describe it as a “lifeline” essential to practice development. We commonly hear that most of what they have learned about LNC and nurse expert work comes from the group. Feedback from experienced LNCs and nurse experts on clinical issues, legal standards/strategy, expert identification, practice issues and sharing of Web resources also gets high marks.

**What does the future hold?** As we celebrate our tenth anniversary in February 2016, we expect that LNC-Exchange will continue to increase its membership base and be an important source of education and networking among its members. Its success is largely attributable to the its members’ active participation as they offer their valuable time to share thoughts, knowledge, resources and experiences.



## LegalMed

**Number of members:** 806

**Activity:** 100-200 messages per month and zero to 15 messages per day.

**To subscribe (free):**

<https://groups.yahoo.com/neo/groups/legalmed/info>

LegalMed was started by an attorney in June 1998 to provide a networking resource for attorneys and other medical-legal professionals to share information related to tort claims, involving medical issues:

- Establishing SOC and causation
- Evaluating physical and psychological injury
- Preparing discovery documents
- Trial preparation
- Sharing pertinent legal cases
- Legal research
- Medical literature resources
- Educational and networking opportunities
- Job opportunities

- Assistance with expert, consultant, and subcontractor needs

The attorney managed this forum until 2004, when his practice as a trial attorney became too busy to maintain it. He recruited Susan Burbank, a research nurse consultant who worked behind the scenes on his cases, to assume ownership and maintain the forum as originally envisioned. Ms. Burbank has been the sole listowner since 2004.

LegalMed does not accept attachments to prevent passing along infected attachments. Content from listservs, online bulletin boards, web pages, and emails is typically discoverable by opposing counsel. Therefore, LegalMed does not archive messages, primarily for the benefit of expert witness members who may

not want posts preserved in a searchable database which could be a source of contradictory testimony.

Membership requires approval by the listserv owner/moderator. New members' posts are moderated for a period of time to prevent spamming or other inappropriate posts. This also allows new members time to learn appropriate listserv etiquette, review the guidelines, and ask the owner for guidance and clarifications. Members must learn how the listserv functions, and to become familiar with the links and files resources.

LegalMed and LNCExchange have a similar mission. In September 2014, LegalMed and LNCExchange owners began sharing moderator responsibili-

*LegalMed was started by an attorney in June 1998 to provide a networking resource for attorneys and other medical-legal professionals.*

## Networking with other professionals in the medical legal field is a critical component to long term success as a legal nurse consultant.

ties to assist with the smooth running of both groups and ensure that they each remain a high quality educational and networking resource for legal nurse consultants, nurse experts, and other professionals who work in the medical legal field.

### ATTORNEY LISTSERVS

Many professional legal associations offer networking forums as a benefit of membership. This includes The American Association for Justice (Voice of the Plaintiff Bar), The Defense Research Institute (Voice of the Defense Bar) and State Bar Associations. Listserv membership criteria varies by group but typically requires membership in the association and perhaps an attorney sponsor for non-attorneys.

Attorney listservs commonly focus on a particular legal practice area. Listservs of interest to legal nurses would include those focused on medical malpractice, personal injury, long term care litigation, products liability and toxic tort. Attorney listservs are a means for LNCs to learn about legal standards and strategy and network with attorneys who may benefit from LNC services.

### CONCLUSION

Participation in professional listservs is an ideal means of acquiring the new knowledge and skills required to function at a high level as a legal nurse consultant or nurse expert. It is also an important means for experienced legal nurses to fulfill their obligation to educate those

nurses interested in practicing as a legal nurse or just starting out in the field. Networking with other professionals in the medical legal field is a critical component to long term success as a legal nurse consultant. ♡



**Elizabeth Zorn, RN, BSN, LNCC** joined the Faraci Lange law firm (Rochester, NY) in 1995, providing medical expertise and research in defense of

medical malpractice and other personal injury cases.

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

She wrote a chapter for AALNC's LNC Principles and Practice, 2nd (2003) and 3rd (2010) editions, several modules in AALNC's LNC Online Course, several JLNC articles, and edited AALNC's "Getting Started in Legal Nurse Consulting." She has served on many national AALNC committees and presented at professional and educational programs and webinars for attorneys and nurses. She has mentored multiple LNC interns at her law firm over the past 12 years.

She is also currently serving on AALNC's Scope & Standards and Revised Online LNC Course Committees. From 2010 to 2014, Beth served on the AALNC board of directors. She can be contacted at [elzorn@faraci.com](mailto:elzorn@faraci.com).



**Claudia P. Caparco, BS, RN** is President/CEO of Alpha CHECKPOINT of Rochester, Inc.. She joined the plaintiff law firm

Faraci, Lange, Johns & Schwarz in 1990 as a LNC specializing in medical malpractice, personal injury, and toxic torts. Since 1995, her LNC consulting business has served the medical-legal needs of attorneys nationally. In December 2000, she formed Alpha CHECKPOINT of Rochester, Inc., as an extension of her forensic expertise, offering forensic testing (drug and alcohol testing, DNA paternity testing, infidelity testing, background checks, etc.) to employers, attorneys, and the public. She is a member of International Association of Forensic Nurses (IAFN) and the American College of Forensic Examiners Institute (ACFI) – Fellow Status, and Diplomate of the American Board of Forensic Nursing. She can be reached at [email@alphacheckpoint.com](mailto:email@alphacheckpoint.com).



**Susan Burbank, RN, C-REIN (Ret)** is the listowner for LegalMed. During several decades of clinical practice, her primary areas included obstetrics/

gynecology/reproductive medicine, minor and plastic surgery, and orthopaedics as staff, nurse manager, and infertility/IVF nurse coordinator. In 1990, she left the clinical setting and started her own independent research nurse consulting service for the research and interpretation of medically-related issues in all medical specialties, addressing the forensic aspects of legal actions. Her primary focus was providing research to assure merit and/or defensibility of cases for a variety of professionals in the medical-legal arena. She can be contacted at [SLBurbank@BurbankResearch.com](mailto:SLBurbank@BurbankResearch.com)



# Social Networking is not Marketing

David Dillard

**S**ocial networking is for many people joining and making friends or contacts on services like Facebook and LinkedIn. I've never heard from most of the people who have befriended me on these services. Google indexes little of the content there, either, because most of it is only accessible to friends. This is not an effective way to market and make people aware of your deeply specialized skills and knowledge. Outside of sharing workload with peers, you won't reach potential clients on private groups, like Yahoo Groups and its competitors, since privacy is an important feature in their business model.

Publically archived and search engine indexed discussion groups, blogs, and wikis are, however, important for professionals to make people in other fields and the general public aware of both the importance of their profession as well as create an awareness of just how much skill and knowledge the posting professional has. The discussion groups I have created and recently expanded provide such a network of resources that members can use to post about news reports, law cases of general interest, journal articles, books, useful websites or their own experiences and publications. Signature lines can be used to identify the professional practice of the poster, publications, and contact links and information.

Some of my discussion groups have no subject limits for fields or disciplines from which the topics originate. YouTube videos of lectures or presentations can be included in posts with accompanying explanatory discussion, a powerful way to encourage clients to take you on. Many of the articles

I have published have been a result of my having posted on discussion groups in specific fields and often have been requested by the editors of the publications in which they appeared. This link provides a list of my discussion groups and blogs.

**Research Guide and Discussion Group Directory:** <https://sites.google.com/site/researchguidesonsites/>

What happens on Yahoo Groups when links to YouTube are included in a post? Look below the text posted to see the images that pop up on your screen. Though this isn't related to legal nursing, it'll show you how this Yahoo Groups YouTube related feature works.

<https://groups.yahoo.com/neo/groups/Net-Gold/conversations/messages/48702>

Finally, how much will potential clients use or view your website? If it only explains to the visitor how important it is to retain YOU, they won't come back to look at it very often. But if your site visitors can find or link to a substantial body of content that teaches them vital medical or legal information, they may start to depend on you and be regularly reminded that you are the person to contact for their professional needs. Google Sites provides excellent free websites. Google also happens to have a heavily used search engine with strong tendency to index content on Google websites. Providing content to publicly archived discussion groups can be a major step towards getting people to discover, come to, and start using your content-laden web resources. Google Sites

websites can also point visitors to your strictly business website, if you have one, and provide your contact information, areas of practice, and hours as well. ☛



**David Dillard, BA, MLS** has degrees in history and library science. He has worked at Temple University Libraries since 1970, first in the Business Library; he moved to Reference and concurrently began to learn bibliographic database searching. He now does collection development for Tourism, Hospitality, Sports Management, Recreation, Therapeutic Recreation, Public Health, Kinesiology, Disabilities, Social Work and Communication Disorders. Dave started sharing information sources and answers to questions on internet discussion groups around 1998 and that has grown to a cottage business. He started a network of public search engine indexed discussion groups and archives for sharing of posts of good websites, bibliographies of sources on a wide variety of topics, and news story summaries with source citations and links to those sources. He is a regular on several nursing specialty lists and is very open to contact from anyone to help with searches on any topic.

# Copyright Hazards

David Douglas Winters, JD, DLL, MS, BS

**Keywords:** copyright, copyright infringement, plagiarism, piracy

*Our copyright system is neither logically nor definitively explainable. The foundation principles are clear, but in application they are essentially ignored, and results are therefore unpredictable. The goal of this article is emphatically NOT to provide guidance through the researcher's personal copyright wilderness, for each one is different. Professional legal counsel, like doctor's advice, can be given only for specific individual cases. This article is intended to clarify this situation with respect to the researcher.*

**R**esearchers constantly face copyright issues. Such issues are not trivial. Intellectual property is nationally a major source of personal wealth and so is also a sensitive, often emotional subject. Copyright infringement suits are bad news for accused infringers; responding to a copyright suit even if one is clearly innocent can be cripplingly expensive. Purported copyright holders can be fiercely aggressive against purported infringers.

This tends to discourage many so accused from mounting any defense at all. They simply give in to the demands of their accusers, no matter how unreasonable.

One long- running, recently resolved example concerns the popular children's

song, "Happy Birthday." The purported owners of the copyright for this song have wrongfully collected millions of dollars in unwarranted licensing fees over many decades. This continued until one recent researcher, making a documentary about the situation, fought assertion of the long expired "Happy Birthday" copyright. She prevailed. Her goal is to force return of all "Happy Birthday" licensing fees back to at least 2009. But such victories are rare (Sisario, 2015).

Copyright is not an inherent right. It is not a part of our Common Law. Copyright was never included in our ancient traditions of right and wrong.

Copyright infringement is not the same as plagiarism. Plagiarism is the misrepresentation of another's work as being

your own. Plagiarism is unethical. It amounts to lying and claiming credit away from the rightful owner. (*Dictionary.com*, n.d.).

The source of copyright privilege is at least partially attributable to the Constitution of the United States (U.S. Const., art. I, § 8, cl.8). But the copyright system has shot off on its own trajectory to create the most frivolous of our intellectual properties. Through influence of the entertainment industries (for which copyright protection was never constitutionally directed at all), copyright infringement is now in our criminal code of statutes. A large portion of it is even located under the section of federal code dealing specifically with crime. (18 U.S.C.-Crimes

and Criminal Procedures; 18 U.S.C. § 2319). Legislators call it piracy, as in the unenacted Stop Online Piracy Act. (H.R. 3261, 2011).

In contrast, patents, which are more serious and economically essential, have no such protection (being non-criminal matters). But in view of this you might ask why frivolous passing fancies of music get protection under our criminal code, but history-changing inventions like cell phone technologies or solar energy breakthroughs do not. There is no legitimately good answer. As Mark Twain noted, "Whenever a copyright law is made or altered, the idiots assemble." (Twain, 1902-1903).

Copyright infringement is not really piracy. Piracy is, by definition, a capital crime involving actual theft. Any other use of the term, except as humorous slang, is misuse and cheapens perception of a serious crime in order to magnify a smaller infraction. (Vander Sar, 2013). In fact, the author maintains that copyright should be, as indeed it long was until relatively recently, merely a matter of civil law, the same as is business law. It is how we do fair business, not how we fight crime.

Copyright infringement is not even theft. In illustration, we ask a hypothetical question. "If my copyright infringement is theft of your material, then why do you still have it after I infringed it?" If I stole it you would no longer have it. Any child knows this.

So let us be clear. Copyright infringe-

ment is simply not a moral wrong. Nor is it, by any stretch of reasonable thought, necessarily an ethical misdeed. If that sounds uncomfortably strange, attribute your discomfort to the constant barrage of propaganda screaming at us that copyright infringement is "theft" or "piracy," or that "Copyright Piracy is not a victimless crime." We have already above addressed these claims.

Lawyers are hard pressed to agree on the details of what, legally at least, constitutes copyright infringement. That is why we frequently find ourselves in court to hammer out answers to such questions. Instead of debating whether our client is or is not guilty of a given offense, we must first debate as to whether or not a crime has actually been committed in the first place.

This makes little sense. If the lawyers cannot agree whether or not a given act was actually criminal, the actual potential perpetrator does not have much of a chance of determining whether he is acting lawfully or not.

So, under such constraints, how can we provide a valid succinct summary to non-practitioners? In all honesty, we cannot. Hence arises the universal lawyer's all-purpose answer, "It depends."

Copyright has no place in our ancient and immortal principles of Common Law, the law that has long defined good and evil for the English speaking civilizations. Copyright falls entirely within the domain of mere statutes and regulations, changeable with the political

wind and climate. In example, copyright infringement previously required publishing, but now it includes mere reproduction (Copyright Act, 1909).

For centuries lawyers have been armed with a doctrine that addressed the trivial and inferior status of such rules, regulations, or statutes, as opposed to true law. The doctrine is *Malum prohibitum*. It is shorthand for, "Merely prohibited." It conveys the understanding that mere bureaucratic rules do not of themselves make a given conduct morally right or wrong. They are more closely analogized to traffic protocols, like driving on the left side of the road in England and on the right side of the road in the United States. They are mere arbitrary rules of conduct. Neither is inherently right or wrong. They are not so serious or important as actual theft, or assault, or the counterfeit of money (Hill & Hill, 2015). Copyright regulations are merely rules supposedly created to encourage creativity. Making their infringement a criminal offense does not change this.

So, having considered all this, how does one avoid unintentional copyright infringement? Your best bet is to ask a lawyer what to do, *in writing*, get his or her advice *in writing*, pay him or her, follow his or her advice, and document the fact that you did so.

Will that absolutely avoid copyright infringement suits? No, it will not.

Will it absolutely avoid having the courts find you guilty of copyright infringement? No it will not.

What it will do is thereby demonstrate for the record that you made every effort to conduct yourself in a lawful and ethical manner. If you do not seek legal counsel, you are operating without a net. If you do get counsel, you will not merely have company in your misery should it arise, but skilled company with a personal stake in relieving that misery.

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*How to avoid unintentional copyright infringement? Ask a lawyer what to do, get his or her advice, pay him or her, follow the advice, and document the fact that you did so.*

But lawyers are expensive—especially fully qualified intellectual property lawyers. To avoid this expense, one might suppose that simple obedience to all statutes should lead one to safe harbor. But that supposition would be in dangerous error. Reading our statutes, clarifying them with the *Oxford English Dictionary*, and then obeying them to the letter, will emphatically NOT protect you from committing or being accused of legal malfeasance. For such protection one requires at a minimum, informed legal counsel to tell you what the statute or legislators really meant to say.

Ultimately, this may require the pronouncement of a judge. Lawyers can absolutely tell you precisely what the law says just as soon as the judge tells us, but not before. And even then we must couch it as “opinion.” This was soundly demonstrated by the recent Supreme Court decision respecting the Affordable Healthcare Act. Chief Justice Roberts unabashedly told us what Congress MEANT to say...which was categorically and unambiguously not what the statute actually said. (*King v Burwell*, 576 U.S. \_\_\_\_ 2015).

This is why I seldom directly reference statutes in my footnotes. No amount of precautionary exhortation will likely prevent their disastrous misuse by the non-initiate. This is a sad situation and I lament with the reader that it has arisen.

Our key lesson is that by getting specific legal advice, particularly advice from an intellectual property specialist, you will avoid most pitfalls that bring about copyright suits in the first place. Further you will render yourself a much less attractive target for copyright “trolls,” because you will probably have rendered moot the large additional penalties potentially available for intentional, knowing infringement and that can massively multiply the likely complainant recovery. In this respect lawsuits that may include such penalties are much more lucrative. The mere act

of consulting legal counsel early takes you off the list of preferred targets.

If you cannot afford legal advice, then I refer you to the publications in the references. Note that NOLO publishes a rather plentiful collection of do-it-yourself references with respect to intellectual property. I recommend *Getting Permission* (Stim, 2013), if only for the fact that it so clearly illuminates the starkly real copyright minefield to be negotiated. Do not ignore these references, but remember that they cannot replace legal counsel. Use such references only with the clear understanding that they swing little weight in court.

The article “Do You Have the Right to Copy?” (Ellenberger & Ellenberger) published in the Spring 2009 edition of this journal, is also a fine bit of research and well worth the read, particularly the last paragraph. But it is no substitute for legal counsel.

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### David Douglas Winters

is the principal of Winters Patent, Trademark, and Copyright Law, and can be contacted at Suite 237, 2277C Wilma Rudolph Boulevard, Clarksville TN 37040 or by email at [WintersPatentLaw@bellsouth.net](mailto:WintersPatentLaw@bellsouth.net)



# Questions for the Life Care Planner

Wendie A. Howland, MN, RN-BC, CRRN, CCM, CNLCP, LNCC

**Keywords:** legal nurse consulting, listserv, networking, life care planning

**L**ife care planners work in many settings, working with plaintiff, defense, trust, and structured settlement firms, and private individuals. Although life care planning falls under the broad umbrella of “legal nursing,” and there are questions about life care planning in the LNCC certification examination, many people are unfamiliar with the specialty practice and its common work products. JLNC

sought out questions from LNCs about this specialty.

## When does a case/attorney need a life care plan?

Life care planners are your go-to experts for medical damages. A life care plan is indicated for any person whose injury or illness will have long-term effects. A life care plan is also useful in other cases. An attorney consulted me once on a

divorce case where future medical care was an issue.

## How is a “life care plan” different from “future medical expenses” or “medical cost projection”?

A life care plan includes data obtained in person by a professional who’s licensed to do the assessments required, and includes everything an individual will need for life expectancy as a result

of an injury or illness. It's not a one-size-fits-all document; not all people with a C5-6 fracture-dislocation or BKA will have the same needs. Cost estimates made at 6 weeks, 6 months, and three years post catastrophic injury will be radically different for a single individual as condition and level of care change, complications do or don't arise, and patient/family preferences surface. A life care plan generally takes 40-60 hours of billable time.

Future medical expenses are for anticipated medical care, based on a limited medical record review; a typical request might be, "What does a total hip replacement cost?" The answer would include hospital, usual therapy, surgeon, assistant, and anesthesia fees for the geographic area, plus usual equipment costs. Many life care planners will prepare this for a flat fee, roughly 10-20 hours depending on complexity;

### **What are some important elements of a life care plan that may not be obvious to the naïve or an inexperienced attorney?**

While unstated, the assumption that underlies this question is often, "Why don't we just ask the physician?" The surprising answer: Over half of LCP costs are unrelated to the medical plan of care. Physicians may be able to describe future medical needs, such as surgeries and related therapies, chronic medications, and the like, for their patients. However, they are rarely aware of the sequelae or what it's like to live with them after discharge. And frankly, they don't usually know the first thing about costs.

For example, an orthopedic surgeon may perform two below-the-knee amputations in one day, both patients admitted to the same semiprivate room on the orthopedic floor, and later transferred to the same post-acute rehabilitation floor. Just as two adjacent airplane seats cost different sums for the

## *"Why don't we just ask the physician?" The surprising answer: Over half of LCP costs are unrelated to the medical plan of care.*

same flight, so will the billing and reimbursement for those two patients differ, and for largely the same reason: contracts with different payer sources, or lack of thereof. If you call the surgeon's practice manager or the hospital and ask for total bills for a BKA, it's likely you won't get an answer from either one of them. The surgeon himself certainly won't know.

Many attorneys don't know about their responsibility to have Medicare Set-aside Arrangements (MSAs) prepared. Most life care planners offer MSA services to satisfy Medicare's requirement for settlements to take its interest into account.

### **What are some good sources for medical care costs, DME costs, etc?**

There is definitely no one-stop website where you'll find all of it; it's a surprisingly complicated issue. For example, Medicare ([www.cms.gov](http://www.cms.gov)) has fee reimbursement schedules for physician services, different levels of care, and lists average covered charges and Medicare payments by DRG and individual facility, to name just a few of their resources. PMSI can estimate replacement frequency for equipment. There are reference books with anesthesia charges, usual and customary charges at different percentiles and Medicare fee for service for CPT codes, and a plethora of books and websites for other resources.

An article by Reinhardt (2006, *Health Affairs* 25:1) says this:

*"Asked by a Wall Street Journal reporter to explain how U.S.*

*hospitals price their services, William McGowan, chief financial officer of the University of California, Davis, Health System and thirty-year veteran of hospital financing, responded: 'There is no method to this madness. As we went through the years, we had these cockamamie formulas. We multiplied our costs to set our charges.'"*

This article was accompanied by a graph indicating the costs for a simple chest x-ray in seven California hospitals, ranging from about \$90 to over \$1500. (SOURCE: L. Lagnado, "California Hospitals Open Books, Showing Huge Price Differences," *Wall Street Journal*, 27 December 2004)

A hospital giving the same care to three patients, two from with the same HMO and one with Medicare, will submit three different bills and get three different reimbursements.

### **Are there mandated Medicare medical care costs and where can they be found, or do all these types of costs vary?**

There are reimbursements mandated by Medicare for Medicare patients. They vary by geographic area; you can find them in several books listing medical fees by CPT code and at the CMS website.

Medicare rates are not binding on anybody else. Further, Medicare will not pay for care if there's a liability settlement, broadly speaking.

Persons who will be paying out of pocket (settlement) for all future care are usually

billed at the highest rates. This is why life care plan costs cannot be based on Medicare rates or past billing.

### Can you give some examples of LCP elements that aren't obvious to the uninitiated?

- We provide for purchase, maintenance, and replacement for all necessary DME (durable medical equipment), such as beds and sleep surfaces, wheelchairs and siting surfaces, tube feeding pumps, suction machines, ventilators, bathroom devices, adaptive technology, and much more. Most do not have to be prescribed by a physician. Physician prescriptions are generally required by insurance carriers only as financial control measures.
- Most supplies, like incontinence pads, gloves, tube feeding sets, dressings, catheters and related care items, and many others are not covered by insurance.
- Prostheses need regular maintenance, fit adjustments, repairs, and replacement with changes in weight, mobility, and aging. Most people, especially younger ones, need two or even three prostheses for different purposes and to cover for repairs.
- Burn wounds can remain unhealed for years, with needs for special topical medications, frequent plastic surgery consults and work. Burns are often accompanied by other injury— multiple trauma, PTSD, brain injury, cardiac damage, and pulmonary sequelae, most of which worsen prematurely with aging.
- After about 15 years of wheelchair propulsion, shoulders get rotator cuff tears and so the patient will likely need a much higher level of care when he can't use his arms for mobility or transfers at all postoperatively; a power chair follows.
- Brain injury predisposes to earlier onset of dementia, with associated escalating levels of care. And many

people have behaviors attributed to psych problems that arise from unrecognized and untreated brain injury sustained with their other injuries.

- The patient may need more environmental changes, such as lifts, temperature controls, or bathroom and kitchen modifications, with increasing disability with aging.
- Many medications require ongoing lab studies to monitor for side effects and blood levels.
- A disabled child will not always have parents to provide care; parents could die, divorce, lose their home. Care must be provided for this possibility.
- Psychiatric/psychological care is not optional for patient and family.

### Does a life care planner have to be certified?

No. However, as a life care plan is given in support of damages and the author will be subject to deposition and/or court testimony, a life care planner with verifiable expertise will be a better choice as a testifying expert.

### Can an in-house life care planner produce a life care plan in a plaintiff case?

An in-house employee can't be a testifying expert, so such a plan would not be useful in a case, either for plaintiff or defense.

### Do all life care planners work for plaintiffs?

No. Many defense firms hire in-house or independent nurse life care planners to critique plaintiff plans for content, methodology, and pricing.

### How long does it take to train a life care planner?

How long does it take to "train" a nurse? I'm still learning and plan to be learning until I retire. Nurse life care planning courses differ from generic courses taken by non-nurses in two critical ways. First, they don't have to teach

about medical diagnoses so intensively. Second, they use the nursing process of individual assessment and planning, already deeply ingrained in all RNs and mandated by RN licensure, as the conceptual framework for planning care and collaboration, rather than the medical diagnosis. Courses vary from roughly 40 - 80 hours.

### Is there a standard format for a life care plan?

No, although there are common elements to all life care plans: review of the history of injury and care, evidence of collaboration with all members of the care team if possible (generally not possible for defense cases), transparency in pricing information, evidence-based practices for provisions, and including the patient and family preferences and capabilities in decisions. Many planners give high, average, and low cost ranges.

There is commercial software for building plans; many people feel they do not allow for sufficient individualization because they are based on medical diagnosis only, and can be challenged on that basis. There are licensure, philosophical, and methodological differences between nurse life care planners and others, such as social workers, educational consultants, and vocational counselors, that are often expressed in formatting. Ask to see redacted work samples before you decide. 🐾



**Wendie A. Howland, MN, RN-BC, CRRN, CCM, CNLCP, LNCC** is the owner of Howland Health Consulting in Massachusetts, offering

legal nurse consulting and life care planning for plaintiff and defense clients nationwide. She is the Editor of the JLNC and the JNLCP and can be reached at [whowland@howlandhealthconsulting.com](mailto:whowland@howlandhealthconsulting.com).

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