Module 1
THE ROLE OF THE
CERTIFIED LEGAL NURSE CONSULTANT™

I. SEVEN TYPES OF CASES ON WHICH CERTIFIED LEGAL NURSE CONSULTANTS™ ARE QUALIFIED TO CONSULT

A. Medical and Nursing Malpractice Cases

1. Cases involving the professional negligence of a healthcare provider or the negligence of a healthcare facility or learning institution.

2. Cases involving the negligence of an individual or entity who makes decisions regarding access to care.
   b. Inappropriate use of utilization review.
   c. Negligent case management.

B. General Personal Injury Cases

1. Nonprofessional negligence cases, commonly referred to as personal injury or PI cases (technically, PI includes malpractice, although attorneys usually distinguish between medical malpractice and other negligence not involving healthcare professionals).

2. Examples of personal injury cases.
   a. Auto accident cases.
   b. Premises liability cases (e.g., slip and fall, high-stacking injuries, sexual assault, physical assault cases).
c. Theme park cases.

d. Aviation cases.

e. Liquor liability cases.

f. Railroad cases.

g. Admiralty and maritime cases.

h. Water accident cases.

i. Sports injury cases.

j. Toxic mold cases.

k. Dog bite cases.

C. Products Liability Cases

1. All claims brought for personal injury, death or property damage caused by the manufacture, construction, design, formulation, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging or labeling of any product.

2. Categories of products liability cases.

   a. Medical device and drug-related cases, such as cases relating to:
      (1) Celebrex®.
      (2) Bextra®.
      (3) Avandia®.
      (4) Hormone therapy.
      (5) Birth control pills.
(6) Vioxx®.
(7) Ephedrine.
(8) Oxycontin®.
(9) Accutane.
(10) Botox®.
(11) Fosamax®.
(12) Dilantin®.
(13) Hip implants (all metal).
(14) Implantable defibrillators.
(15) Pacemakers.
(16) Industrial-grade silicone breast implants.
(17) Ventilators.
(18) Heart valves.
(19) IV pumps.

b. Nonmedical device cases, such as cases relating to:
(1) Machinery and equipment.
(2) Children’s toys and products.
(3) Cigarettes and cigarette lighters.
(4) Motor vehicles, automobiles and automobile parts.
(5) Food.
(6) Household products.
(7) Personal care products.
(8) Consumer products (e.g., appliances).
(9) Industrial products.

D. Toxic Tort and Environmental Cases

1. These cases involve alleged damages or injuries caused by the release of toxins into the environment.

2. Examples of toxic tort and environmental cases include cases involving toxins from:
   
   a. Oil spills.

   b. Waste products from manufacturing processes.
c. Electromagnetic fields (e.g., against a utility company).

d. Radiation contamination.

e. Hazardous chemicals in a workplace.

f. Waste management and disposal.

g. Pesticides.

h. Sick building syndrome.

i. Lead poisoning.

E. **Workers’ Compensation and Workplace Injury Cases**

1. Cases involving job-related injuries, i.e., injuries that arise out of and in the course of employment.

2. A claimant must show that he suffered an impairment or incapacity that rendered him unable to earn the wages he was being paid when he sustained the injury in the same or other employment.

3. Examples of workers’ comp cases.
   a. Equipment- and machinery-related injuries.
   b. Cumulative trauma disorders.
   c. Injuries caused by objects striking workers.
d. Back injuries.

e. Auto accidents.

F. Criminal Cases

1. A crime is any act that society has deemed contrary to the public good.
   a. The act must be injurious to society to be considered a crime.

2. Differences between civil and criminal cases.
   a. Personal versus social.
      (1) Civil actions are personal in nature, cause individual harm, personal injury or property damage, and result in monetary damages.
      (2) Criminal actions are deemed against all of society, violating the peace and tranquility of the community.
   
   b. Type of act.
      (1) Civil cases involve a cause of action from which the injury arises.
      (2) Criminal cases involve homicide, assault, rape or abuse, among others.
   
   c. Proof required.
      (1) Civil cases require proof by a preponderance of the evidence.
      (2) Criminal cases require proof beyond a reasonable doubt.
   
   d. Verdict required.
      (1) A civil verdict requires a majority of the jury (usually 10 of 12) to agree.
      (2) A criminal verdict must be unanimous.
   
   e. Some actions can be both criminal and civil.
3. Elements of a crime.

      (1) Considers the mental state or reasoning of the individual performing the act.
      (2) Words used to describe the *mens rea*:
          (a) Intentional.
          (b) Knowingly.
          (c) Recklessly.
          (d) Negligently.
          (e) Maliciously.
          (f) With gross disregard.

   c. Causation – Did the act induce harm?

4. Examples of criminal cases on which Certified Legal Nurse Consultants\textsuperscript{CM} consult.
   a. Driving while intoxicated (DWI)/driving under the influence (DUI) cases.

   b. Sexual and physical assault cases.

   c. Child, spouse or elderly abuse cases.

   d. Criminal cases against individual providers and facilities.

   e. Criminal environmental cases.

   f. Any case involving a victim of a violent crime.

   g. Psychiatric defenses and psychiatric issues.
h. Medicaid and medicare fraud and abuse cases.

i. Possession of narcotics cases.

j. Excessive use of force by law enforcement cases.

G. Any Case Where Health, Illness or Injury Is an Issue

1. Certified Legal Nurse Consultants\textsuperscript{CM} are qualified to answer questions, research topics and assist the attorney in developing the medical-related issues of many types of cases.

2. Examples of such cases include:
   
a. Family law (e.g., custody battle).

   b. Probate (e.g., competency in issue).

   c. School health (e.g., injury of a child while crossing the street, sexual assault by a teacher).

   d. Americans with Disabilities Act (ADA).

   e. Employer-employee relationships (e.g., wrongful dismissal).

   f. Sexual harassment.

   g. Right to die.

   h. Social Security benefit issues.

   i. Medicare benefit issues.
j. Physician-facility relationships (e.g., physician dropped from an HMO, preferred provider network or managed care network).

k. Psychiatrist or therapist abuse or injury.

l. Insurance issues (e.g., reasonableness of a medical bill, relationship of a medical bill to the alleged damages or injuries).

m. Family Leave Act.

n. Bad faith litigation against insurance companies for failure to pay a claim or for denial of access to specific care or treatment.

o. Wrongful adoption.

p. Healthcare professional board disciplinary actions.
II. DISTINCTIONS BETWEEN THE TESTIFYING EXPERT AND THE CONSULTING EXPERT

A. Summary of Distinctions

<table>
<thead>
<tr>
<th>Testifying Expert (TE)</th>
<th>Consulting Expert (CE)</th>
</tr>
</thead>
<tbody>
<tr>
<td>• An expert who is expected to testify at deposition or trial.</td>
<td>• An expert who is not expected to testify, but consults with attorney-client behind the scenes, preps attorney and helps attorney develop the case.</td>
</tr>
<tr>
<td>• Testimony is limited to areas of professional expertise.</td>
<td>• Can review and analyze all aspects of a variety of cases. No limitations on the scope of consultation.</td>
</tr>
<tr>
<td>• Work product is generally discoverable.</td>
<td>• Work product is generally not discoverable.</td>
</tr>
</tbody>
</table>

B. Implications of Distinctions

1. Expectations.
   a. Both types of consultants can provide similar services, but you can only wear one hat at any given time in a case. Establish up front with the attorney whether you are wearing the hat of the expert witness or consulting expert. Ask the attorney, “Am I expected to testify at any time in the future?” If the answer is “yes,” or even “maybe,” consider yourself a testifying expert and conduct yourself accordingly.

   b. The Certified Legal Nurse Consultant\textsuperscript{CM} should never start out believing she is wearing the hat of the consulting expert, only to find that she will be testifying. She might do something that is appropriate if she is a consulting expert but that damages the case if she is an expert witness. Additionally, the attorney now has to find someone who is willing to testify, and the client relationship will probably suffer.
c. The Certified Legal Nurse Consultant℠ might start out with the understanding that she will serve as an expert witness and shift to being a consulting expert (e.g., if her opinion does not comport with the opinion of the hiring attorney, or if she honestly believes someone else is better qualified to testify on the matter).

2. Professional expertise.
   a. Testifying experts should be active in the healthcare setting to lend credibility to their opinions and to eliminate problems with being labeled a “professional expert witness” or “hired gun.”

   b. Some states require that the expert was actively practicing at the time of the incident made the basis of the lawsuit.

   c. Some jurisdictions require that the expert witness be active in the specialty implicated to be legally qualified.

   d. A few states require that the testifying expert be licensed within the state or a contiguous state.

3. Discoverability.
   a. All nonprivileged and relevant materials that an expert witness uses in preparing opinions are discoverable. Any document normally protected under attorney-client privilege used by the testifying expert to refresh her memory is generally held to have waived any privilege by the attorney’s voluntary disclosure of the confidential communication.

   b. The testifying expert should be very cautious about her conduct.
      (1) Do not discuss the case with others.
      (2) Do not participate heavily in liaison activities with clients and other consultants.
      (3) Check with the attorney before putting anything in writing.
      (4) Make all written reports as brief as possible.
      (5) Avoid basing an opinion on someone else’s summary or version of the case.
c. The consulting expert’s work product is generally treated as the attorney’s work product. The written material and mental impressions formulated by the attorney are generally protected from disclosure as the attorney’s work product. The attorney’s strategies, themes, assessments of the strengths and weaknesses of the case, conclusions, opinions and legal theories are afforded the highest level of protection.

The fact that the consulting expert’s work product is protected gives the attorney the opportunity to reject unfavorable potential testifying experts without having to disclose them to the opposition.

The protection is qualified – not absolute (Federal Rules of Civil Procedure).

1. Protection extends only to “documents and tangible things,” but facts contained in those documents can be discoverable.
2. Protected documents must have been prepared in anticipation of litigation or for trial. “Documents prepared in the regular course of business” are not protected.
3. The party seeking discovery of an attorney’s work product must show substantial need and must be unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.
4. The protection can be waived.
   a. The attorney sharing opinion work product with an expert potentially waives protection of these materials if the attorney’s intent was that the witness use the materials in forming an opinion.
   b. Some courts require disclosure to the opposition of all materials the attorney provides to the expert witness in anticipation of trial; therefore, protection of the attorney’s work product is completely waived.

d. Exceptions to the consulting expert’s protection – The consulting expert’s opinion is discoverable if:

1. A testifying expert considered it in forming her opinions. Federal Rules of Civil Procedure suggest that mere review opens the opinion to discovery.
   a. Always label your report Confidential for Attorney-Client Use Only.
(2) The party seeking discovery cannot obtain facts or opinions on the same subject by other means. This exception is rarely applied.

(a) The opposing party has retained the only expert on a particular matter.

(b) The same inspection or examination made by one party’s expert cannot be made by the opposing party’s expert.

**EXERCISE: DISCOVERABLE OR NOT DISCOVERABLE?** State whether each of the following are generally discoverable.

___ The consulting expert’s 15-page report.
___ The testifying expert’s conversation with a nursing peer regarding the case.
___ The testifying expert’s 2-page report.
___ The testifying expert’s 12-page report labeled “CONFIDENTIAL – FOR ATTORNEY WILLIE BILLUM ONLY.”
___ The consulting expert’s 15-page report, which was reviewed by the testifying expert in the case.
___ The plaintiff consulting expert’s interview with the plaintiff.
___ The consulting expert’s verbal communications with the attorney-client.
___ The consulting expert’s consultation with the graphics company that will be producing demonstrative evidence.
___ The testifying expert’s conversation with a consulting expert in the case.
___ A 30-page memorandum written by the attorney and submitted to the testifying expert.
___ A 30-page memorandum written by the attorney and submitted to the consulting expert.
___ The hospital policies and procedures reviewed by the testifying expert.
___ Articles reviewed by the testifying expert.
___ Articles reviewed by the consulting expert.
___ A consulting expert’s conversation with a specialist MD who is not a testifying expert.
___ The letter written by the attorney to the testifying expert requesting her to review the case and serve as an expert witness.
___ A list of deposition questions submitted by the consulting expert to the attorney.
___ A testifying expert’s summary of the opposing expert’s deposition.

4. Distinctions highlight why the attorney benefits from using both a consulting expert and testifying expert.
III. **SCOPE OF PRACTICE OF THE CLNC® CONSULTANT**

A. **Distinction Between Roles of the CLNC® Consultant and the Attorney**

1. The Certified Legal Nurse Consultant<sup>CM</sup> provides medical (consulting expert only) and nursing opinions as the expert on health, illness and injury and on the inner workings of the healthcare system.

2. The attorney is the expert on the legal issues and the law governing the case. The Certified Legal Nurse Consultant<sup>CM</sup> does not render legal advice.

3. The attorney serves as the advocate, the person who pleads and urges the cause of another. The testifying expert should *never* advocate a position in the case. The consulting expert might advocate a position or do something that can be construed as advocacy but should remain objective at all times.

B. **CLNC® Consultant’s Major Role – Educator**

1. The Certified Legal Nurse Consultant<sup>CM</sup> does not speak for the patient but rather represents and speaks for the nursing profession. The patient is *not* the focus but can be the beneficiary of the CLNC<sup>®</sup> consultant’s involvement in the case.

2. The Certified Legal Nurse Consultant<sup>CM</sup> educates:
   a. Attorney-client.
   b. Opposing attorneys.
   c. Jurors.
   d. Plaintiffs and defendants.
e.  Judge.

f.  Resource consultants.

g.  Consumers.

C.  Clients Who Use CLNC® Services

1.  Attorneys (plaintiff and defense).

2.  Insurance companies.

3.  Healthcare facilities.


5.  Governmental agencies at all levels.

6.  Private corporations (e.g., for developing corporate strategies for quality assurance, risk identification and management, evaluation and control of loss exposure).
## D. CLNC® Services

<table>
<thead>
<tr>
<th>Service</th>
<th>Consulting Expert</th>
<th>Testifying Expert</th>
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</thead>
<tbody>
<tr>
<td>1. Screen or investigate cases for merit.</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>2. Define the applicable standards of care.</td>
<td>All disciplines</td>
<td>Nursing only</td>
</tr>
<tr>
<td>3. Define deviations from, and adherences to, the applicable standards of care.</td>
<td>All disciplines</td>
<td>Nursing only</td>
</tr>
<tr>
<td>4. Assess the alleged damages and/or injuries.</td>
<td>Yes</td>
<td>Nursing issues only</td>
</tr>
<tr>
<td>5. Identify factors that caused or contributed to the alleged damages and/or injuries.</td>
<td>Yes</td>
<td>Nursing issues only</td>
</tr>
<tr>
<td>6. Organize, tab and paginate medical records.</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>7. Summarize, translate and interpret medical records.</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>8. Identify and recommend potential defendants.</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>9. Conduct literature searches and integrate the literature and standards/guidelines into the case analysis.</td>
<td>Yes</td>
<td>Only to support testimony</td>
</tr>
<tr>
<td>10. Research and analyze the validity and reliability of research studies relied on by all parties.</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>11. Identify and review relevant medical records, hospital policies and procedures, other essential documents and other tangible items.</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Service</td>
<td>Consulting Expert</td>
<td>Testifying Expert</td>
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<tr>
<td>------------------------------------------------------------------------</td>
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<tr>
<td>12. Expand the attorney’s medical library</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>13. Interview clients, key witnesses and experts.</td>
<td>Yes</td>
<td>No, except subsequent treating providers and life care planners</td>
</tr>
<tr>
<td>14. Consult with healthcare providers</td>
<td>Yes</td>
<td>Rarely</td>
</tr>
<tr>
<td>15. Identify types of testifying experts needed.</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>16. Locate and interface with expert witnesses.</td>
<td>Yes</td>
<td>Less common</td>
</tr>
<tr>
<td>17. Communicate with potential testifying experts.</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>18. Analyze and compare expert witness reports and other work products.</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>19. Serve as liaison between the attorney and healthcare providers, testifying experts, parties, witnesses and other consultants.</td>
<td>Yes</td>
<td>Rarely</td>
</tr>
<tr>
<td>20. Prepare interrogatories.</td>
<td>Yes</td>
<td>Verbally only</td>
</tr>
<tr>
<td>21. Review and draft responses to various legal documents and corresponding for the attorney’s signature.</td>
<td>Yes</td>
<td>Review – yes; draft – verbally only</td>
</tr>
<tr>
<td>22. Assist in exhibit preparation.</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>23. Prepare deposition and trial (cross or direct) questions.</td>
<td>Yes</td>
<td>Verbally only</td>
</tr>
<tr>
<td>Service</td>
<td>Consulting Expert</td>
<td>Testifying Expert</td>
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<tr>
<td>24. Review, analyze and summarize depositions, including past testimony.</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>25. Attend depositions, trials, review panels and arbitration and mediation hearings.</td>
<td>Yes</td>
<td>Only the expert’s own deposition, etc.</td>
</tr>
<tr>
<td>26. Help prepare witnesses and experts for deposition and trial.</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>27. Develop written reports for use as study tools by the attorney.</td>
<td>Yes</td>
<td>Brief reports only – not study tools</td>
</tr>
<tr>
<td>28. Coordinate and attend independent medical examinations (IMEs).</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>29. Develop life care plans.</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>30. Coordinate and assist in facilitating focus groups and mock trials.</td>
<td>Yes</td>
<td>No</td>
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</table>
E. **Practice Environment of the CLNC® Consultant**

1. Certified Legal Nurse Consultants™ work within the legal system, which is an adversarial system with negotiation as an inherent part of the process.

2. Certified Legal Nurse Consultants™ work independently or in-house as employees of law firms, insurance companies, healthcare facilities, government agencies and other consulting firms.

<table>
<thead>
<tr>
<th>Independent</th>
<th>In-House</th>
</tr>
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<tbody>
<tr>
<td>• Autonomy.</td>
<td>• You’re part of a team.</td>
</tr>
<tr>
<td>• Career satisfaction and the challenge of mastering business management and marketing skills.</td>
<td>• Don’t have the responsibility of owning and operating a business.</td>
</tr>
<tr>
<td>• Flexibility and control over career.</td>
<td>• Workday clearly has a beginning and end to it.</td>
</tr>
<tr>
<td>• Greater opportunities for prosperity.</td>
<td>• Steady income and benefits.</td>
</tr>
<tr>
<td>• Opportunity to work with a variety of clients.</td>
<td>• Opportunity to work closely with one or two attorneys.</td>
</tr>
<tr>
<td>• Can remain connected to the healthcare system.</td>
<td>• Can develop new network within your employer’s firm.</td>
</tr>
<tr>
<td>• Freedom to branch out geographically.</td>
<td>• Generally get to stay in your geographic area.</td>
</tr>
<tr>
<td>• Security.</td>
<td>• Security.</td>
</tr>
</tbody>
</table>
3. Certified Legal Nurse Consultants\textsuperscript{CM} work full time or part time.

<table>
<thead>
<tr>
<th>Part Time</th>
<th>Full Time</th>
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<tbody>
<tr>
<td>• Risk nothing financially.</td>
<td>• Greater opportunity for prosperity.</td>
</tr>
<tr>
<td>• Opportunity to supplement existing income.</td>
<td>• Able to devote all your effort toward building your dream.</td>
</tr>
<tr>
<td>• Can work as many or as few hours as you choose.</td>
<td>• Know your hours in advance</td>
</tr>
<tr>
<td>• Can remain connected to the healthcare system.</td>
<td></td>
</tr>
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</table>

F. The CLNC\textsuperscript{®} Consultant’s Impact on the Legal System

1. Represent and speak for the nursing profession.

2. Uphold standards of care for the healthcare community by identifying meritorious cases and communicating deviations from recognized standards. The result is improved quality of care.

3. Identify fraudulent and nonmeritorious claims and help to defend against them or keep them out of the system.

4. Help to ensure that the legal system uses scientific, medical and nursing information properly and without distortion.

5. Provide a cost-effective adjunct to the litigation process.

6. Promote justice
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