I. THE PRE-LITIGATION PHASE OF A LAWSUIT

A. An Incident or Dispute Occurs

1. Incident.
   a. Any event that suggests the possibility of a lawsuit.

2. A dispute or suit arises out of a tort or some legal wrong.
   a. Plaintiff – Person allegedly harmed by the wrong and bringing the suit.
   b. Defendant – Person or company defending or denying; the party against whom relief or recovery is sought in a suit.
   c. Tortfeasor – Wrongdoer; one who committed the tort.

3. Actions that should be taken following an incident.
   a. The potential defendant should document the incident in accordance with industry standards.
      (1) CLNC® Consultant’s Role – Assess whether the defendant documented in accordance with healthcare industry standards.
   b. The potential defendant should make contemporaneous written notes in the business or medical records of all oral communications with plaintiff, family members or witnesses concerning the incident.
c. If a recognized incident occurs, a special report is indicated.

(1) **CLNC® Consultant’s Role** – Educate the attorney about whether an incident was significant enough to indicate completing an incident report.

B. **The Potential Defendant Investigates**

1. Immediately following the incident, the potential defendant should review relevant records or documents in detail.

2. The potential defendant notifies the insurance carrier.

3. The potential defendant should not talk to the plaintiff attorney, other employees, etc., about the incident.

4. For future reference, the potential defendant should keep anecdotal or personal notes of anything that might help the case, but that would not normally be included in the business or medical record.

   a. **CLNC® Consultant’s Role** – Incorporate any applicable anecdotal notes into your case analysis.

C. **The Potential Defendant’s Insurance Company Investigates**

1. Investigation is done as soon after the incident as possible and before the plaintiff seeks an attorney or suit is filed.

2. The insurance company assigns a claims investigator to investigate the claim to the extent necessary:

   a. Assesses coverage.
b. Assesses liability and damage issues; that is, assess the incident as a potential claim for which they might be liable and evaluate possible future losses that might arise from the claim.

c. Interviews the potential defendant, witnesses and key employees.
   (1) To determine what they will say.
   (2) To set down their statements in writing.

d. Reviews and analyzes medical records and relevant documents.
   (1) Similar to what the plaintiff attorney does.
   (2) Summarizes facts and events.
   (3) Evaluates potential liability on the part of the potential defendants.
   (4) Researches the literature.
   (5) Analyzes liability issues.
   (6) Analyzes damage issues.

3. Retains a consulting expert (CE), if necessary at that time.

4. Evaluates the defendant as a potential witness.

5. Investigates further or hires a private investigator, if necessary.

6. Obtains information on the potential plaintiff/claimant.
   a. Background information.
   b. Medical history of the plaintiff.
   c. Overall evaluation of the prospective plaintiff.

7. Identifies codefendants and third-party defendants.
8. Evaluates potential defenses.
   a. Begins early development of themes, positions and strategies for representing the defendant.
      (1) **CLNC® Consultant’s Role** – Provide input on development of these themes, positions and strategies.

   a. Funds set aside to cover future expenses, losses or claims.

10. Investigates many incidents that don’t become claims.
    a. If the incident does not result in a claim, eventually the claim file is closed.

11. **CLNC® Consultant’s Role** – Provide opinions which assist the insurance company in the investigation.

D. **The Potential Plaintiff Recognizes There Is a Problem**

1. The potential plaintiff will quickly identify an unexpected bad result.

2. Regardless of the magnitude of the incident, the potential plaintiff might not be aware of the problem at the time.

3. Outside stimulus might make the potential plaintiff see the incident differently.
   a. A neighbor, family member, etc., suggests something is not right and recommends finding an attorney.
b. A subsequent treating healthcare provider comments on medical care rendered.

c. A healthcare provider from the facility approaches the client or family member regarding the incident.

d. An argument between healthcare providers takes place in front of the client or family members.

e. A supervisor reprimands an employee in the presence of a patient or family member.

f. The plaintiff sees an attorney’s advertising in print, television, radio, billboards, Internet or other media.

4. CLNC® Consultant’s Role – Ask how the plaintiff came to recognize the problem and what gave him the idea to sue.

E. What Motivates People to Sue

1. Bad result.

2. Anger.

3. Feeling that they have been misled.

4. Desire for compensation for damages.

5. No income for future healthcare needs.

7. Desire to improve a system.

8. Genuine attempt to find out what really happened.

9. Media attention.

10. Unrealistic expectations.


12. **CLNC® Consultant’s Role** – Address the plaintiff’s motives with your attorney-client if the motives seem unrealistic or less than pure.

F. **The Prospective Plaintiff Seeks an Attorney**

1. Sources for locating attorneys.
   a. Referral from a friend, family member, professional colleague, etc.
   b. Advertisements in print, television, radio, billboards, Internet or other media.
   c. History of doing business with the attorney.
   d. Attorney-related association, legal directory or legal referral line or service.
e. Telephone book (Yellow Pages).

f. Newspaper and magazine articles about a medication, condition or defective product.

g. “Shingle” or signage for attorney’s office.

2. Prospective plaintiff’s initial telephone call to the attorney.

a. The prospective plaintiff might interview several attorneys to determine which one can best represent him.

b. The prospective plaintiff articulates his case.
   (1) The prospective plaintiff communicates.
      (a) What happened.
      (b) What and who he is complaining about.
      (c) Damages sustained and future prognosis.

c. If interested, the attorney probes further for:
   (1) Date of the incident.
   (2) Names of potential defendants.
   (3) Names of subsequent treating providers.
   (4) Assurance that the prospective plaintiff doesn’t currently have another attorney or hasn’t fired another attorney.

d. The attorney makes it clear to the prospective plaintiff that she is only investigating at this stage.

e. **CLNC® Consultant’s Role** – An in-house Certified Legal Nurse Consultant™ might be the first representative of the legal team to talk to the prospective plaintiff.
3. If interested, the attorney sets up a conference with the prospective plaintiff and asks him to bring the following:

   a. A narrative of the incident including:
      (1) Chronology of events.
      (2) Comprehensive history of the prospective plaintiff’s health prior to and subsequent to the incident.
      (3) The prospective plaintiff’s description of how the incident has affected his life and the lives of his family members.
      (4) Names of people who have knowledge of the incident.
      (5) Relevant communications between the prospective plaintiff and other healthcare providers.

   b. All medical records, bills, special studies (X rays, etc.), photographs, video and other relevant materials.

G. The Prospective Plaintiff’s Initial Conference with the Law Firm

1. As with the initial phone conversation, the first step is information gathering.

2. Office intake form. (Exhibit A)

   a. Different office intake forms are used for different types of cases and different injuries.
      (1) Personal injury (medical malpractice).
      (2) Auto accident.
      (3) Products liability.

   b. May be presented prior to or at initial interview and are often available online.

3. CLNC® Consultant’s Role – Sit in on this initial conference, if invited by the attorney.
4. Some firms have the prospective plaintiff review a video to educate them about the litigation process.

a. **CLNC® Consultant’s Role** – Make sure the prospective plaintiff is asked if he has any questions about the video.

5. The prospective plaintiff tells his story. The story might be repetitive of what was covered in a phone conversation or written narrative submitted by the prospective plaintiff because the attorney wants to be sure of getting the complete story.

a. Prospective plaintiff’s personal information.
   (1) Background information.
   (2) Employment history.
   (3) Marital status, dependents, living parents, legal guardian, etc.
   (4) Education.

b. Prospective plaintiff’s impression of the case.
   (1) Objective summary of events.
   (2) Parties of whom the prospective plaintiff is complaining.
   (3) Date of the incident.

c. Detailed medical history.
   (1) Past medical history.
   (2) Incident itself.
   (3) History subsequent to the event.

d. Injuries and damages.

e. If a death case, whether an autopsy was performed.

f. Prospective plaintiff’s legal history.

g. Let the prospective plaintiff tell his own story.
6. The attorney evaluates the prospective plaintiff.
   a. Does the attorney like the prospective plaintiff?
   b. Does the attorney think the prospective plaintiff will be an ideal or difficult client?

7. If the attorney decides to pursue the case further, sometimes she obtains a power of attorney and retainer contract simply to investigate the case.

8. The attorney assesses whether to represent the prospective plaintiff.

9. The prospective plaintiff decides whether he wants this attorney to represent him.

H. The Client Hires the Attorney and the Paperwork Begins in Earnest

1. The attorney obtains a signed power of attorney and retainer contract.
   a. The power of attorney gives the attorney the power to act on behalf of the client. (Exhibit B)
   b. The retainer contract addresses fees, how expenses are handled and the attorney’s right to withdraw from the case. (Exhibit C)

2. Usually the plaintiff attorney’s fee is on a contingent basis.
   a. The plaintiff attorney bears the financial risk of the litigation process by fronting the expense of conducting the case.
b. If a case settles or there is a jury verdict for the plaintiff:
   (1) The attorney’s fee/percentage is distributed after any costs and expenses are deducted, i.e. on the “net” recovery.

c. Some states regulate allowable fees setting maximum rates for different types of cases either by law or through the attorneys’ code of professional responsibility.
   (1) Example: In one state’s courts, flat or fixed billing fees are limited to 33⅓% of total recovered.
   (2) Example: In the same state’s courts the sliding fee scale in medical malpractice cases is limited to:
      (a) 30% of the first $250,000 recovered, plus
      (b) 25% of the next $250,000 recovered, plus
      (c) 20% of the next $500,000 recovered, plus
      (d) 10% on any amounts recovered over $1,250,000 (all net of costs and expenses).
   (3) Example: In the same state’s courts the sliding fee scale in general civil cases is limited to:
      (a) 50% of the first $1,000 recovered, plus
      (b) 40% of the next $2,000 recovered, plus
      (c) 35% of the next $22,000 recovered, plus
      (d) 25% of any amounts over $25,000 (all net of costs and expenses).

d. A contingency fee may also be based on the time or stage of litigation at which recovery is made.
   (1) Example:
      (a) 33⅓% of the total recovered prior to filing the suit.
      (b) 40% of the total recovered after filing suit but before trial.
      (c) 40+% of the total recovered at, during or after trial or during or after appeal.

e. The contingency fee benefits our society in several ways.
   (1) Offers the average consumer a right to justice.
   (2) Helps to level the playing field somewhat.
   (3) Promotes a safer U.S.

f. Any state or federal restrictions on attorney’s fees will apply.
3. The attorney obtains medical authorizations to be able to obtain medical records and billing records.
   a. The right to protect confidentiality of information in the medical record belongs to the patient.
   b. The patient has a legal right to the content of the medical records.
   c. The patient can authorize the release of confidential information to anyone at any time.
   d. The attorney cannot obtain records without the client’s permission.

4. Unrestricted Medical Authorization (Exhibit D) allows the plaintiff’s attorney free access to any and all medical records, reports, etc.

5. Limited Medical Authorization (Exhibit E) allows an attorney access to medical records with certain restrictions.
   a. Allows the facility or provider to release medical records and reports to an attorney with certain provisions.
      (1) The facility or provider releasing the records may not discuss the case without the written consent of the patient or without the plaintiff attorney present.
      (2) The facility or provider may not release records without delivering a legible copy to the plaintiff attorney.
      (3) The limited authorization is valid only through a certain date.

6. Medical records retention ensures that patients can have access to their records years after their treatment.
I. Attorney Referrals

1. The first attorney may refer the case out to an attorney who specializes in the matter.
   
a. **CLNC® Consultant’s Role** – Screen the case before the attorney refers it out, if requested by the attorney.
      
      (1) The new attorney might already have a Certified Legal Nurse Consultant™ on staff or on retainer as a consultant. Be prepared to offer your CLNC® services to the new attorney if needed – an excellent possibility for expanding your clientele.

J. The Plaintiff Law Firm Investigates the Case

1. The plaintiff attorney reviews and analyzes medical records and relevant documents.
   
a. Scrutinizes records and documents inside and out.

b. Identifies the liability and damages issues.

c. Identifies the factual issues – what happened and what is in dispute.

d. Reviews past medical records, subsequent treating records, bills, etc.

2. The attorney has consulting experts or potential testifying experts review the case for merit.
   
a. **CLNC® Consultant’s Role** – Conduct this initial review.

3. The plaintiff attorney determines whether the documents and records are consistent with the plaintiff’s story.
4. The plaintiff attorney assesses potential plaintiffs again in-depth.

5. The plaintiff attorney speaks to subsequent treating providers.

6. The plaintiff attorney evaluates potential defendants and their potential liability.
   a. Usually, multiple defendants participate in the lawsuit.
   b. If the attorney doesn’t sue all appropriate defendants, she might be liable for legal malpractice.
   c. Once the statute of limitations has expired, defendants will unite and shift all responsibility to the empty chair, i.e., the culpable party that was not sued.
   d. The reputation of the defendant is important.
   e. CLNC® Consultant’s Role – If you have had any experience with any of the defendants, offer your opinion of their competence and credibility. Of course, you would not divulge anything told to you in confidence.
   f. What’s the feasibility of locating a TE to testify against this defendant?
      (1) CLNC® Consultant’s Role – Advise the attorney on feasibility of locating a TE.
   g. Does the attorney have any conflict of interest with any of the defendants?
7. The plaintiff attorney evaluates potential defenses against the plaintiff.
   a. Establishes whether there was contributory or comparative negligence, i.e., negligence on the part of the plaintiff.
   b. Assesses whether contributory or comparative negligence defenses will overwhelm proof of the plaintiff’s case.

8. The plaintiff attorney might investigate the case further.
   a. Interviews witnesses to obtain their written statements.
   b. Researches the literature.
   c. Hires private investigators.

9. The plaintiff attorney assesses legal issues and applicable laws.
   a. Types of law.
      (1) Common law – Precedents set by the aggregate of previous court cases.
      (2) Statutory law – Laws enacted by the legislature.
      (3) Administrative law – Body of law created by administrative agencies in the form of rules and regulations.

10. The plaintiff attorney decides on the theory of the lawsuit.
    a. Based on TEs’, CEs’ and subsequent treating providers’ opinions regarding legal elements of the case.
    b. Based on legal issues that don’t involve experts.
11. The attorney develops the theme, positions and strategies for representing the client.
   a. **CLNC® Consultant’s Role** – Know and understand your attorney’s theme, positions and strategies for each case.

12. The plaintiff attorney analyzes the case for settlement potential.

**II. NOTICE LETTERS**

A. **Notice of Lawsuit Required in Most States**

1. Written notice must be given to the defendant against whom the claim is made or the suit is filed.

2. There will be a deadline, in advance of filing the suit, for sending notice letters.

3. The notice must:
   a. Comply with the state’s statute requiring notice.
   b. Be given pursuant to this specific statute; i.e., must list the relevant statute.

4. The same statute may allow the notice to request medical records.

5. **CLNC® Consultant’s Role** – Assist in identifying the parties that should be noticed and the specific medical records that should be requested.
6. Sample notice letter. (Exhibit F)
   a. Please be advised that this office represents Ms. Nitsover in regard to the assertion of a healthcare liability claim arising from improper care rendered on or about July 10, 0000.

III. FILING THE SUIT

A. The Plaintiff Files a Complaint or Petition

1. The lawsuit technically begins when the plaintiff files a complaint or petition.

2. The complaint or petition is a legal document containing the allegations and the legal basis to support a claim for the case.

   a. The complaint names the parties to the suit.
      (1) Plaintiffs.
      (2) Defendants.

   b. Date of incident.

   c. Allegations and legal basis for allegations.

   d. Demand for judgment for the relief to which the plaintiff deems himself entitled.

   e. Jurisdiction for the case.
      (1) The power, right and inherent authority of a court to hear a case and apply the law. A court may exercise its authority only if it has both personal and subject matter jurisdiction.
         (a) Personal jurisdiction is the authority that a court has over the parties in the case.
         (b) Subject matter jurisdiction is a court's authority over the particular claim or controversy.
i) Courts of special jurisdiction or courts of limited jurisdiction, also known as subject matter jurisdiction courts, may hear only certain types of cases, i.e. family law, probate, tax, traffic, juvenile or admiralty cases.

ii) Courts of general jurisdiction can hear cases that are not specifically reserved for courts of special jurisdiction.

f. Venue for the case.
   (1) The geographical area in which a court with the proper jurisdiction may hear a case.
      (a) Determined by the place where the cause of action arose, where the parties reside or where they conduct their business.
      (b) Related to convenience of the litigants and may be waived by consent of the parties.

g. **CLNC® Consultant’s Role** – Assist your attorney-client to gather information relevant to drafting the complaint (date of incident, allegations, etc.).

3. The complaint must be filed before the statute of limitations expires.
   a. The statute varies from state to state.
   b. Generally, the statute expires at the end of a specified period that starts with the ascertainable date of the tort.
   c. In some jurisdictions, the statute of limitations runs from the last date of treatment by the defendant connected with the injury.
   d. Two common exceptions to the statute recognized by many but not all jurisdictions:
      (1) Discovery exception – Statute runs from the date the plaintiff discovers or should have reasonably discovered his injury.
(2) Intentional concealment exception – Statute runs from the date the plaintiff discovered the concealment.

e. Assessing the statute of limitations is the attorney’s job, not the job of the Certified Legal Nurse Consultant®

(1) **CLNC® Consultant’s Role** – Be aware if the statute is about to expire, because this should make the case a top priority.

4. Some jurisdictions require electronic filing in civil cases.

   a. Parties can send and receive all court documents, pay filing fees, notify other parties, receive court notices and retrieve court information via an efilning system.

5. The complaint can and will be amended numerous times during the lawsuit. *(Exhibit G)*

   a. **CLNC® Consultant’s Role** – You might be involved in helping the attorney identify issues for amendment.

6. Some states require that an expert affidavit, certificate of merit (declaration of merit) or certificate of good faith be filed at the time the suit is filed. *(Exhibit H)*

   a. **CLNC® Consultant’s Role** – Help the attorney obtain expert affidavits or certificates.

**B. The Court Serves the Defendant with a Summons**

1. Once the complaint or petition has been filed, the court serves the defendant with a summons (citation).

   a. The summons is the instrument the court uses to announce the lawsuit to the defendant.
b. The summons is attached to the complaint or petition.

c. The summons informs the defendant that he must file an answer to all allegations and issues raised by the plaintiff within a specified period of time.

d. An individual defendant must be served with summons in one of three ways:
   (1) By a sheriff, other proper peace officer or by some other person specially appointed by the court for that purpose:
       (a) Leaving a copy with the defendant personally, frequently at the defendant’s workplace.
       (b) Leaving a copy at his usual place of abode with a family member who is at least 13 years old.
   (2) By certified mail, return receipt requested.

e. A corporation or institution can be served with a summons by:
   (1) Leaving a copy of the summons:
       (a) With the corporation or institution’s registered agent.
       (b) With an officer of the defendant corporation or institution.
   (2) By certified mail, return receipt requested.

C. The Defendant Notifies the Insurance Company

1. The defendant should notify his insurance carrier as soon as he realizes there is a possible claim.

2. The insurance carrier discusses the case with the defendant.

3. The defendant delivers the summons with the attached complaint or petition to the insurance carrier or its attorney.
4. The defendant should not talk about the case with the plaintiff, plaintiff’s attorney, neighbors, friends, colleagues, codefendants, etc.

5. The defendant should review the record or documents in detail.
   a. A defendant should never tamper with the records or documents.
   b. **CLNC® Consultant’s Role** – Alert the insurance carrier to any suspicions of tampering.

6. The insurance carrier assigns the case to a defense law firm that will litigate the case.

7. The defendant should prepare a thorough analysis of the case for the defense attorney.

D. **The Defense Attorney Prepares the Answer**

1. The defense attorney reviews the information received from the defendant and the insurance carrier.

2. The defense attorney sets up a file with information received and new information acquired.
   a. Information about the defendant and defendant’s case.
      (1) Name, address and phone number.
      (2) Background information.
      (3) Nature of practice.
      (4) Specialty.
      (5) Professional memberships.
      (6) Any disciplinary actions taken (probations, suspensions, etc.).
      (7) History of prior lawsuits.
      (8) Date the incident was reported to the insurance carrier.
b. Information about the plaintiff and plaintiff’s case.
   (1) Name, address and phone number.
   (2) Age and weight at the time of the incident.
   (3) Occupation.
   (4) Employer and place of employment.
   (5) Marital status.
   (6) Number of children.
   (7) Relationship to defendant.
   (8) Health status at the time of the incident.
   (9) Description of the incident itself.
   (10) Alleged damages/injuries.
   (11) Relevant causation issues and defenses.
   (12) Treatment rendered by the defendant that was not reflected in the medical record.
   (13) Defendant’s understanding of the plaintiff’s allegations.
   (14) Who was in charge of the situation surrounding the event?
   (15) Dates the defendant-provider first and last treated the plaintiff (medical malpractice).
   (16) Who owns the related facility or corporation?

c. **CLNC® Consultant’s Role** – Assist in gathering information essential to this file.

3. The assigned defense attorney prepares the answer.
   a. The answer is the formal document filed in response to the petition or complaint.
   
   b. The defense must respond to each of the allegations and issues.

   c. **CLNC® Consultant’s Role** – Assist in drafting the answer by discussing plausible defenses with the attorney.

4. The answer may contain other matters:
   a. Procedural matters.
b. Answers that attack the sufficiency of the complaint.
   (1) Failure to state a claim.
   (2) Special exceptions.
      (a) Most state courts require a plaintiff to plead a short
          statement of the cause of action sufficient to give
          fair notice of his claim.
      (b) The defendant may object to the way the cause of
          action is stated and ask the court to require the
          plaintiff to plead with more specificity.

c. Answers concerning the merits of the suit.
   (1) Denial of facts.
   (2) Affirmative defense.
      (a) States that even if the plaintiff can prove his basic
          claim, there is an external reason why the plaintiff
          should not recover damages.

5. The answer can and will be amended several times before trial. (Exhibit I)

E. The Defendants File Cross-Suits

1. A cross-suit is a claim brought by a defendant against a codefendant or
   plaintiff.

2. **CLNC® Consultant’s Role** – Help the attorney identify other culpable
   players or potential codefendants.

F. The Defense Attorney Decides on the Theory of the Lawsuit

1. Based on TEs’, CEs’ and subsequent treating physicians’ opinions
   regarding four legal elements.

2. Based on legal issues that don’t involve experts.
3. Does a lot of what the plaintiff attorney has done or will do.
   a. Identifies factual issues.
   b. Identifies liability issues.
   c. Identifies legal issues.
   d. Assesses for liability, exposure, cost to defend, etc.

G. Negotiating a Settlement

1. A settlement is an agreement between parties to an incident, claim or lawsuit that resolves their legal dispute.

2. Some settlements are sealed.
   a. To maintain the defendant’s public image.
   b. To prevent a flood of similar lawsuits.
   c. To protect proprietary secrets.
   d. To protect privileged information contained in a settlement agreement.

3. All parties consider settlement throughout the litigation process.
4. Negotiations take place throughout the litigation process.
   a. **CLNC® Consultant’s Role** – Help the attorney develop issues essential to the settlement negotiations.

5. Common settlement scenario.
   a. The defense attorney makes an offer of settlement or the plaintiff attorney makes a demand for settlement.
   b. The opposing attorney responds.
   c. Negotiations continue.
   d. Settlement occurs or negotiations break down.
   e. Broken-off settlement negotiations can be reactivated at any time.

6. Factors affecting settlement:
   a. The attorneys.
      (1) Reputation and experience.
      (2) Desire to limit expenses.
      (3) Desire to win – No attorney likes to lose.
      (4) Plaintiff attorney – Desire to assure client will receive some compensation.
      (5) Volume of cases – Playing the numbers.
   b. Plaintiff.
      (1) Credibility.
      (2) Emotional stress.
      (3) Financial stress.
      (4) Desire for some level of compensation.
c. Defendants.
   (1) Credibility.
   (2) Avoid additional financial costs.

d. Insurance company has right to settle.

e. Extent of injuries.

f. Evidence and proof of four legal elements.

g. Possible defenses.

h. Credibility of parties’ witnesses.

i. Experts.
   (1) Whether there is an expert who will agree to testify.
   (2) Whether the expert’s testimony will be effective.
   (3) TE’s performance in deposition is poor.
   (4) TE’s opinions weaken as litigation progresses.

j. Insurance coverage limits.

k. Judge.

l. Jurisdiction.

m. CLNC® Consultant’s Role – Offer opinions which can influence the attorney’s assessment of settlement factors.

7. Settlement brochure.

a. Contains:
   (1) Summary of facts.
   (2) Background information on plaintiff.
(3) Liability issues.
(4) Damages and injuries.
(5) Key witnesses’ or experts’ testimony.

b. **CLNC® Consultant’s Role** – Help the attorney develop a settlement brochure, video or PowerPoint® presentation.

8. Structured settlements.
   a. The plaintiff receives periodic, specified payments.

**IV. MOTIONS AND PRETRIAL HEARINGS**

A. **Definition of Motion**

   1. An application to the court for a rule or order directing some action in favor of the applicant.

B. **Procedure**

   1. The attorney files a motion in writing with the court.

   2. The attorney requests a hearing on the motion.

   3. A hearing is scheduled.

   4. The judge hears the motion in court.

   5. **CLNC® Consultant’s Role** – Assist the attorney in preparing motions.
C. Examples of Motions

1. Motion for summary judgment.
   a. If the undisputed facts, as developed through affidavits or discovery (depositions, interrogatories, pleadings, admissions), show that one side or the other is entitled to judgment, a judge can grant a summary judgment.
   b. There is no genuine issue of material fact.
   c. The burden is on the movant to show that there are no issues of material fact, and that the movant is entitled to a judgment as a matter of law.

2. Motion to compel production.

3. Motion for protective order.
   a. Used to gain protection against undue burden, unnecessary expense, harassment, annoyance, etc.

4. Motion for a bill of particulars.
   a. If the plaintiff’s allegations lack detail, the defendant can demand more detailed allegations.

5. Motion in limine.
   a. Motion to preclude admission of certain evidence or certain testimony.
V. DISCOVERY

A. Introduction

1. Definition of discovery – Procedures for obtaining information from other parties and witnesses before trial.
   a. Each attorney develops his own discovery and responds to discovery from other parties.
      (1) CLNC® Consultant’s Role – Assist with all aspects of discovery.

2. Purpose of discovery.
   a. Get to the truth.
   b. Obtain the facts and evidence in a form admissible at trial.
   c. Narrow the issues.
   d. Determine the strengths and weaknesses of the case.
   e. Effectively negotiate settlement.
   f. Plan trial strategy.
   g. Intimidate and harass.
   h. Prevent unfair surprises.

   a. Any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense.
(1) Scope of discovery is broader than what is admissible at trial.
(2) Not necessarily admissible at trial, but reasonably calculated to lead to discovery of admissible evidence.

4. The majority of states have adopted Rules of Civil Procedure that mirror or are similar to the Federal Rules of Civil Procedure (FRCP).

a. Discovery in state courts is governed by that state’s rules and any local rules just as discovery in federal courts is governed by the FRCP.

b. Additionally, many state courts and federal district courts also have their own local rules or standing orders that govern litigation in those courts.

5. Mandatory disclosure.

a. Federal and state trends toward mandatory disclosure.

b. Voluntary disclosure of information that is likely to be sought in routine discovery is mandated.

   (1) Name, address and telephone number.
   (2) Qualifications of the expert.
   (3) Publications within preceding ten years.
   (4) Basis of opinions, fees, exhibits, other cases and more.

d. Failure to comply without substantial justification can result in sanctions.

6. A joint discovery plan is required in some jurisdictions and is governed by the court’s local rules.
7. eDiscovery (discovery of electronically stored information) in federal courts.

   a. Requires all parties to meet within 99 days of suit being filed and at least 21 days prior to any “scheduling conference” with the judge.

   b. An important, time-consuming and often expensive process.

   c. Purpose.
      (1) Discuss any issues relating to preserving discoverable information.
      (2) Develop a proposed discovery plan that includes the parties’ views along with proposals concerning the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to, or focused upon, particular issues.
      (3) Discuss types of information available and any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.
      (4) Discuss what changes should be made in the limitations on discovery imposed under the federal rules or by local rules, and what other limitations should be imposed, if any.

B. Methods of Discovery

1. Interrogatories. (Exhibit J)

   a. Definition – A set or series of written questions directed to a party in the lawsuit requiring written responses.

   b. Limitations.
      (1) Interrogatories can be directed only to a party in a lawsuit.
      (2) Number of questions allowed varies by state.
         (a) Federal rules – Limit of 25 per side, including sub-parts.
(3) Interrogatories are best for obtaining simple factual information and for gathering information for later eDiscovery using requests for production.

c. Responses.
(1) The party answering interrogatories has a certain period of time to respond under oath, unless formally objecting, in which case the reasons for objection must be stated in lieu of an answer.
   (a) Federal rules – Within 30 days after receiving service of the interrogatories.
(2) The party will either:
   (a) Answer.
   (b) Object.
      i) Privileged.
      ii) Not relevant or too broad.
      iii) Burdensome.
      iv) Vague.
(3) Responses may be admissible as evidence at trial.
(4) Duty to supplement.
   (a) A party knows his response was incorrect or incomplete when made.
   (b) A party knows his former response is no longer true and complete, and the failure to amend would be misleading.

d. Interrogatories are usually served before other discovery.

e. CLNC® Consultant's Role – Draft interrogatories specific to the case and review parties’ responses to interrogatories and provide the attorney information to assist in drafting of interrogatories.

2. Requests for production. (Exhibit K)

a. Definition – A request to another party in the lawsuit asking that party to produce certain documents or other tangible items.
   (1) Any party may request another party to produce or permit the requesting party or someone acting on the requesting party’s behalf to inspect, copy, test, sample or photograph documents or tangible things that constitute or contain matters within the scope of discovery and that are in the
possession, custody or control of the party on whom the request is served.

(2) Unequivocally covers electronic data, business records, etc.

(3) Kinds of requests:
   (a) General.
   (b) Specific.

b. Limitations.
   (1) Requests for production can only be directed to a party in the lawsuit.
   (2) No limitations on the number of requests for production.

c. Responses.
   (1) The responding party has a certain period of time to respond.
      (a) Federal rules – within 30 days.
   (2) The responding party will either:
      (a) Produce.
      (b) Object.
   (3) Objections.
      (a) Privileged.
         i) Generally includes:
            a) Peer review committee reports or proceedings.
            b) Medical review committee reports or proceedings.
            c) Quality improvement or assurance reports.
            d) Incident reports created specifically for, and collected, and maintained by a quality improvement committee.
               i) Does not include incident reports in general, although this varies from state to state.
            (b) Not relevant or too broad.
            (c) Burdensome.
   (4) Duty to supplement.

d. CLNC® Consultant’s Role – Draft requests for production specific to the case and review parties' responses to requests for production
3. Requests for admission. (Exhibit L)

a. Definition – A written statement of facts or opinion concerning the case submitted to a party to which that party must admit or deny under oath.

b. Purpose.
   (1) Establish the existence, custody, description, location of documents or tangible items.
   (2) Establish genuineness of documents.
   (3) Establish the identity and location of individuals who have relevant information.
   (4) Facilitate proof of issues.
   (5) Narrow the issues by eliminating uncontested issues.

c. Limitations.
   (1) May only be served on a party to the lawsuit.
   (2) No limitations on the number of requests for admission.

d. Responses.
   (1) The party responding has a certain period of time to respond under oath, unless formally objecting, in which case the reasons for objection must be stated in lieu of an answer.
   (2) The party will either:
      (a) Answer.
      (b) Object.
         i) Information is privileged.
         ii) Not relevant or too broad.
         iii) Burdensome and harassing.
      (c) State they are unable to admit or deny.
   (3) If the party fails to respond within the allotted time, that party is deemed to have admitted the statement.
      (a) If the party admits a statement, this is equivalent to conclusively establishing it at trial.
      (b) If the party denies or refuses to make an admission, costs associated with proving those issues can be assessed against the answering party.
   (4) Duty to supplement.
   (5) Amendments are generally permitted.
e. **CLNC® Consultant’s Role** – Draft requests for admission specific to the case and review the parties’ responses to requests for admission.

4. **Depositions. (Exhibit M)**

   a. Definition – An attorney questions a witness, party or expert under oath in front of a court reporter and other attorneys prior to the trial.
      (1) State or Federal Rules of Civil Procedure apply even though the deposition is not taken in open court.
      (2) Depositions can be oral or written.
      (3) In most states, parts of the deposition testimony are admissible at trial.
      (4) Limitations.

   b. Purpose.
      (1) Obtain evidence to discover and narrow facts and issues.
      (2) Obtain admissions from the opposing party.
      (3) Lock in the testimony of a witness or expert.
      (4) Impeach a witness at trial.
      (5) Learn the identity of other witnesses, documents and tangible items.
      (6) Evaluate the strengths and weaknesses of the case.
      (7) Discredit a witness at trial.
      (8) Assess the credibility and effectiveness of an expert witness.

   c. Most attorneys consider deposition the most valuable discovery tool.

   d. Depositions are usually taken of:
      (1) Parties to the lawsuit.
      (2) Material fact witnesses.
      (3) Testifying experts.
      (4) Subsequent treating providers.

   e. Parties usually do not depose their own witnesses and experts unless they will be unavailable for trial.
f. **CLNC® Consultant’s Role** – Draft deposition questions specific to the case, review deposition transcripts of relevant witnesses and experts and attend depositions when requested.

5. **Subpoena.**

   a. An order by a government agency, court or officer of the court (attorney) to compel testimony by a witness or production of evidence under a penalty for failure to do so.

   b. Two types of subpoena:
      (1) **Subpoena for deposition.**
          (a) Requires the individual to appear at a certain time and place to give testimony on a certain matter.

      (2) **Subpoena duces tecum. (Exhibit N)**
          (a) A process by which the court, at the request of a party, requires a witness to produce certain documents or tangible items relevant to the subject matter in question.

   c. **CLNC® Consultant’s Role** – Identify significant players the attorney should depose. Review documents and tangible items produced through *subpoena duces tecum*.

6. **Physical and mental examination.**

   a. Any party whose physical or mental condition is in controversy may be required to have a physical or mental examination.

   b. Also known as independent medical examination (IME) or defense medical examination (DME)

   c. **CLNC® Consultant’s Role** – Attend IMEs.
VI. PRETRIAL CONFERENCE

A. The Judge and the Attorneys of Record Meet

1. May be called at the discretion of the court.

2. Purpose.
   a. To discuss the way the trial will be conducted.
   b. To explore and encourage settlement.
   c. To rule on pretrial matters.
   d. To set deadlines for discovery and other matters.
   e. To narrow the issues.

VII. MOCK TRIAL

A. Purpose

1. Used by one party to assess strengths and weaknesses of the case and to evaluate how real people will react to the basic facts and arguments; similar to a dress rehearsal.

B. Procedure

1. Mock jurors are hired.

2. Mock jurors are assembled.
3. The case is presented in the format of a mini-trial or summary jury trial.

4. Mock jury returns a verdict.

5. The attorney questions jurors about their assessment of the case.

6. The attorney evaluates the results and responds accordingly.

7. **CLNC® Consultant’s Role** – Help set up mock trials and focus groups from beginning to end.

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**VIII. PEACE NEGOTIATIONS – ADR**

**A. Definition**

1. Alternative dispute resolution (ADR) is any procedure designed or used to resolve disputes outside the traditional legal system.

**B. Importance of ADR to the Consumer and Certified Legal Nurse Consultant**

1. Courthouses are rapidly becoming alternative dispute resolution centers offering not only the traditional courtroom setting but also a variety of ADR services.

2. Clogged court dockets are putting more emphasis on use of ADR to resolve cases in a timely manner.

   a. Many state and county courts have ADR days during which a push is made to settle many cases.
b. Many states require some form of ADR in medical malpractice or personal injury cases.

3. ADR is growing as a more respected means of settling disputes.
   a. More attorneys and law firms are involved in ADR, opening up a new field of practice for the Certified Legal Nurse Consultant® CM.
   b. Many contractual relationships now include an ADR clause.

C. Benefits of ADR to the Consumer-Litigant

1. Increased access to justice – Because of the benefits of ADR, more people are able to have their day in court.

2. Reduced costs – Lower costs make ADR available to more people.

3. Faster resolution of disputes – Clogged courts cannot handle all litigation (up to five years wait in some jurisdictions). ADR can resolve disputes in six months or less from initial filing.

4. Flexibility – Because there are several types of ADR, the consumer can select the most beneficial form of ADR for each particular case.

5. Binding or nonbinding – Depending on the nature of the agreement made prior to entering ADR, it can be binding or nonbinding.
   a. If nonbinding, parties still have a right to litigate the case or try another ADR process.
   b. If binding, parties have little or no appeals process available.

a. If parties reach and sign agreements during ADR, the agreements:
   (1) Cannot be repudiated by one party.
   (2) Can be enforced by the court system same as a judgment.
      (a) The winning party has the signed agreement entered into court records as an “agreed final judgment.”

b. Oral agreements are occasionally reached in mediation but are difficult to enforce and prove.

7. Confidentiality.

a. Generally, ADR procedures take place in the context of settlement discussions or under specific state statutes, and a party’s offers or admissions cannot be used against that party in a later judicial proceeding.
   (1) Federal Rules of Civil Procedure provide that evidence of conduct or statements made in compromise negotiations are not admissible in subsequent litigation (absent exceptions).
      (a) The purpose is to encourage settlement discussions and to exclude evidence that could be of low probative value since the compromise or statement might have been motivated by a desire to buy peace rather than to acknowledge liability.
      (b) If an evidentiary offering (verbal statement, document, etc.) would be admissible or discoverable independent of the ADR process, it can be admissible in a later proceeding.
   (2) Most states provide similar protection in their various ADR statutes, but the privilege is not universal. Attorneys should research the extent of confidentiality in their jurisdiction.
   (3) The parties can also contract for confidentiality.

b. Witnesses who appear and testify in private arbitration proceedings are usually entitled to the same litigation privilege as persons who testify in court.

c. Arbitrators and mediators are often granted similar protection from having to testify to the subject or contents of a mediation caucus.
8. Privacy.

a. ADR proceedings take place outside the traditional legal process and are not a matter of public record.

b. This privacy allows corporations to shield wrongdoing from the public eye. Settlement agreements often contain clauses that:
   (1) Deny liability.
   (2) Require the recipients of any settlement and their attorneys not to disclose the terms of any settlement.
   (3) Require the recipients’ attorneys not to bring suit against the company for a similar case.

c. This privacy allows people to keep their medical, psychological and sexual histories out of the court records and the public eye.
   (1) Because of publicity surrounding certain cases, large amounts of information about the participants from the court record may be published in print, broadcast media and on the Internet.
   (2) The same information, if disclosed in ADR, remains confidential.

9. Client participation – Clients are present throughout the ADR process and can be empowered through participation in the decision-making process.

a. This is especially true in mediation, where the parties themselves help work out the settlement.

b. Additionally, since most ADR processes take place outside the traditional courtroom, there is less stress and pressure on the parties, and this could make them less contentious.

10. Absence of legal jargon and procedures – Most ADR procedures use plain English and a common sense manner.
D. **Drawbacks**

1. No discovery or limited discovery with mostly voluntary compliance.
   
   a. By placing this language in the agreement to arbitrate or in the contract compelling arbitration, you can allow discovery and sanctions for noncompliance:
      
      (1) *Discovery shall be allowed and shall be pursuant to the state of [(your state)] rules of civil procedure governing the same. In the event of any dispute of any character, those rules shall be controlling.*

2. Perception that there is no clear winner in the process – The general perception is that ADR “splits the baby,” that is, a compromise is reached without one side clearly victorious or vindicated.

3. Attorneys are not fully open to the process.
   
   a. Reasons for this include:
      
      (1) Defense firm fees are limited due to the short duration of ADR cases.
      
      (2) Damages and punitive damages are the friend of the plaintiff attorney. The common perception that arbitrators cannot award punitive damages is not true. However, damage awards do run lower in ADR than in traditional lawsuits.
      
      (3) Delay is the friend of the defense. Many cases can be settled for lower damage amounts after the injured party has died and no longer needs maintenance, nursing care, etc. Some states have limits or caps on mental anguish or survivor’s actions.

E. **Nature of ADR**

1. Nonbinding.
   
   a. Unless the parties have agreed or have been ordered otherwise, they can ignore the decision.
b. Some states have laws giving the courts discretion in ordering or referring cases to nonbinding ADR. In other states, they may only do so with the consent of the parties.

2. Binding.

a. If the parties agree to binding ADR, the parties must live with the outcome. There is no second chance for a trial, and appeals are limited to instances of fraud or gross misconduct. This is most often seen in arbitration as this is the only process where a nonadvisory award is made.

F. How Parties Enter into ADR

1. ADR usually takes place after a suit has been filed and after discovery has been completed.

2. Parties may enter into ADR using one of two methods.

a. Voluntarily – Upon agreement of the parties.
   (1) The parties sign an agreement to enter into ADR to resolve the dispute and set out.
      (a) The rules to be followed.
      (b) A statement of the dispute.
      (c) The amount in controversy.
      (d) The limits of the authority of the arbitrator, mediator, etc.
   (2) The parties’ agreement made the basis of the action contains a clause compelling an ADR process.
      (a) Courts will enforce a contractual agreement to arbitrate and will compel arbitration before the parties may enter the courtroom.
      (b) Courts have voided some mandatory arbitration clauses in cases of fraud, abuse or gross disparity in bargaining positions between the parties.
b. Involuntarily – By court order.
   (1) Almost always nonbinding except in cases of public emergency (baseball players, air traffic controllers, etc.).

G. The Role of the CLNC® Consultant in ADR Proceedings

1. As more attorneys become involved in ADR, more Certified Legal Nurse Consultants® skilled and familiar with the process will be needed to participate with them.

2. As more companies write ADR clauses into terms of service contracts (e.g., HMOs), more CLNC® consultants will be needed in this area.

3. Provide the ADR attorney-client with the same CLNC® services she would provide to prepare an attorney-client for deposition or trial.
   a. Help develop the case theme.
   b. Help with demonstrative evidence, briefs, presentations, witness preparation, etc.
   c. Attend or participate in mock arbitration or mediation proceedings.
   d. Attend the ADR proceedings.
   e. Appear as a fact witness or as an expert witness.
   f. Participate in the mediation to evaluate arguments and counter-proposals.
4. Because ADR often takes place after a suit has been filed but prior to trial, many CLNC® services might have already been provided.
   a. Initial screening for merit.
   b. Initial client interviews.
   c. Assessment of damages and injuries.
   d. Organizing, summarizing, translating and interpreting the medical records.
   e. Identifying relevant hospital policies and procedures.
   f. Coordinating and attending IMEs.

5. Offer other services to help prepare the attorney for the ADR proceedings:
   a. Define the applicable standards of care.
   b. Prepare and interview key witnesses and clients.
   c. Locate and prepare expert witnesses.
   d. Summarize depositions.
   e. Paginate and organize medical records.
   f. Prepare settlement brochures.
   g. Collaborate in developing demonstrative evidence.
h. Prepare direct and cross-examination questions.

i. Develop life care plans.

j. Attend the arbitration hearing, mediation and settlement conferences or summary jury trial.

k. Evaluate and demonstrate the strengths or weaknesses of the case and of any settlement offers or options.

6. After the ADR process, offer the services listed above and additional CLNC® services to prepare for eventual trial or settlement discussions:

a. Evaluate the performance of witnesses during the ADR process.

b. Review and analyze ADR testimony of witnesses and experts.

c. Research the scientific literature to support or contradict testimony.

d. Summarize and analyze transcripts of an ADR procedure (if any).

e. Contribute to drafting of a post-hearing brief (arbitration).

f. Review and comment on any agreement reached during ADR (if any).

7. Importance of the Certified Legal Nurse Consultant®

a. Attorneys must be just as prepared for ADR as for trial.

(1) Often parties use ADR as a free preview and an opportunity to measure the skills of the opposing party. An attorney who enters ADR fully prepared and with a well-developed case will have an advantage over the other party.
b. In all ADR procedures, there is a stronger reliance on both the presentation of the evidence and the preparation of the attorney. As a result, the attorney has greater need for the CLNC® consultant’s input on demonstrative evidence and case presentation.

H. Types of ADR

1. Arbitration.

a. Definition – The process of submitting a dispute to a third party or neutral party (or panel), known as an arbitrator (or arbitration panel), at a formal hearing. The arbitrator renders an award or decision in a quasi-judicial proceeding comparable to trial.

b. Features.
   (1) Best used when there is little likelihood of a negotiated settlement.
   (2) There is a hearing at which each side may present verbal arguments, present a brief, call and cross-examine witnesses and present evidence. The arbitrator then renders a decision, which might be binding on the parties (depending on the circumstances).
   (3) Proceedings are not open to the public, and no court reporter is present, so no record is generally kept.

c. Benefits.
   (1) Reduced attorneys’ fees.
   (2) Reduced preparation time.
   (3) Can provide for sharing of involved fees and expenses.
   (4) Can keep parties out of court.
   (5) Shorter resolution time.
   (6) Can limit the scope of the arbitration (i.e., which issues may be arbitrated) in the arbitration agreement or contract clause compelling arbitration.
   (7) Arbitrators are often familiar with the field or have extensive experience as judges.
   (8) A third party makes the decision, taking it out of the hands of the parties who are unable to agree.
   (9) Each side may feel like they’ve had a day in court.
d. Drawbacks.
   (1) Might unnecessarily duplicate costs if the parties will end up in court later.
   (2) Discovery is limited with voluntary compliance.
       (a) No remedies for noncompliance.
       (b) Might not take depositions or statements.
   (3) Traditional rules of evidence do not apply. Under American Arbitration Association guidelines, evidence must be material and relevant to the dispute to be admissible.
       (a) Might allow the introduction of hearsay evidence.
   (4) Parties must develop a more concise case (since they have less time to present) with limited documents and witnesses.
   (5) Perception of participants that arbitrators “split the baby” and render compromise settlements holding parties equally at fault, without vindicating one party’s position.
   (6) Settlement value of cases is often lower in arbitration.
   (7) Arbitrators do not always issue written decisions, rulings or findings supporting their awards, leading both parties to wonder what happened and why.
   (8) Arbitrators are not required to follow legal precedent, which can result in unpredictable outcomes.
   (9) Right to appeal can be limited depending on the arbitration agreement executed by the parties.
   (10) Awards can only be set aside in situations where there is fraud or corruption.

e. Binding versus nonbinding.
   (1) The final decision is nonbinding unless the parties agree otherwise in advance in a contract or other agreement.
       (a) Parties can then resort to other forms of ADR or court if they are unhappy with the outcome or decision.
   (2) The final decision is binding if parties have agreed to binding arbitration in advance in a contract or other agreement.
       (a) The decision is binding on both parties and may not be appealed (absent special circumstances).
       (b) The winning party can have the final decision filed with a court and enforced like a judgment.

f. A court will enforce a contract clause that makes disputes under the contract subject to arbitration and will compel arbitration.
   (1) Courts infer that the parties intentionally and knowingly waived their rights to trial.
(2) If nonbinding, parties must complete the arbitration procedure before choosing to litigate or attempt another form of ADR.

(3) If binding, absent special circumstances, no appeal is allowed and the parties lose the right to litigate due to the contractual agreement.
   (a) Few cases find special circumstances substantial enough to void the arbitration clause.
   (b) Special circumstances can include situations in which:
       i) The clause calling for binding arbitration was not in bold print, highlighted or separately initialed.
       ii) The parties waived statutorily mandated rights and benefits (such as punitive damages and attorney fees) granted by federal law.
       iii) The clause did not specifically state that the party was waiving the right to a jury trial.
       iv) One party had a dominant economic power over the other.

g. In court-ordered arbitration, the judge refers civil suits to arbitration for a prompt, nonbinding decision.
   (1) If accepted by both parties, the decision ends the dispute.
   (2) If rejected by one or both parties, the process allows the court to set a trial date as if the arbitration had never happened.

h. Selection of arbitrators – Arbitrators should be selected on the basis of their impartiality and experience in a given field.

i. Stages of arbitration.
   (1) Arbitration is initiated by:
       (a) Submission of a mutual agreement to arbitrate.
       (b) Demand or notice by one party when provided for in a contract or other agreement between the parties.
       (c) Court order compelling arbitration.
   (2) The agreement or order to arbitrate should contain:
       (a) Rules governing the selection of the arbitrator and his authority.
       (b) A confidentiality clause.
       (c) A stay of discovery in the underlying lawsuit.
(d) Arbitration schedule with deadlines.
(e) Allocation of costs and expenses.
(f) Statement of the disputed matter.
(g) Amount in controversy.

(3) Pleadings – Complaining party must submit a statement of the claim, and respondent must file an answer along with special defenses and any counterclaims. Any stipulations of facts or law should be submitted at this time.

(4) Preparation – Actual preparation of the case by each party.

(5) Discovery – If allowed or agreed between the parties.

(6) Prehearing conference – Normally administrative in nature and not mandatory. At this conference, the briefing schedule can be set.

(7) Written briefs supporting each party’s position can be submitted to arbitrators (not mandatory).

(8) Hearing – Actual oral hearing (which may be waived by mutual agreement) with no set order for presentation of evidence.
   (a) Generally parties will offer:
      i) Opening statements.
      ii) An evidentiary presentation.
      iii) An analysis of the evidence, issues and damages.
      iv) Presentation of witnesses.
         a) Direct examination.
         b) Cross-examination.
      v) Closing statements.
   (b) Usually the claimant goes first and the defendant second.
   (c) Arbitrators may also question witnesses and attorneys during the hearing.

(9) Post-hearing briefs can be submitted to clarify issues and testimony.

(10) Decision and award.
   (a) The decision may be:
      i) Immediate or delayed.
      ii) Oral or written.
   (b) The decision is short, definite and final (if binding).
   (c) A written opinion may accompany the decision or be issued, usually no later than 30 days after the closing date of the hearing.
2. **Mediation.**

a. **Definition** – A non-adversarial process in which a third party or one or more neutral parties help the parties resolve the dispute between themselves. Also called assisted settlement negotiations.

b. **Voluntary settlement conferences,** in which a third party such as a judge or magistrate is present, is a form of mediation.

c. Mediation is growing in popularity and has overtaken arbitration as the most commonly used ADR process.

d. **Features.**
   (1) Mediation is best used when there is strong likelihood of a negotiated settlement and the parties are expected to have a continuing relationship after the resolution.
      (a) Should not be used when one party displays a pattern of lying, deliberately misrepresenting the truth or refusing to divulge pertinent information.
   (2) There is no hearing, just a series of discussions or caucuses between the mediator and the parties, individually or together.
   (3) The parties communicate directly, and the mediator’s role is to help them focus on the real issues of the dispute, to keep communications from stagnating or deadlocking and to generate options for settlement.
   (4) The mediator does not decide the case, only facilitates communication between the parties.
   (5) Agreement becomes binding only when both parties sign it (agree to it).

e. **Benefits.**
   (1) Reduced attorneys’ fees.
   (2) Can provide for sharing of involved fees and expenses.
   (3) Reduced preparation time.
   (4) Can keep parties out of court.
   (5) Short resolution time (usually less than three days).
   (6) Parties themselves work out the dispute in an amicable proceeding.
   (7) Little discovery is necessary since context is settlement discussion (discovery might have been completed, depending on the stage at which mediation takes place).
(8) Can be entered into at any time (usually done before trial, but can occur after judgment, during appeal, etc.).

(9) Provides a safe climate that frees participants to speak candidly and negotiate in good faith.
(a) Mediation statutes generally provide that information disclosed to a mediator during private discussions may not be disclosed to any other party without the permission of the disclosing party.
(b) The parties must maintain the confidentiality of the proceedings and any records or materials disclosed during the proceedings.

(10) Mediators are often familiar with the field or have extensive experience as judges.

f. Drawbacks.
(1) Mediation might be nonbinding and might unnecessarily delay scheduling of a court date and preparation for trial.
(2) Neither party comes away completely vindicated and might feel they have “split the baby” with a compromise settlement.
(3) The mediator does not decide the case, only facilitates communication between the parties. The discussion might go nowhere, depending on the personality of the mediator.
(4) Mediation requires different skills on the part of the attorneys. They are now trying to sway the decision-maker (who is the other party), and typical trial advocacy skills used to sway a jury might not be appropriate.
(5) Parties might not be fully open regarding facts, testimony and liability, resulting in no agreement.
(6) One party might use mediation meetings as a chance to obtain a free preview of the other side’s case without serious intent to settle.

g. Binding versus nonbinding.
(1) The final decision is nonbinding, unless the parties agree otherwise in advance in a contract or other agreement.
(a) Parties can then resort to other forms of ADR or court if they are unhappy with the outcome or decision.
(2) The final decision is binding if parties have agreed to binding mediation in advance in a contract or other agreement.
(a) The decision is binding on both parties and unappealable (nature of a contractual agreement).
h. In court-ordered mediation, as in a court-ordered settlement conference, the judge refers a civil suit to mediation to attempt nonbinding resolution.
   (1) If the parties reach a resolution, this can end the dispute.
   (2) If the parties do not reach a resolution, the process allows the court to set a trial date as if the mediation had never happened.

i. Stages of mediation.
   (1) Mediation is initiated by:
      (a) Submission of a mutual agreement to mediate.
      (b) Demand or notice by one party when provided for in a contract or other agreement between the parties.
      (c) Court order compelling mediation.
   (2) The agreement or order to mediate should contain:
      (a) A confidentiality clause.
      (b) A stay of discovery in the underlying lawsuit.
      (c) Mediation schedule with deadlines.
      (d) Allocation of costs and expenses.
   (3) The parties file position statements framing themes to be developed, any statements regarding the law bearing on the case and any general information germane to the dispute.
   (4) Both parties and the mediator hold joint meetings or caucuses, at which each party presents a statement or brief summary.
   (5) The mediator meets privately with each party, at which time strengths and weaknesses of each party’s position and settlement offers by one or both parties may be discussed (shuttle diplomacy).
   (6) The mediator and all parties meet again. Demonstrative evidence may be presented, and settlement offers and strengths and weaknesses of the parties’ positions may be discussed.
   (7) Negotiations are followed by more private and joint meetings if necessary.
   (8) Written agreement is executed by the parties (if reached).

3. Summary jury trial.
   a. Definition – A semi-adversarial process in which the attorneys for the parties present an abbreviated version of the evidence to an advisory jury, sitting as neutral parties, selected from the regular
jury pool. The jury then renders a nonbinding advisory verdict, which the parties use to evaluate their cases.

b. Features.
   (1) Injects the reality of a “jury verdict” into the parties’ negotiations.
   (2) Best used when the parties’ predictions of the likely outcome are very far apart.
   (3) Also used when there is only one issue blocking settlement (e.g., liability is clear, but the damage amount is uncertain).
   (4) Usually seen in complex business litigation between larger companies.
   (5) The jury often does not know it is only rendering a nonbinding, advisory verdict.
   (6) Run like a real trial except conducted in one to three days versus one to three weeks.
   (7) Evidentiary presentations are often limited to the core issues and essential witnesses and evidence.
   (8) The parties and their attorneys may poll and question the jurors, and information gained is used in further settlement discussions between the parties.
   (9) The goal is to give parties a preview of what a jury might do so that the parties can better assess their cases.

c. Benefits.
   (1) Allows the parties to better assess their cases, including the verdict that a real jury might reach.
   (2) Can keep parties out of court as they continue settlement discussions following the process.
   (3) By presence and participation, parties receive bluntly realistic views of their own and the other side’s cases.
   (4) Parties feel that they’ve had a day in court and often prefer adjudication (even nonbinding) over settlement.

d. Drawbacks.
   (1) Might delay scheduling of a court date and preparation for a real trial.
   (2) Can tip off parties as to strengths and weaknesses of the other side’s case for trial later.
e. **Binding versus nonbinding.**
   (1) Are almost always nonbinding, unless agreed otherwise in advance (extremely rare).

f. **Stages of a summary jury trial.**
   (1) Initiated by executing an agreement to use a summary jury trial.
   (2) Approval of court or selection of forum.
   (3) Submission of briefs to court or forum.
   (4) Selection of jury from regular jury pool.
   (5) Hearing with evidentiary presentations.
   (6) Jury renders verdict (nonbinding/advisory).
   (7) Parties poll or interview jury (privately or jointly).
   (8) Additional settlement discussions.

4. **Mini-trial.**

a. **Definition** – A semi-adversarial process in which the attorney for a party presents an abbreviated version of the case to a panel for the purpose of resolving or settling the dispute.

b. **Features.**
   (1) Mini-trial is a semiformal hearing or series of hearings in a quasi-trial setting before a panel who represent each party (plus a “neutral” official) and who have authority to settle the dispute.
   (2) Panel and neutral official hears the arguments then retires to work out a settlement in the case.
   (3) Ideally, the panel is selected from persons representing the interest of each party, often top management executives of each party, and should have full settling authority.
   (4) Mini-trial is best used when the parties are likely to settle and want to preserve a business relationship.
   (5) Most often seen in commercial litigation.

c. **Benefits.**
   (1) Allows the parties to better understand and assess their cases (often management has incomplete understanding).
   (2) Can keep the parties out of court as they continue settlement discussions during the process.
d. Drawbacks.
   (1) Can delay scheduling of a court date and preparation for trial.
   (2) Can tip off parties as to strengths and weaknesses of the other side’s case.

e. Stages of a mini-trial.
   (1) Initiated by execution of agreement to use mini-trial.
   (2) Approval of court or selection of forum.
   (3) Submission of briefs to court or forum.
   (4) Selection of panel and selection of a neutral official.
   (5) Hearing with evidentiary presentations.
   (6) Panel and neutral official enter into settlement discussions.


a. Definition – A semi-adversarial process in which attorneys for each party present legal and factual arguments to a panel of neutral parties, often attorneys.

b. Features.
   (1) Best used when the parties are likely to work out a settlement and want to preserve a business relationship.
   (2) The panel may question the attorneys and the clients (who are present throughout the process).
   (3) The panel then deliberates and renders a candid and confidential advisory evaluation of the strengths and weaknesses of each party’s case. They may even suggest an amount or percentage range for settlement.
   (4) Information gained is used as the basis for further settlement negotiations.
   (5) The evaluation is nonbinding.

c. Benefits.
   (1) Allows the parties to better assess their cases.
   (2) Can keep parties out of court as they continue settlement discussions during the process.
   (3) Parties themselves work out the dispute.
d. **Drawbacks.**
   (1) Can delay scheduling of a court date and preparation for trial.
   (2) Can tip off parties as to strengths and weaknesses of the other side’s case.

e. **Stages of a moderated settlement conference.**
   (1) Initiated by:
      (a) Execution of agreement to use the moderated settlement conference format.
      (b) Court order compelling a moderated settlement conference.
   (2) Approval of court or selection of forum.
   (3) Submission of briefs to court or forum.
   (4) Selection of panel of neutral parties.
   (5) Hearing with evidentiary presentations and questioning by the panel.
   (6) Panel renders confidential advisory evaluation.
   (7) Parties poll or interview the panel (privately or jointly).
   (8) Additional settlement discussions.

6. **Private courts and private judging companies.**

   a. Fairly recent development in which private companies, as opposed to organizations, provide a location and personnel for ADR proceedings.
      (1) Television programs such as *People’s Court, Judge Judy*, etc.

   b. Usually employ retired judges and litigators who offer a wealth of experience in various types of commercial litigation.

   c. Can facilitate any sort of ADR process.

   d. Major advantage is in timing. It is often difficult to obtain a courtroom for an arbitration or mini-trial. Private courts provide instant access to similar facilities.
I. **Significant Differences Between the Traditional Legal Process and ADR**

<table>
<thead>
<tr>
<th>Stage</th>
<th>Litigation</th>
<th>ADR Processes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Initiation</strong></td>
<td>Filing of complaint or serving of process.</td>
<td>Filing of demand pursuant to contract, court order or by agreement of the parties.</td>
</tr>
<tr>
<td><strong>Selection of Decision Maker</strong></td>
<td>Judge is assigned by court system (no choice).</td>
<td>Arbitrator or mediator may be selected by parties.</td>
</tr>
<tr>
<td><strong>Discovery</strong></td>
<td>Pursuant to state rules – generally broad.</td>
<td>Limited discovery with mostly voluntary compliance.</td>
</tr>
<tr>
<td><strong>Admissibility of Evidence</strong></td>
<td>Pursuant to state rules.</td>
<td>Generally must be material and relevant; lesser burden.</td>
</tr>
<tr>
<td><strong>Duration of Process</strong></td>
<td>Up to five years from initial setting through appeals.</td>
<td>Generally no longer than six months.</td>
</tr>
<tr>
<td><strong>Costs</strong></td>
<td>Vary by jurisdiction.</td>
<td>Depend on chosen location and amount in controversy.</td>
</tr>
<tr>
<td><strong>Attorney Fees</strong></td>
<td>Vary by agreement; often very expensive.</td>
<td>Vary by agreement; often less expensive.</td>
</tr>
<tr>
<td><strong>Scheduling</strong></td>
<td>By courts.</td>
<td>Upon agreement of parties.</td>
</tr>
<tr>
<td><strong>Confidentiality</strong></td>
<td>Public hearing and record unless sealed.</td>
<td>Private hearing – may be limited by confidentiality agreement and/or state law.</td>
</tr>
<tr>
<td><strong>Setting/Location</strong></td>
<td>Dependent on jurisdiction and venue.</td>
<td>Chosen upon agreement of parties.</td>
</tr>
<tr>
<td><strong>Participation by Clients</strong></td>
<td>Limited to role of witness and behind the scenes.</td>
<td>More participatory: especially in mediation.</td>
</tr>
<tr>
<td><strong>Representation by Counsel</strong></td>
<td>Required.</td>
<td>Recommended.</td>
</tr>
<tr>
<td><strong>Decision/Award/ Settlement</strong></td>
<td>At whim of court.</td>
<td>Generally within 30 days of the end of arbitration or during mediation.</td>
</tr>
<tr>
<td>Stage</td>
<td>Litigation</td>
<td>ADR Processes</td>
</tr>
<tr>
<td>----------------------</td>
<td>------------</td>
<td>--------------------------------------</td>
</tr>
<tr>
<td>Binding</td>
<td>Yes.</td>
<td>Upon agreement of parties.</td>
</tr>
<tr>
<td>Appeal</td>
<td>Yes.</td>
<td>Limited rights to appeal.</td>
</tr>
<tr>
<td>Enforceability</td>
<td>Yes.</td>
<td>Yes, as agreed final judgment.</td>
</tr>
<tr>
<td>Legal Jargon</td>
<td>Required.</td>
<td>No.</td>
</tr>
</tbody>
</table>

J. Organizations That Have More Information on ADR

1. American Arbitration Association – adr.org

2. Association for Conflict Resolution – acrnet.org

3. State and local organizations and bar associations.

IX. TRIAL PREPARATION

A. The Attorney Develops a Battle Plan

1. The attorney develops a master plan for winning the case.

B. The Attorney Marshals the Necessary Resources

1. The attorney coordinates evidence, witnesses, expert witnesses and demonstrative evidence (including preparation of courtroom presentation technology).

   a. Witnesses are served with trial subpoenas.
2. **CLNC® Consultant’s Role** – Assist with any aspect of trial preparation.

C. **The Attorney Develops the Famous Trial Notebook**
   1. The attorney’s way of organizing himself for the courtroom.
   2. Attorneys often create electronic trial notebooks.

X. **TRIAL**
   A. **Definition**
   1. A judicial examination, in accordance with the law of the land, of the issues between the parties before a court of proper jurisdiction.

   B. **Timing**
   1. The litigation process may take three to five years to get to this stage.
      a. **CLNC® Consultant’s Role** – Be prepared to commit for the long haul when involved in a case.
   2. Trial may last days to weeks.
      a. **CLNC® Consultant’s Role** – Be available during this period to respond to questions and do further research, even if the attorney does not hire you to sit in on the trial.

C. **The Roles of Judge and Jury**
   1. The judge presides over the case and decides questions of law.
2. The jury decides questions regarding disputed facts that are material to resolving the dispute.

3. Some cases are tried without a jury.
   a. In that instance, the judge serves as both the trier of fact and the trier of law.

D. The Right to a Jury Trial
   1. Generally all parties have a right to a jury trial.

   2. Who really wants a jury trial?

E. Jury Selection
   1. Potential jurors are summoned at random to create a panel.

   2. *Voir dire* examination – To say the truth.
      a. Potential jurors on the panel are questioned by the judge, the attorneys or both.

      b. A potential juror may be called to the witness stand, following a response that calls for further inquiry.

   3. Purpose of *voir dire*.
      a. To test the legal qualifications of the panel members to serve as jurors.
b. To enable counsel to obtain factual information relevant to peremptory challenges.

4. The right to *voir dire*.

5. Jury selection is the attorney’s first opportunity to interface with potential jurors.

6. The attorney might ask jurors to complete a questionnaire before *voir dire*.

7. Disqualifications.
   
a. Grounds for disqualification are established by law.

b. Once grounds for disqualifying a juror are established, the juror must be removed for cause.

c. The trial court has the discretion to remove for “cause” any juror who, in the court’s opinion, is unfit to sit on the jury.

d. Challenge for cause (strike for “cause”).
   
   (1) The attorney objects to a juror by alleging some fact which, by law, disqualifies him from serving as a juror.

8. Peremptory challenge (peremptory strike).

   a. The attorney concludes a prospective juror is objectionable for reasons that will not support a disqualification for cause.

   b. Each party is entitled to six peremptory strikes in a civil lawsuit (depending on the law of that jurisdiction).
c. A peremptory challenge requires no explanation.

d. Racially or religiously motivated peremptory strikes are prohibited.

9. Attorneys do not select jurors.

   a. Some attorneys employ jury selection experts.
      (1) **CLNC® Consultant’s Role** – Know when *not* to offer your services. Unless you are a psychologist, do not claim to be a jury selection expert.

10. Court (judge) addresses the jury after the panel is selected.

    a. Judges will give jurors specific instructions including:
       (1) Don’t talk about the case with anyone.
       (2) Do not discuss the case on social media and do not “friend” or follow any party to the case.
       (3) Discuss the case with other jurors only during deliberations.
       (4) Do not research the case on your own.
       (5) Do not speak to any party, attorney or witness.
       (6) Only give words and phrases the meanings that are defined by the court. Sometimes legal meanings are different than everyday meanings.
       (7) Keep an open mind until you’ve heard all the evidence and make your decision only on the evidence presented.
       (8) Do not let bias, sympathy, prejudice or public opinion influence your decision.

F. **The First Act of the Trial – Opening Statements**

1. The attorneys’ first opportunity to present a concise and organized description of what happened.

   a. The opening statement includes:
      (1) Introduction.
         (a) Self, clients and opponents.
         (b) Explain and introduce court personnel.
(c) Express belief in the jury.
(d) Discuss the purpose of opening statement.
(e) Discuss the stages of trial.

(2) Concise summary of what happened.
   (a) The five Ws.
   (b) Theme.
   (c) What the evidence will show.
   (d) What the TEs will testify to.

(3) Damages.
(4) Conclusions.
(5) CLNC® Consultant’s Role – Offer opinions so the attorney can incorporate aspects of them into the opening statement.

2. Plaintiff goes first, then defense.
   a. Theory of primacy gives the plaintiff an edge.

G. The Drama Unfolds – Presentation of the Case

1. The plaintiff usually has the burden of proof.
   a. The burden of proof in a civil case is by the *preponderance of the evidence*.
   b. The burden of proof in a criminal case is *beyond a reasonable doubt*.

2. Invoking the rule.
   a. At any point in the trial, but usually before the first witness testifies, at the request of either party or on the court’s own motion, the witnesses on both sides may be sworn in and then removed from the courtroom.
   b. The party, party’s spouse, or designated representative of a nonnatural party, such as a corporation or hospital, is exempt from the rule.
c. Expert witnesses are usually not permitted to stay in the courtroom during the testimony of other witnesses and parties.

3. The plaintiff presents the case.
   
a. Does direct examination of own witnesses and experts.

b. Purpose of direct examination.
   (1) To present or expand the story.
   (2) To establish legal elements of the claim and elicit information that supports the case.
   (3) To provide tools the jurors need to respond to the court’s instructions when it is time to deliberate the case.

4. Defendant cross-examines each plaintiff witness and expert witness.
   
a. Purpose of cross-examination.
   (1) To destroy or weaken any effects of opposing attorney’s direct examination of the witness.
   (2) To develop facts and proof of theories.
   (3) To obtain favorable testimony.
   (4) To get the testifying expert to change his opinions or conclusions.
   (5) To discredit the witness.
   (6) To impeach a witness.
   (7) To persuade the jury.
   (8) To focus the jury’s attention on any weaknesses in the TE’s presentation and detract their attention from any strengths.

b. Plaintiff attorney has opportunity for redirect examination.

c. Defense attorney has opportunity for recross-examination.

5. Plaintiff closes or rests.
6. Defense makes a motion for dismissal or for an instructed verdict (directed verdict).
   a. Judge can dismiss the case or grant an instructed verdict for defendant if plaintiff fails to produce enough evidence to make a minimum legal case.
   b. With an instructed verdict, the jury does not decide the case.
      (1) The judge decides the case according to legal standards.
   c. These are rarely granted, so the defense must then proceed with their case.

7. Defendant presents the case.
   a. Does direct examination of own witnesses and experts.

8. Plaintiff cross-examines each defense witness and TE.
   a. Defense attorney has opportunity for redirect examination.
   b. Plaintiff attorney has opportunity for recross-examination.

9. Defendant closes the case.


11. In some jurisdictions, jurors are permitted to take notes and ask questions.

12. CLNC® Consultant’s Role – Assist the attorney in preparing to present the case.
H. The Final Curtain – Closing Statements

1. Components of the final argument or closing statement.
   a. Introduction.
   b. Summary of facts.
   c. Interpretation of the issues and evidence.
   d. Explanation of the court’s charge.
   e. The proper conclusion.
   f. CLNC® Consultant’s Role – Offer your opinion so the attorney can incorporate aspects of it into the closing argument.

2. Attorneys attach a lot of weight to final arguments.

3. The order of closing statements: plaintiff → defendant → plaintiff.

I. The Court’s Charge to the Jury (Jury Instructions)

1. The jury decides the facts but does so according to instructions, any necessary definitions and questions from the judge.

2. The judge must define terms for the jury and instruct them on how to use these legal concepts.
3. Judge also addresses:
   a. Credibility of witnesses.
   b. Direct and circumstantial evidence.

4. Judge may allow jurors to take written instructions with them into the deliberation room.

J. Jury Deliberation
1. The jury reviews facts and votes on the verdict.

K. The Verdict
1. The verdict is the jury’s decision.

XI. CLEANING UP AFTERWARDS – POSTTRIAL MANEUVERS

A. Mediation
1. Recommended or ordered by the court.

B. Settlement Negotiations
1. Frequently, if the plaintiff wins, he may settle for less than the verdict to avoid appeal.
2. Settlement negotiations might not occur during the initial mediation.
C. **Motions**

1. Numerous motions can be made, such as:
   
   a. Motion for new trial.
   
   b. Motion to reduce damages.

D. **Judgment**

1. The court issues an order.

2. The order states what relief is granted or refused.

XII. **THE LAST ENCORE – APPEAL**

A. **Function of the Appellate Court**

1. The appellate court does not hear evidence or decide disputed questions of fact.

2. The appellate court has two functions:
   
   a. To determine whether the case was tried in accordance with the law.
   
   b. To determine whether the evidence in the record supports the verdict, according to legal standards.
3. The appellate court considers only the following:
   a. The record of evidence presented and other proceedings in the trial court.
   b. The briefs written by the attorneys for the appeals process.
   c. Any oral arguments the attorneys make to expand on the issues set forth in their briefs.

XIII. VARIABLES AFFECTING WHO WINS

A. Evidence Is Not the Only Factor
   1. We like to believe that justice always prevails.

B. Other Variables
   1. Plaintiff and defendant parties and witnesses.
      a. **CLNC® Consultant’s Role** – Interview and prepare parties and witnesses to testify.
   2. Plaintiff and defendant testifying experts.
      a. **CLNC® Consultant’s Role** – Locate, interview and prepare TE s to testify and assess their work product for the attorney.
   3. Damages and injuries.
   4. Judge.
5. Jurors.

6. Jurisdiction in which case is tried.

7. The attorneys.

8. Tampering or alteration of evidence by any party.

XIV. CLASS ACTION LAWSUITS

A. What Is a Class Action?

1. A method by which a large group of people, unable to be estimated or determined in number, are represented in court by a few representatives who sue without the need of joining all the affected members of the class.

2. CLNC® Consultant’s Role – Can be involved in class action lawsuits for the plaintiff or the defense.

B. Requirements for a Certified Class Action Lawsuit

1. Numerous plaintiffs.

   a. A class must be large enough.

   b. The class must be so numerous that joinder of all members is impracticable.
2. Common issues of law or fact.
   a. Common questions of law or fact must predominate over individual issues.
   b. The presence of individual issues will not bar a class action.

3. Typicality.
   a. The claims or defenses relevant to the class representatives must be typical of the claims or defenses for the class.
      (1) A plaintiff is typical if he suffered an injury or harm that is typical of the injury or harm suffered by other class members.
      (2) A plaintiff’s claim is typical if it gives rise to the claims of other class members and is based on the same legal theory.
         (a) This enables him to fulfill the requirement that he adequately represent the collective interests of the class as a whole (see below).

4. Adequacy of representation.
   a. The class representatives must have no interests that are antagonistic to class members.
   b. The class counsel must be experienced, qualified and able to conduct class litigation.
   c. The attorney is responsible for representing the class as necessary, including:
      (1) Financing initial costs.
      (2) Accomplishing discovery.
      (3) Responsibly investigating all aspects of the case.
   d. The attorney must vigorously prosecute the class action allegations.
C. **Advantages**

1. Opportunity to litigate claims which alone would not be economically feasible to litigate.

2. Combines cases with repetitive issues.

3. Encourages manufacturers and large companies to do the right thing for consumers.

D. **Disadvantages**

1. Often associated with small damage awards.

2. Less personal.

3. Cases are not handled individually.

4. Plaintiffs’ consent to settlement is not required.

E. **Notice to Opt Out of Class**

1. Notice allows individuals to opt out.

2. Notice advises each member of the class that the court will exclude the member from the class if the member asks to be excluded by a certain date.
3. The judgment will include all members of the class who do not request exclusion.

F. Resolution of the Class Action

1. Judicial approval is required for:
   a. Settlement.
   b. Payment of attorney fees.
   c. Distribution of settlement money.

G. Examples of Class Action Lawsuits

1. Vioxx®.

2. Oil spills.

3. Chemical exposure.


5. Asbestos.

6. Heart valves.
XV. TORT REFORM

A. Definition

1. Method of legislatively limiting remedies available to an injured party or parties.

B. Measures Instituted at State Level

1. Shorter period for statutes of limitation.

2. Plaintiff must give notice of claim before filing suit.

3. Required affidavits.
   a. Affidavits must be filed within prescribed periods attesting that:
      (1) The attorney has obtained a written opinion from an expert who has knowledge of standards of care.
      (2) The acts of the healthcare providers were negligent.
      (3) The negligence caused the damages and injuries.

4. Mandatory but nonbinding mediation or other form of ADR.

5. Screening panels.

6. Damage caps.

7. Modification of punitive damages or increase in the burden of proof.

8. Elimination of pre- and post-judgment interest for noneconomic damages.
9. Limits on attorney contingency fees.

10. Juries may be informed of money paid from collateral sources.

11. Injury compensation plan or patient compensation fund.

12. Modification of joint and several liability rules.

13. Immunity statutes.

14. Healthcare provider adherence to practice parameters and guidelines is proof of adherence to the standard of care.

15. Under products liability:
   a. A product that meets state and federal standards is presumed to be safe.
   b. Strict liability abolished for product seller (versus manufacturers).
C. Implications for Certified Legal Nurse Consultants<sup>CM</sup>
   1. Incorporate tort reform measures into marketing.
   2. Continue to respond to hot areas of litigation.
   3. Be politically active.

XVI. CONCLUSION

A. The Litigation Process Can Be a Long One
   1. Most cases take three to five years to come to a conclusion.
      a. Some jurisdictions have a fast-track system requiring that each case be disposed of within 12 to 18 months.

B. The System Works
   1. The American legal system might seem cumbersome and overburdened with rules and strange procedures. The process also seems to be filled with loopholes and opportunities for the guilty to triumph and profit.
   2. But overall, the system works to punish wrongdoers and make justice available to all.

C. Litigation Process Timeline (Exhibit O)
Exhibit A
Sample Intake Form

Law Offices of Bettit, Hertz & Howe
Intake Form – Personal Injury/Medical Malpractice

Personal Details

Full name ____________________________________________
Date of birth ______________________________ Place of birth __________________________
Social security number ______________________________________
Driver’s license state and number ________________________________
Home address _____________________________________________
Work address _____________________________________________
Mailing address _____________________________________________
Home __________________________ Work _______________________
Cell __________________________ Email ________________________
What is the best way to reach you? ___________________________

Marital status  □ Single □ Married □ Divorced □ Legally separated
If married, spouse’s name ________________________________
Place of marriage _________________________________________
If divorced or separated please provide date(s) and details ________________

Number of children _______________________________________

Any other names by which you have been known, including maiden or marital names, aliases and/or nicknames __________________________
What is the highest level of education you have achieved?

Please indicate as follows (A) for attended (G) for graduated

___ Primary school only   ___ Vocational degree   ___ Master degree
___ High school degree   ___ University degree   ___ Doctorate degree

Name and location of vocational school(s), college(s), graduate school(s) or doctoral school(s) attended or graduated from ________________________________

________________________________________________________________________

________________________________________________________________________

Did you serve in the military?  ❑ Yes  ❑ No

If so, which branch? __________________________ Type of discharge __________

Details of Incident, Accident or Injury

Date of incident __________________________________________

Location of incident ________________________________________

Describe how incident/your injury occurred ______________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

Describe your injury(ies) _______________________________________

________________________________________________________________________

________________________________________________________________________

Who do you believe was responsible for the incident/your injury and why ______

________________________________________________________________________

________________________________________________________________________
List any and all doctors, nurses, therapists and other healthcare providers who treated your injury(ies), including addresses and phone numbers ________________
_________________________________________________________________
_________________________________________________________________
_________________________________________________________________

List any and all facilities where you received healthcare for your injury(ies), including addresses and phone numbers ________________
_________________________________________________________________
_________________________________________________________________

List any and all insurance companies that may be involved in treatment of, or payment for, your injury(ies), including addresses, phone numbers and account numbers ________________
_________________________________________________________________
_________________________________________________________________

Your total medical expenses incurred to date for your injury(ies) are $__________
The total medical expenses you expect to incur in the future related to your injury(ies) are $__________

**Employment History**

Are you currently working?  □ Yes □ No

If not, date you are expected to return to work ____________________________

Current or most recent employer _______________________________________

Employer’s address ________________________________________________
Employer's phone ____________________________________________________________

Start date _______________ Ending date (blank if still employed) __________

Job title and description __________________________________________________
________________________________________________________________________

How long have you worked there?___________________________________________

Current pay (hourly, monthly or annually) ________________________________

Pay prior to injury(ies) (hourly, monthly or annually) ______________________

Have you missed work due to your injuries?  ❑ Yes  ❑ No

Dates you were unable to work ____________________________________________
________________________________________________________________________

Have you lost income due to your injuries?  ❑ Yes  ❑ No

If so, amount of lost income:______________________________________________


Physical Condition

Are you experiencing pain? If so, please describe ___________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

Has your life changed since your injury(ies)? If so, please describe how _______
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________


Do you have any prior physical conditions, diseases or illnesses? If so, please describe ____________________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________

Have you had any prior accidents resulting in an injury? If so, please describe __________________________________________________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________

Have you previously consulted an attorney(ies) regarding this issue?
☐ Yes  ☐ No

If yes, please provide the name(s), address(s) and telephone number(s) of that attorney(ies) _______________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________

Do you have a current agreement or contract with any attorney above?
☐ Yes  ☐ No

Did any attorney decline to take your case? If so, describe why _________________________________________________________________
__________________________________________________________________
__________________________________________________________________

Additional information not previously covered
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
Exhibit B
Sample Limited Power of Attorney

Law Offices of Bettit, Hertz & Howe
Limited Power of Attorney

BE IT KNOWN, that Anita Dayov, residing at 5 Mountain View Drive, Houston, Texas 77000, being of sound mind and legal capacity, has made and appointed, and by these presents does make and appoint, G. Howitt Hertz of the Law Offices of Bettit, Hertz & Howe, of 1200 Seeyain Court, Suite 5000, Houston, Texas 77000, my true and lawful Agent and attorney-in-fact, to act in my name and place, and for my use and benefit to do on my behalf anything that I can lawfully do by an attorney. Including:

- Authorize payment of bills; handle and settle legal claims; collect Social Security, disability, insurance and other benefits; employ professional assistance and collect debts.

This Power of Attorney shall be effective on the date of April 1, 0000. And shall not be affected by my disability or mental incompetency, except as may be provided otherwise by an applicable state statute governed by the laws of the state of Texas.

I may revoke this Power of Attorney at any time by providing written notice to my Agent.

Anita Dayov

Principal's Signature

________/________/________

Date

Witness__________________________ Witness__________________________

STATE OF TEXAS:

COUNTY OF HARRIS:

I HEREBY CERTIFY that on this 1st day of April, 0000, personally appeared Anita Dayov, and made an oath in due form of law that the matters and facts set forth in the foregoing Limited Power of Attorney are true and correct to the best of her knowledge, information and belief.

Donatello Nobodi

Seal:

__________________________

Notary Public

My Commission Expires: ______________
Exhibit C
Sample Retainer Agreement

Law Offices of Bettit, Hertz & Howe
Retainer Agreement

Anita Dayov
5 Mountain View Drive
Houston, Texas 77000

Dear Ms. Dayov:

Thank you for retaining the firm of Bettit, Hertz & Howe (the “Firm”) to represent you regarding your injuries sustained at General Hospital. The ethics rules governing lawyers encourage us to explain to our clients, in writing, both the financial aspects of the attorney-client relationship, and the responsibilities and expectations of both parties to the relationship. Please examine this agreement carefully and let me know immediately if you have any questions or concerns. No work will be performed on your matter and no attorney-client relationship is established until you have both signed and returned this agreement.

I, G. Howitt Hertz, will be the primary attorney responsible for your matter. For efficiency purposes, I may delegate work to other lawyers or legal assistants within the Firm or outside of the Firm.

The fees for representing you in this matter will at the following rate(s):

**33 1/3% (thirty three and one third percent)** of any sums recovered through compromise, settlement or recovery through any court proceedings prior to any trial in the matter after the costs and expenses of prosecuting the matter are deducted.

**40% (forty percent)** of any sums recovered through compromise, settlement or recovery through, during or immediately following any trial in the matter (but prior to any appeal) after the costs and expenses of prosecuting the matter are deducted.

**50% (fifty percent)** of any sums recovered through compromise, settlement or recovery through, during or immediately following any appeal or reconsideration in the matter after the costs and expenses of prosecuting the matter are deducted.

In representing you, the Firm may incur out of pocket costs for items such as court costs, filing fees, delivery fees, copies of needed documents, long distance telephone charges, court reporter or investigator fees. These amounts are separate and different than the fee discussed above. These out of pocket costs will be deducted from the amount recovered through settlement, litigation or otherwise. The fee discussed above will then be calculated after said out of pocket costs are deducted from the total recovery.
In the event it is necessary to hire an expert witness, any expert witness(es) will be retained only after discussing with you why it would be helpful to your matter and what the cost will be. We will forward invoices from expert witnesses directly to you for payment. Failure to pay the expert witness will result in the expert’s refusal to perform any work on your matter and may severely prejudice the success of your matter. In the event the Firm pays such invoice for you, these amounts shall be deducted from any recovery in the same manner as other out of pocket expenses.

The Firm will work diligently on your matter and will keep you informed regarding the progress of your matter. We will send you copies of all correspondence sent on your behalf, copies of all pleadings and other documents filed on your behalf and copies of all documents received from opposing/interested parties.

We cannot guarantee the outcome of your matter. We will advise you of the recommended technical and legal tactical issues as they arise so that you may continue to evaluate whether and how you wish to continue the legal representation. However, lawyers are subject to independent ethical obligations and a lawyer is not obligated to pursue objectives or employ means simply because you may wish that the lawyer do so, especially if the lawyer would be violating another duty by pursuing the requested action.

Generally, the information you give to our Firm is subject to the attorney-client privilege. However, lawyers are sometimes under an independent ethical duty to reveal privileged information, such as illegal or fraudulent acts committed by clients in the course of the attorney-client relationship, the intention of the client to commit a crime or when the lawyer is required to divulge the information by law or court order.

In order for an attorney-client relationship to work effectively, you must be truthful in all discussions with us, even if, and especially when, you think the information is hurtful to you and your case. In order to help you, we need to have all information in a timely manner. If we are missing part of the picture, we cannot effectively represent you.

All of your original materials will be returned to you, or you will have an opportunity to retrieve your original materials, immediately upon the conclusion of the representation. If you do not pick up your original materials within 12 months of receiving the notice that they are available, they may be destroyed without further notice to you. If any notification is sent to you, it will be to the last current address we have on file for you.

The Firm has the right to maintain your closed file in electronic format only, and to shred the hard copies of the documents in your file at the time your case is closed.

You have the right to discontinue the services of the Firm at any time. However, in a litigation matter, your desire to obtain a new attorney may be subject to court approval. The court may not grant the substitution of counsel or agree to delay the proceeding to provide you time to obtain a new attorney.
The Firm reserves the right to withdraw from this representation if there has been a breakdown of the attorney-client relationship.

Termination of services does not affect your responsibility to pay for any legal or other services rendered and the costs incurred up to the date of termination.

If the court should order payment of attorneys’ fees by a third party, the court awarded fees will first be applied to any outstanding bill for costs you have with the Firm.

I appreciate the opportunity to be your representative in this important matter and look forward to working with you. Please indicate your acceptance of this Retainer Contract by signing in the space provided below.

For the Firm of Bettit, Hertz & Howe

__________________________________________________________  ______________________
G. Howitt Hertz – Attorney  Date

Agreed and accepted

__________________________________________________________  ______________________
Anita Dayov – Client  Date
Exhibit D
Unrestricted Medical Authorization

AUTHORIZATION
For the Disclosure of Protected Health Information
Pursuant to 45 CFR 164.508
Important – Read Before Releasing Any Records

Medical Records Custodian
Doctors’ Hospital of Northwest New Mexico
2000 Doctors’ Road
Dry Heaves, NM 87201

1. I hereby authorize the disclosure of protected health information as described below from the record(s) pertaining to:
   Patient Name: Anita Dayov
   Date of Birth: 05/05/75
   Social Security No.: 555-55-5555

2. Person(s) or class of person authorized to disclose the protected health information. All “Covered Entities” and their “Business Associates” as those terms are defined under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and any applicable state law(s), including, but not limited to, all healthcare providers, health plans, healthcare clearinghouses, physicians, hospitals, pharmacists and any other medical facility or healthcare provider that possesses protected health information pertaining to the above-named patient.

3. Person(s) or class of persons to whom the protected health information may be disclosed:
   Attorney G. Howitt Hertz and the law firm Bettit, Hertz & Howe and agents for the attorneys. The phrase “agents” shall include, but not be limited to, record service representatives, and any other person or entity that assists the attorneys.

4. Description of protected health information to be disclosed:
   In-patient and/or out-patient records; admission and discharge records, summaries and/or forms; patient information sheets; consent forms; authorization forms; patient questionnaires; patient history and/or physical forms; operation, admission and discharge records; operative reports; physician’s notes; nurse’s notes; skilled nurse’s notes; physician reports; physician orders; observation notes; procedure notes; medication notes; physical orders; observation notes; physical therapy records or notes; rehabilitation records or notes; social worker records or notes; face sheets; dictations, phone orders; lab reports; summaries; photographs; slides; pulmonary or cardiac diagnostic test or procedure reports; consultation reports; progress notes or reports; status notes or reports; diagnoses, treatment notes or reports; narratives; emergency room records; X rays; CT scans; MRI scans; EEGs, EKGs; echocardiogram worksheets; reports and tapes/films;
Authorization for the Disclosure of Protected Health Information
Doctor’s Hospital of Northwest New Mexico

sonogram or ultrasound worksheets, reports and tapes/films; arteriogram worksheets, reports and tapes/films; cardiac catheterization worksheets, reports, tracings and tapes/films; pathology reports, samples, specimens, paraffin blocks, unstained and/or stained slides; written prescriptions and triplicate forms; packing inserts, patient information leaflets, sheets and/or PPIs or other information provided with prescriptions; patient counseling records, documents used by pharmacists, pharmacist technicians or assistants giving counseling; copies of prescription labels used on the bottle and package attachments showing dosage and instructions for administration of prescriptions; autopsy reports; post-mortem reports; external examination reports; toxicology reports; body transferal records, notes and correspondence; billing invoices, correspondence/memoranda, itemized statements, computer printouts, ledger cards, doctors’ liens, letters of protection, Medicare/Medicaid filing statements; correspondence from attorneys, other physicians, insurance companies, Workers’ Compensation Commission or Social Security Administration; notes or messages of telephone conversations; handwritten notes; office notes; patient charts; test results or data; calendar entries reflecting scheduled appointments for the patient. The information also includes insurance records, including Medicare/Medicaid and other public assistance claims, applications, statements, eligibility materials, claims or claim disputes, resolutions and payments, medical records provided as evidence of services furnished under Title XVII of the Social Security Act or other forms of public assistance (federal, state or local).

5. **HIV/AIDS:**
   I understand that the records used and disclosed pursuant to this authorization form may include information relating to human immunodeficiency virus (“HIV”) infection or acquired immunodeficiency syndrome (“AIDS”).

6. **The protected health information will be disclosed for the purpose of allowing my attorneys to properly and fully represent me.**

7. **I understand that the protected health information described above may be re-disclosed and no longer protected by federal and state privacy regulations.**

8. **I understand that I may revoke this authorization in writing at any time.**
   I understand that if I revoke this authorization by sending or faxing a written notice to the disclosing party identified in 2 above the written revocation must state my intent to revoke this authorization. However, I understand that any actions already taken in reliance on this authorization cannot be reversed, and any revocation will not affect those actions.
9. I understand that the entity to whom this authorization is directed may not make conditional any treatment, payment, enrollment or eligibility benefits on whether I sign this authorization.

10. Any facsimile, copy or photocopy of this authorization shall be as valid as the original.

11. This authorization shall expire three years after the date below unless it is sooner revoked as referred to above.

Signature of Patient or Patient’s Legal Representative:

______________________________

Patient: Anita Dayov

______________________________

Date: ___________________________

Printed Name of Legal Representative (if any):

______________________________

Representative’s Authority to Act for Patient:

______________________________
Exhibit E
Limited Medical Authorization

AUTHORIZATION
For the Limited Disclosure of Protected Health Information
Pursuant to 45 CFR 164.508
Important – Read Before Releasing Any Records

Medical Records Custodian
Doctors’ Hospital of Northwest New Mexico
2000 Doctors’ Road
Dry Heaves, NM 87201

1. I hereby authorize the limited disclosure of protected health information as described below from the record(s) pertaining to:
   Patient Name: Anita Dayov
   Date of Birth: 05/05/75
   Social Security No.: 000-00-0000

2. Person(s) or class of person authorized to disclose the protected health information. All “Covered Entities” and their “Business Associates” as those terms are defined under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and any applicable state law(s), including, but not limited to, all healthcare providers, health plans, healthcare clearinghouses, physicians, hospitals, pharmacists and any other medical facility or healthcare provider that possesses protected health information pertaining to the above-named patient.

3. Person(s) or class of persons to whom the protected health information may be disclosed:
   Attorney G. Howitt Hertz and the law firm Bettit, Hertz & Howe and agents for the attorneys. The phrase “agents” shall include, but not be limited to, record service representatives, and any other person or entity that assists the attorneys.

4. Description of protected health information to be disclosed:
   In-patient and/or out-patient records; admission and discharge records, summaries and/or forms; patient information sheets; consent forms; authorization forms; patient questionnaires; patient history and/or physical forms; operation, admission and discharge records; operative reports; physician’s notes; nurse’s notes; skilled nurse’s notes; physician reports; physician orders; observation notes; procedure notes; medication notes; physical orders; observation notes; physical therapy records or notes; rehabilitation records or notes; social worker records or notes; face sheets; dictations, phone orders; lab reports; summaries; photographs; slides; pulmonary or cardiac diagnostic test or procedure reports; consultation reports; progress notes or reports; status notes or reports; diagnoses, treatment notes or reports; narratives; emergency room records; X rays; CT scans; MRI scans; EEGs, EKGs; echocardiogram worksheets; reports and tapes/films;
sonogram or ultrasound worksheets, reports and tapes/films; arteriogram worksheets, reports and tapes/films; cardiac catheterization worksheets, reports, tracings, and tapes/films; pathology reports, samples, specimens, paraffin blocks, unstained and/or stained slides; written prescriptions and triplicate forms; packing inserts, patient information leaflets, sheets and/or PPIs or other information provided with prescriptions; patient counseling records, documents used by pharmacists, pharmacist technicians or assistants giving counseling; copies of prescription labels used on the bottle and package attachments showing dosage and instructions for administration of prescriptions; autopsy reports; post-mortem reports; external examination reports; toxicology reports; body transferal records, notes and correspondence; billing invoices, correspondence/memoranda, itemized statements, computer printouts, ledger cards, doctors’ liens, letters of protection, Medicare/Medicaid filing statements; correspondence from attorneys, other physicians, insurance companies, Workers’ Compensation Commission or Social Security Administration; notes or messages of telephone conversations; handwritten notes; office notes; patient charts; test results or data; calendar entries reflecting scheduled appointments for the patient. The information also includes insurance records, including Medicare/Medicaid and other public assistance claims, applications, statements, eligibility materials, claims or claim disputes, resolutions and payments, medical records provided as evidence of services furnished under Title XVII of the Social Security Act or other forms of public assistance (federal, state or local).

5. **HIV/AIDS:**
I understand that the records used and disclosed pursuant to this authorization form may include information relating to human immunodeficiency virus (“HIV”) infection or acquired immunodeficiency syndrome (“AIDS”).

6. **Any such release of records should be made ONLY if the following provisions are complied with:**
   a) That the entity(ies) preparing such records NOT DISCUSS OR COMMUNICATE in any other manner my physical or mental condition without my separate, written consent or without the presence of my attorney of record; and
   b) That said records NOT BE RELEASED unless and until a legible copy of the same is delivered to my attorney of record: G. Howitt Hertz, Bettit, Hertz & Howe, 1200 Seeyain Court, Suite 5000, Houston, TX 77000.

7. **This authorization in no way serves as a release of my physician/patient privileges.**

8. **I understand that I may revoke this authorization in writing at any time.**
I understand that if I revoke this authorization by sending or faxing a written notice to the disclosing party identified in 2 above, the written revocation must state my intent to
revoke this authorization. However, I understand that any actions already taken in reliance on this authorization cannot be reversed, and any revocation will not affect those actions.

9. I understand that the entity to whom this authorization is directed may not make conditional any treatment, payment, enrollment or eligibility benefits on whether I sign this authorization.

10. Only those authorizations bearing my original signature shall be valid.

11. This authorization shall expire one year after the date below unless it is sooner revoked as referred to above.

Signature of Patient or Patient’s Legal Representative:

________________________________

Patient: Anita Dayov

Date: ____________________________

Printed Name of Legal Representative (if any):

________________________________

Representative’s Authority to Act for Patient:

________________________________
Willie Bettit  
G. Howitt Hertz  
Ann Howe

October 25, 0000

Lou Zherr, MD  
Pokem, Produm & Moore  
411 South Main  
Houston, TX 77022

Re: Patient: Sue Nitsover, A Minor

Dear Dr. Zherr:

Please be advised that this office represents Ms. Allie Nitsover individually and as next friend of Sue Nitsover, a minor in regard to the assertion of a healthcare liability claim arising from the deafness sustained by Sue as a result of misdiagnosis of meningitis on or about June 9, 0000.

Written notice is hereby given to you pursuant to Texas Revised Civil Practice and Remedies Code §74.051 et seq.

Also pursuant to that same statute, please consider this to be our written request that you provide a complete and unaltered copy of Sue Nitsover’s medical records within ten days of your receipt of this notice.

If you are insured, please forward this letter to your insurance carrier immediately.

Very truly yours,  
Bettit, Hertz & Howe

G. Howitt Hertz, Esq.

GHH:bsp
Exhibit G
First Amended Complaint

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

JANET JONES, individually ) CIVIL DIVISION
and as Administratrix of the Estate of )
SAMUEL JONES, deceased, )
Plaintiff, )
) No.: 09-00000
V. )
)
SUNNYSIDE HOSPITAL; and )
TIM POURARY, )
Defendants. )

FIRST AMENDED COMPLAINT IN CIVIL ACTION

AND NOW, comes the Plaintiff, JANET JONES, individually and as Administratrix of the Estate of Samuel Jones, deceased, by and through her attorneys, Blanco & Malive, P.C., and Diana S. Malive, M.D., J.D., and files the following First Amended Complaint in Civil Action and in support thereof avers as follows:

1. Plaintiff Janet Jones is an adult individual who, at all times material to the matters set forth in this Complaint, resided at 619 Quilt Avenue, Cheswick, Allegheny County, Pennsylvania 15000.

2. Samuel Jones, hereinafter referred to as "the Decedent," was the husband of Janet Jones and resided with her until the time of his death. Samuel Jones died intestate on May 16, 0000. The Decedent was 62 years old on the date of his death.

3. Plaintiff Janet Jones was appointed Administratrix of the Estate of Samuel Jones on October 8, 0000, by the Register of Wills of Allegheny County Pennsylvania, at Estate No. 020900000 of 0000.

4. Plaintiff Janet Jones is the only person entitled by law to recover damages in this matter.
5. Defendant Sunnyside Hospital, hereinafter referred to as "Defendant Hospital," is a corporation or other entity chartered and existing under the laws of the Commonwealth of Pennsylvania, with its principal place of business in the City of Pittsburgh, Allegheny County, Pennsylvania. At all times material to the matters set forth in this Complaint, this Defendant owned, operated, managed and/or controlled a certain general hospital situated in the City of Pittsburgh and known as "Sunnyside Hospital," located at 200 Lower Street, Allegheny County, Pennsylvania 15000. At all times material to the matters set forth in this Complaint, this Defendant acted by and through its agents, ostensible agents, servants, representatives and/or employees, including, but not limited to, one or more of the other Defendants named herein. Plaintiff is asserting a professional liability claim against this Defendant.

6. Defendant Tim Pourary, hereinafter referred to as "Defendant Pourary," at all times material to the matters set forth in this Complaint, was a duly licensed physician in the Commonwealth of Pennsylvania and was engaged in the practice of critical care medicine. His principal place of business was located at 200 Lower Street, Allegheny County, Pennsylvania 15000. Plaintiff is asserting a professional liability claim against this Defendant.

7. The Decedent, a 62-year-old man, was admitted to Defendant Hospital on or about May 13, 0000, after he was discovered to have a subarachnoid hemorrhage. Other than a headache, the Decedent's neurologic function was entirely intact.

8. To evaluate him for the cause of the subarachnoid hemorrhage, the Decedent underwent an angiogram of the brain on May 14, 0000. This showed no aneurysm or abnormality of the arteries in his brain, and he was judged to have had a spontaneous hemorrhage and to have a good prognosis.

9. Prior to the performance of the above-described angiogram, the Decedent was intubated by an attending physician on the anesthesiology service. The Decedent was noted to be a "difficult intubation" due to obesity, a short neck and a hypoplastic mandible. In order to accomplish the difficult intubation, the anesthesiology attending used a fiberoptic bronchoscope, a #5 Fast-Track LMA, and a tube exchanger. The important fact that the Decedent was a difficult intubation was duly recorded in the Decedent's chart by the attending anesthesiologist along with the recommendation that future providers use "awake fiberoptic intubation." After the procedure, the Decedent's family was notified that he was a difficult intubation so that appropriate precautions would be taken for future intubations.
10. Following the May 14, 0000 angiogram, the Decedent was maintained on a ventilator overnight. On the morning of May 15, 0000, he was neurologically stable, and the order "wean to extubate" was given.

11. At or about 12:00 hours, the Decedent was on the ventilator with settings of FIO2 of 40%, CPAP, PEEP of 5 and PSV of 5. On those settings, his oxygen saturation was only 91%. This should have alerted members of the hospital staff that he would likely fail extubation. Despite the borderline oxygen saturation, no blood gas was done.

12. Prior to extubating the Decedent on May 15, 0000, no tests were done to ensure that extubation would be safe, including but not limited to a Rapid Shallow Breathing Index, a Vital Capacity, and/or a Peak Inspiratory Force.

13. In or about the early afternoon of May 15, 0000, the Decedent was extubated and placed on non-rebreather mask and then a BiPAP mask to help him to ventilate.

14. Following extubation, the Decedent was noted to have increased work of breathing. A chest X ray showed probable congestion of the lungs from fluid, and the Decedent was treated with multiple doses of intravenous diuretics to remove fluid from his body.

15. The Decedent's family went to visit him at or about 19:00 hours on May 15, 0000. He was noted to have on a BiPAP mask. The Decedent was awake, alert, in good spirits and joked with his family. The Decedent's son noted that there was no fiberoptic bronchoscope in the room, nor was there a difficult airway cart in the room.

16. On May 16, 0000, at or about 00:30 hours, nursing called the critical care medicine fellow, Defendant Pourary, to the bedside to assess the Decedent for increased shortness of breath. Defendant Pourary ordered that the Decedent be administered a breathing treatment.

17. Thereafter, at or about 00:35 hours the Decedent was given an aerosol treatment by respiratory therapy with little improvement. He was noted to have crackles, wheezes and rales in all lung fields and difficulty clearing secretions both before and after the treatment.

18. Thereafter, at or about 01:00 hours, monitors showed that the Decedent's pulse was 66, his respiratory rate was 32, and his 02 saturation was 96%. At or about that time, Defendant Pourary recommended to the Decedent that he be reintubated. At the time of this conversation, the Decedent was working hard to breathe and was in distress. The Decedent
initially refused to be intubated. Defendant Pourary did not contact the Decedent's family, call an attending to the bedside, or get a difficult airway cart and/or a fiberoptic bronchoscope into the room.

19. Thereafter, at or about 01:05 hours, the Decedent relented and agreed to be intubated. At some point soon thereafter, Defendant Pourary bagged the Decedent and/or ordered someone else to bag the Decedent. The Decedent, as should have been expected, fought to breathe and became agitated.

20. At or about 01:15 hours, Defendant Pourary administered two medications, etomidate and propofol, to the Decedent. These medications took away the ability of the Decedent to fight and also took away his ability to breathe.

21. By 01:18 hours, the Decedent had ceased to breathe. Several minutes later his heart stopped. A "crash cart" had to be fetched by a nurse. No attending physician was initially present. Defendant Pourary tried to intubate the Decedent multiple times with a laryngoscope and ETT and then with an Eschmann. All of Defendant Pourary's attempts to resuscitate and/or to ventilate and/or to intubate the Decedent were in vain.

22. By the time an attending physician and/or a difficult airway team and/or the difficult airway cart, and/or a fiberoptic bronchoscope arrived at the scene, multiple, failed, woefully inadequate attempts at intubation by Defendant Pourary had rendered the Decedent's airway unworkable. Air no longer could be moved in and out of the Decedent's lungs. Initial attempts at bedside cricothyroidotomy failed.

23. By the time a workable airway had been established, the Decedent, despite undergoing a tracheotomy first at his bedside then in the operating room, had irreversible brain damage. His family discontinued life support, and he was pronounced dead on the afternoon of May 16, 0000.

24. All of the above-described complications suffered by the Decedent and his death under the circumstances described above, and as will be described in more detail hereafter, were the direct and proximate result of the negligence of the Defendants.

25. As a direct and proximate result of the negligence of the Defendants, the Decedent suffered damages including, but not limited to:
a. Great suffering, fear, inconvenience and physical and/or mental anguish;
b. Severe pain;
c. Hypotension;
d. Asystole;
e. Cardiopulmonary arrest;
f. Hypoxic encephalopathy;
g. Seizures;
h. Brain swelling; and
i. A slow, agonizing and painful death by suffocation.

26. Because of the death of Samuel Jones, Janet Jones has suffered great pecuniary loss by reason of expenses incurred for medical and hospital care, funeral bills, estate administration, lost work and other items connected with Samuel Jones's death.

27. By reason of the death of Samuel Jones, Janet Jones has been deprived of the Decedent's services, earnings, companionship, society and comfort.

COUNT I - WRONGFUL DEATH

Janet Jones, individually and as Administratrix of the Estate of Samuel Jones, deceased v. Sunnyside Hospital and Tim Pourary

28. Paragraphs 1 through 27 of this Complaint are hereby incorporated by reference as though the same were set forth fully at length herein.

29. Plaintiff brings this action pursuant to 42 Pa.C.S, § 8301 and Pa.R.C.P. 2202 to recover all damages whatsoever in nature to which Plaintiff is entitled under the laws of Pennsylvania governing wrongful death actions.

30. The Decedent did not recover for the damages claimed in this action during his lifetime.

COUNT I (a) - NEGLIGENCE

Janet Jones, individually and as Administratrix of the Estate of Samuel Jones, deceased v. Sunnyside Hospital

31. Paragraphs 1 through 30 are hereby incorporated as though the same were set forth fully at length herein.
32. All of the resultant damages and injuries to and the ultimate death of the Decedent were the direct and proximate result of some or all of the following negligent acts of this Defendant and its agents, ostensible agents, servants, representatives and/or employees:

a. In extubating the Decedent when he was not stable for extubation;
b. In failing to do tests prior to extubation that would have predicted the safety of the procedure;
c. In failing to do a Rapid Shallow Breathing Index prior to extubation;
d. In failing to do a Vital Capacity prior to extubation;
e. In failing to check Peak Inspiratory Force prior to extubation;
f. In failing to note that the ventilatory parameters available to them on the morning of May 15, 0000, predicted a failed extubation;
g. In failing to properly ventilate the Decedent when he ceased to breathe;
h. In failing to have proper protocols and/or procedures in place and/or to follow protocols and/or procedures in place regarding extubation;
i. In failing to use proper procedures and protocols to ventilate and/or intubate the Decedent when he ceased to breathe;
j. In failing to have proper protocols and/or procedures in place and/or to follow protocols and/or procedures in place regarding intubation;
k. In failing to use the correct instruments in the correct fashion during attempts at intubating the Decedent following his respiratory arrest;
l. In failing to use proper procedures to call the difficult airway team;
m. In the failure of Hospital staff to notice that the Decedent had a recent history of a difficult intubation and to properly prepare for the possibility of a repeat difficult intubation as he became increasingly short of breath;
n. In the failure of the Hospital staff to perform an "awake look" at the Decedent's upper airway prior to a calamity;
o. In the failure of Hospital Staff to timely consult anesthesiology to avoid the disaster that ensued;
p. In the failure of Hospital Staff to have surgery at the bedside prepared to perform an emergency procedure prior to respiratory arrest;
q. In allowing a fellow with inadequate training to handle a patient with a difficult airway;
r. In failing to properly train critical care medicine fellows the limits of their capabilities;
s. In failing to timely have a code cart in the room;
t. In failing to timely have a difficult airway cart in the room;
u. In failing to timely have critical personnel at the bedside to intubate the Decedent;
v. In failing to enlist the help of the family in getting the Decedent to agree to be intubated when he was clearly too sick to be able to make an informed decision;
w. In failing to enlist the help of a Hospital ethicist when the Decedent was not agreeing to be intubated and appeared to be unable to make a good decision regarding his health and well-being;
x. In failing to properly position the Decedent when attempting to ventilate him;
y. In failing to properly position the Decedent when attempting to intubate him;
z. In failing to have imaging studies of the upper airway in anticipation of a difficult intubation;

aa. In failing to know and/or utilize the proper procedures to establish an emergency surgical airway;
bb. In failing to establish a surgical airway prior to the Decedent having a cardiopulmonary arrest.
cc. In performing repeated attempts at oral intubation when it should have been clear that a surgical airway was needed;
dd. In performing repeated attempts at oral intubation when it should have been clear that the only result would be trauma to the airway and further obscuration of the cords;

ee. In a Level I Trauma Center, such as Defendant Hospital, failing to have qualified persons immediately available who are able to establish an airway in a man with a history of known difficult intubation with shortness of breath;
ff. In failing to adequately oxygenate the Decedent so that he suffered a cardiac arrest;

gg. In the misuse of medications when the Decedent was having trouble breathing;
hh. In administering propofol to the Decedent, which caused him to cease to breathe;
ii. In administering etomidate to the Decedent, which caused him to cease to breathe;
jj. In allowing unskilled physicians to practice within the walls of Defendant Hospital;

kk. In nurses failing to timely communicate pertinent information regarding the condition of the Decedent to physicians;
ll. In allowing unskilled nurses and other health care workers to care for this acutely ill patient without appropriate supervision;

mm. In failing to adequately monitor the condition of the Decedent;

nn. In allowing the Decedent to deteriorate and die in a painful, horrible fashion;

oo. In failing to properly supervise nursing staff in their care of the Decedent;

pp. In failing to adopt and/or enforce routine and/or standard procedures for the agents, ostensible agents, servants, representatives and/or employees of these Defendants and/or physicians on staff at Defendant Hospital to follow for the diagnosis and/or care of persons with a potentially difficult intubation;

qq. In failing to properly monitor the Defendant physicians' conduct in their care of the Decedent;

rr. In failing to maintain safe and adequate facilities, namely systems to ensure that the nursing staff and physicians were properly supervised;

ss. In failing to formulate, adopt and enforce adequate rules and policies to ensure proper and appropriate care for patients known to be difficult intubations who may require reintubation including the Decedent; and

tt. In failing to adopt, enforce or formulate rules for the supervision of the nursing staff and/or attending physicians practicing medicine within the walls of Defendant Hospital.

33. As a direct and proximate result of the negligent conduct of these Defendants and their agents, ostensible agents, servants, representatives and/or employees, the Decedent suffered the injuries and damages described aforesaid in Paragraphs 1 through 32.

WHEREFORE, Plaintiff demands all damages whatsoever in nature to which Plaintiff is entitled under the laws of Pennsylvania governing wrongful death actions from this Defendant in excess of Twenty Five Thousand Dollars ($25,000.00). A jury trial of twelve is demanded.

COUNT I (b) - NEGLIGENCE

Janet Jones, individually and as Administratrix of the Estate of Samuel Jones, deceased v. Tim Pourary

34. Paragraphs 1 through 33 of this Complaint are hereby incorporated by reference as though the same were set forth fully at length herein.

35. All of the resultant injuries and damages to and the ultimate death of the Decedent were the direct and proximate result of some or all of the following negligent acts of this Defendant and his agents, ostensible agents, servants, representatives and/or employees:
a. In the misuse of medications when the Decedent was having trouble breathing;
b. In administering propofol to the Decedent, which caused him to cease to breathe;
c. In administering etomidate to the Decedent, which caused him to cease to breathe;
d. In the failure to notice that the Decedent had a recent history of a difficult intubation and to properly prepare for the possibility of a repeat difficult intubation as he became increasingly short of breath;
e. In the failure to perform an "awake look" at the Decedent's upper airway prior to a calamity;
f. In the failure to timely consult anesthesiology to avoid the disaster that ensued;
g. In the failure to have surgery at the bedside, prepared to perform an emergency procedure prior to respiratory arrest;
h. In failing to recognize that he had inadequate training to handle a patient with a difficult airway;
i. In failing to timely obtain the assistance of an attending physician;
j. In failing to have a code cart in the room;
k. In failing to timely have a difficult airway cart in the room;
l. In failing to timely have critical personnel at the bedside to intubate the Decedent;
m. In failing to enlist the help of the family in getting the Decedent to agree to be intubated when he was clearly too sick to be able to make an informed decision;
n. In failing to enlist the help of a Hospital ethicist when the Decedent was not agreeing to be intubated and appeared to be unable to make a good decision regarding his health and well-being;
o. In failing to properly position the Decedent when attempting to ventilate him;
p. In failing to properly position the Decedent when attempting to intubate him;
q. In failing to have imaging studies of the upper airway in anticipation of a difficult intubation;
r. In failing to establish a surgical airway prior to the Decedent having a cardiopulmonary arrest;
s. In performing repeated attempts at oral intubation when it should have been clear that a surgical airway was needed;
t. In performing repeated attempts at oral intubation when it should have been clear that the only result would be trauma to the airway and further obscuration of the cords;

u. In failing to adequately oxygenate the Decedent so that he suffered a cardiac arrest;

v. In failing to adequately monitor the condition of the Decedent; and

w. In allowing the Decedent to deteriorate and die in a painful, horrible fashion.

x. In failing to timely obtain assistance when it was clear he did not have the training or experience to care for the Decedent;

y. In failing to know how to position a patient properly to ventilate and/or intubate them;

z. In failing to know and/or use proper methods of mask ventilation in a critical situation;

aa. In failing to know how to optimize his chances of successfully intubating the Decedent;

bb. In failing to use the proper equipment when attempting to intubate the Decedent;

36. As a direct and proximate result of the negligent conduct of this Defendant and his agents, ostensible agents, servants, representatives and/or employees, the Plaintiff suffered the injuries and damages described aforesaid in Paragraphs 1 through 35.

WHEREFORE, the Plaintiff demands all damages whatsoever to which the Plaintiff is entitled under the laws of Pennsylvania governing wrongful death actions from each Defendant in excess of Twenty Five Thousand Dollars ($25,000.00). A jury trial of twelve is demanded.

COUNT II - SURVIVAL ACTION

Janet Jones, individually and as Administratrix of the Estate of Samuel Jones, deceased v. Sunnyside Hospital and Tim Pourary

37. Paragraphs 1 through 36 are hereby incorporated as though the same were set forth fully at length herein.

38. The Plaintiff brings this action on behalf of the Estate of Samuel Jones, deceased, under and by virtue of 20 Pa.C.S. § 3373 and 42 Pa.C.S. § 8302 and all other applicable laws and statutes of the Commonwealth of Pennsylvania to recover all damages whatsoever to which said estate is entitled by reason of the death of Samuel Jones under the laws governing survival actions.
39. The Plaintiff claims on behalf of the estate, by reason of the death of Samuel Jones, damages including, but not limited to, her suffering, inconvenience, destruction of her earning capacity and the expenses of administration.

WHEREFORE, the Plaintiff demands all damages whatsoever to which said estate is entitled under the laws governing survival actions from each Defendant in excess of Twenty Five Thousand Dollars ($25,000.00). A jury trial of twelve is demanded.

Blanco & Malive, P.C.

By

Diana S. Malive, M.D., J.D.,
Counsel for Plaintiff
Certificate of Merit as to Sunnyside Hospital

I, Diana S. Malive, M.D., J.D., certify that:

☑ an appropriate licensed professional has supplied a written statement to the undersigned that there is a basis to conclude that the care, skill or knowledge exercised or exhibited by this defendant in the treatment, practice or work that is the subject of the complaint fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm;

AND/OR

☑ the claim that this defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard and an appropriate licensed professional has supplied a written statement to the undersigned that there is a basis to conclude that the care, skill or knowledge exercised or exhibited by the other licensed professionals in the treatment, practice or work that is the subject of the complaint fell outside acceptable professional standards and that such conduct was a cause in bringing about harm;

OR
☐ expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim against this defendant.

Date: ____________________________  ____________________________

Attorney or Party
**Exhibit I**

**Answer to Amended Complaint**

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

JANET JONES, individually and as Administratrix of the Estate of SAMUEL JONES, deceased, Plaintiff,

V.

SUNNYSIDE HOSPITAL; and TIM POURARY, Defendants.

CIVIL DIVISION

G.D. No. 09-00000

AND NOW comes of the defendants, Sunnyside Hospital, by and through its attorneys, Billum, Tillit, Hertz, P.C., John Cash, Esquire, and Marge Enoverror, Esquire, and files the within Answer to Plaintiff’s Amended Complaint and in support thereof avers as follows:

1. After reasonable investigation, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 1 of the Amended Complaint, the same being denied and strict proof thereof will be demanded at the time of trial.

2. After reasonable investigation, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 2 of the Amended Complaint, the same being denied and strict proof thereof will be demanded at the time of trial.

3. After reasonable investigation, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 3 of the Amended Complaint, the same being denied and strict proof thereof will be demanded at the time of trial.
4. After reasonable investigation, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 4 of the Amended Complaint, the same being denied and strict proof thereof will be demanded at the time of trial.

5. The allegations set forth in Paragraph 5 of the Amended Complaint are admitted in part and denied in part. It is averred that the correct name of this defendant is Sunnyside Hospital. It is averred that, at all times relevant hereto, this defendant owned and operated a hospital known as Sunnyside Hospital located at 200 Lower Street, Pittsburgh, Allegheny County, Pennsylvania 15000. To the extent that this paragraph alleges that this defendant provides medical care and treatment to patients, this allegation is denied. On the contrary, it is averred that this defendant provides a facility in which medical care and treatment are rendered by physicians and other licensed health care professionals. This defendant, as an entity, does not provide medical care and treatment to patients. It is averred that this defendant acts by and through its agents and employees; however, to the extent that this paragraph fails to identify with specificity those individuals, after reasonable investigation, this defendant is without knowledge or information sufficient to form a belief as to the truth of these allegations, the same being denied and strict proof thereof will be demanded at the time of trial. To the extent that this paragraph alleges that Dr. Pourary was the agent, servant or employee of this defendant at anytime relevant hereto, this allegation is admitted in part and denied in part. It is averred that, at all times relevant hereto, Dr. Pourary was a fellow in critical care medicine and was an employee of this defendant. It is denied that Dr. Pourary was the agent of this defendant at anytime relevant hereto. On the contrary, it is averred that, at all times relevant hereto, Dr. Pourary was acting under the direction and supervision of his attending physicians. It is admitted that plaintiff is asserting a professional liability claim against this defendant.

6. The allegations set forth in Paragraph 6 of the Amended Complaint are directed to another defendant and thus require no response from this defendant.

7. The allegations set forth in Paragraph 7 of the Amended Complaint are denied as stated. The particulars of the care and treatment provided to the decedent as well as his condition are set forth in the medical records. Pursuant to Pa. R. Civ. P.1029(e), all other allegations of fact set forth in this paragraph are generally denied.
8. The allegations set forth in Paragraph 8 of the Amended Complaint are denied as stated. The particulars of the care and treatment provided to the decedent are set forth in the medical records. Pursuant to Pa. R. Civ. P. 1029(e), all other allegations of fact set forth in this paragraph are generally denied.

9. The allegations set forth in Paragraph 9 of the Amended Complaint are denied as stated. The particulars of the care and treatment provided to the decedent are set forth in the medical records. Pursuant to Pa. R. Civ. P. 1029(e), all other allegations of fact set forth in this paragraph are generally denied.

10. The allegations set forth in Paragraph 10 of the Amended Complaint are denied as stated. The particulars of the care and treatment provided to the decedent are set forth in the medical records. Pursuant to Pa. R. Civ. P. 1029(e), all other allegations of fact set forth in this paragraph are generally denied.

11. The allegations set forth in Paragraph 11 of the Amended Complaint are denied as stated. The particulars of the care and treatment provided to the decedent are set forth in the medical records. Pursuant to Pa. R. Civ. P. 1029(e), all other allegations of fact set forth in this paragraph are generally denied. To the extent that this paragraph alleges or implies negligent conduct on the part of this defendant, these allegations/implications are denied. Further, this paragraph contains medical opinions which are more appropriately the subject of expert medical testimony at trial and thus require no response from this defendant.

12. The allegations set forth in Paragraph 12 of the Amended Complaint are denied as stated. The particulars of the care and treatment provided to the decedent are set forth in the medical records. Pursuant to Pa. R. Civ. P. 1029(e), all other allegations of fact set forth in this paragraph are generally denied. To the extent that this paragraph alleges or implies negligent conduct on the part of this defendant, these allegations/implications are denied. Further, this paragraph contains medical opinions which are more appropriately the subject of expert medical testimony at trial and thus require no response from this defendant.

13. The allegations set forth in Paragraph 13 of the Amended Complaint are denied as stated. The particulars of the care and treatment provided to the decedent are set forth in the medical records. Pursuant to Pa. R. Civ. P. 1029(e), all other allegations of fact set forth in this paragraph are generally denied.
14. The allegations set forth in Paragraph 14 of the Amended Complaint are denied as stated. The particulars of the care and treatment provided to the decedent are set forth in the medical records. Pursuant to Pa. R. Civ. P. 1029(e), all other allegations of fact set forth in this paragraph are generally denied.

15. After reasonable investigation, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 15 of the Amended Complaint, the same being denied and strict proof thereof will be demanded at the time of trial.

16. The allegations set forth in Paragraph 16 of the Amended Complaint are denied as stated. The particulars of the care and treatment provided to the decedent as well as his condition are set forth in the medical records. Pursuant to Pa. R. Civ. P. 1029(e), all other allegations of fact set forth in this paragraph are generally denied.

17. The allegations set forth in Paragraph 17 of the Amended Complaint are denied as stated. The particulars of the care and treatment provided to the decedent as well as his condition are set forth in the medical records. Pursuant to Pa. R. Civ. P. 1029(e), all other allegations of fact set forth in this paragraph are generally denied.

18. The allegations set forth in Paragraph 18 of the Amended Complaint are denied as stated. The particulars of the care and treatment provided to the decedent as well as his condition are set forth in the medical records. Pursuant to Pa. R. Civ. P. 1029(e), all other allegations of fact set forth in this paragraph are generally denied. The allegations of negligence set forth in this paragraph are directed to another defendant and thus requiring no response from this defendant.

19. The allegations set forth in Paragraph 19 of the Amended Complaint are denied as stated. The particulars of the care and treatment provided to the decedent as well as his condition are set forth in the medical records. Pursuant to Pa. R. Civ. P. 1029(e), all other allegations of fact set forth in this paragraph are generally denied.

20. The allegations set forth in Paragraph 20 of the Amended Complaint are denied as stated. The particulars of the care and treatment provided to the decedent as well as his condition are set forth in the medical records. Pursuant to Pa. R. Civ. P. 1029(e), all other allegations of fact set forth in this paragraph are generally denied. It is specifically denied that Etomidate and Propofol were administered to the decedent at anytime as alleged in this paragraph.
21. The allegations set forth in Paragraph 21 of the Amended Complaint are denied as stated. The particulars of the care and treatment provided to the decedent are set forth in the medical records. Pursuant to Pa. R. Civ. P. 1029(e), all other allegations of fact set forth in this paragraph are generally denied. It is denied that Dr. Pourary tried to intubate the decedent. On the contrary, it is averred that Dr. Pourary did not attempt intubation. To the extent that this paragraph alleges or implies negligent conduct, these allegations are directed to another defendant and thus require no response from this defendant.

22. The allegations set forth in Paragraph 22 of the Amended Complaint are denied as stated. The particulars of the care and treatment provided to the decedent are set forth in the medical records. Pursuant to Pa. R. Civ. P. 1029(e), all other allegations of fact set forth in this paragraph are generally denied. It is denied that Dr. Pourary tried to intubate the decedent. On the contrary, it is averred that Dr. Pourary did not attempt intubation. To the extent that this paragraph alleges or implies negligent conduct, these allegations/implications are denied.

23. The allegations set forth in Paragraph 23 of the Amended Complaint are denied as stated. The particulars of the care and treatment provided to the decedent as well as his condition are set forth in the medical records. Pursuant to Pa. R. Civ. P. 1029(e), all other allegations of fact set forth in this paragraph are generally denied.

24. The allegations of negligence set forth in Paragraph 24 of the Amended Complaint directed to this defendant are denied.

25. The allegations of negligence set forth in Paragraph 25 of the Amended Complaint directed to this defendant are denied. With regard to the damage contentions set forth in this paragraph, after reasonable investigation, this defendant can neither admit nor deny these damage contentions. Hence, strict proof thereof will be demanded at the time of trial.

26. With regard to the damage contentions set forth in Paragraph 26 of the Amended Complaint, after reasonable investigation, this defendant can neither admit nor deny these damage contentions. Hence, strict proof thereof will be demanded at the time of trial.

27. With regard to the damage contentions set forth in Paragraph 27 of the Amended Complaint, after reasonable investigation, this defendant can neither admit nor deny these damage contentions. Hence, strict proof thereof will be demanded at the time of trial.
COUNT I — WRONGFUL DEATH

JANET JONES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF SAMUEL JONES, DECEASED v. SUNNYSIDE HOSPITAL AND TIM POURARY

28. Paragraph 28 of the Complaint incorporates by reference the allegations set forth in Paragraphs 1 through 27 of that pleading. In response thereto, this defendant incorporates by reference its responses to Paragraphs 1 through 27 of the Complaint as if the same were more fully set forth at length herein.

29. The allegations set forth in Paragraph 29 of the Amended Complaint consist of conclusions of law to which no response is required by this defendant.

30. The allegations set forth in Paragraph 30 of the Amended Complaint are admitted to the extent that this decedent did not initiate a lawsuit against this defendant during his lifetime.

WHEREFORE, the defendant, Sunnyside Hospital, denies any and all liability to plaintiff and demands that judgment be entered in its favor and against plaintiff.

JURY TRIAL DEMANDED.

COUNT I (a) — NEGLIGENCE

JANET JONES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF SAMUEL JONES, DECEASED v. SUNNYSIDE HOSPITAL

31. Paragraph 31 of the Complaint incorporates by reference the allegations set forth in Paragraphs 1 through 30 of that pleading. In response thereto, this defendant incorporates by reference its responses to Paragraphs 1 through 30 of the Complaint as if the same were more fully set forth at length herein.

32. The allegations of negligence set forth in Paragraph 32 and the subparagraphs thereunder of the Amended Complaint are denied. Insofar as this paragraph alleges conduct on the part of agents, ostensible agents, servants and employees of this defendant and fails to identify with specificity these persons, after reasonable investigation, this defendant is without knowledge or information sufficient to form a belief as to the truth of these allegations, the same being denied and strict proof thereof will be demanded at the time of trial.
33. The allegations of negligence set forth in Paragraph 33 of the Amended Complaint are denied. Insofar as this paragraph alleges conduct on the part of agents, ostensible agents, servants and employees of this defendant and fails to identify with specificity these persons, after reasonable investigation, this defendant is without knowledge or information sufficient to form a belief as to the truth of these allegations, the same being denied and strict proof thereof will be demanded at the time of trial. With regard to the damage contentions set forth in this paragraph, after reasonable investigation, this defendant can neither admit nor deny these damage contentions. Hence, strict proof thereof will be demanded at the time of trial.

WHEREFORE, the defendant, Sunnyside Hospital, denies any and all liability to plaintiff and demands that judgment be entered in its favor and against plaintiff.

JURY TRIAL DEMANDED.

COUNT I (b) — NEGLIGENCE

JANET JONES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF SAMUEL JONES, DECEASED v. TIM POURARY

34. Paragraph 34 of the Complaint incorporates by reference the allegations set forth in Paragraphs 1 through 33 of that pleading. In response thereto, this defendant incorporates by reference its responses to Paragraphs 1 through 33 of the Complaint as if the same were more fully set forth at length herein.

35. The allegations set forth in Paragraph 35 of the Amended Complaint are directed to another defendant and thus require no response from this defendant.

36. The allegations set forth in Paragraph 36 of the Amended Complaint are directed to another defendant and thus require no response from this defendant.

WHEREFORE, the defendant, Sunnyside Hospital, denies any and all liability to plaintiff and demands that judgment be entered in its favor and against plaintiff.
JURY TRIAL DEMANDED.

COUNT II — SURVIVAL ACTION
JANET JONES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF SAMUEL JONES, DECEASED v. SUNNYSIDE HOSPITAL AND TIM POURARY

37. Paragraph 37 of the Complaint incorporates by reference the allegations set forth in Paragraphs 1 through 36 of that pleading. In response thereto, this defendant incorporates by reference its responses to Paragraphs 1 through 36 of the Complaint as if the same were more fully set forth at length herein.

38. The allegations set forth in Paragraph 38 of the Amended Complaint consist of conclusions of law to which no response is required by this defendant.

39. With regard to the damage contentions set forth in Paragraph 39 of the Amended Complaint, after reasonable investigation, this defendant can neither admit nor deny these damage contentions. Hence, strict proof thereof will be demanded at the time of trial.

WHEREFORE, the defendant, Sunnyside Hospital, denies any and all liability to plaintiff and demands that judgment be entered in its favor and against plaintiff.

JURY TRIAL DEMANDED.

BILLUM, TILLIT, HERTZ, P.C.

By

John Cash
Attorney for Defendant,
Sunnyside Hospital
Exhibit J
Sample Interrogatories

No. 1  Please state the name, address, title and position of the person answering these written interrogatories on behalf of the defendant-hospital.

No. 2  Please state the exact name of the corporation, partnership or individual that owns the defendant-hospital. In that regard, please state whether such is a corporation, partnership, foundation, assumed name or individual.

No. 3  Medical records indicate that a fetal monitor was used on Ms. Smith on June 6, 0000. In that regard, please state:
   a. The exact number of 8-hour strips contained in a box of fetal monitor strips and the exact number of boxes contained in a carton.
   b. The mechanism for storing the fetal monitor paper on the labor and delivery unit and in the labor and delivery rooms. In that regard, please state the exact storage location for the fetal monitor paper on June 6, 0000.
   c. The storage location (i.e., fetal monitor drawer, on top of the fetal monitor, at the nurses’ desk, etc.) for new and unused fetal monitor paper.
   d. The manufacturer, serial number, identification number, make, model, size and color of fetal monitor and monitor paper used on Ms. Smith.
   e. Whether the fetal monitor performed its functions as you expected and/or anticipated.
   f. If said fetal monitor did not perform as expected, please state:
      i. The manner in which said fetal monitor failed to perform as you expected or anticipated.
      ii. Whether you issued any form of complaint to the manufacturer or Federal Drug Administration (FDA). If your answer is “yes,” please state the company or agency to whom the complaint was issued and please state the name, address, title and position of the individual to whom said complaint was directed.

No. 4  Please state the number of fetal monitors North Shore Hospital owned or possessed on June 6, 0000. In that regard, please state:
   a. The brand of fetal monitor paper used for said monitors.
   b. The manufacturer, serial number, identification number, make, model, size and color of fetal monitor paper used.
   c. The location where the fetal monitors were used and/or stored. In that regard, please state whether any fetal monitors were on rollers and whether there was the capability of moving said monitors from one location to another.

No. 5  Does North Shore Hospital have a central fetal monitor display system in the nurses’ station? If your answer is “yes,” please state:
   a. Whether the system has an “alert parameters” screen.
   b. Whether there is a remote unit or remote display located in the doctors’ lounge, nurses’ lounge or any other area in the hospital for department-wide surveillance.
Exhibit K
Sample Requests for Production

No. 1  Please provide a copy of all policies and procedures which were in effect June 6, 0000 which set out or specify the scope of conduct of patient care to be rendered by the critical care nurses.

No. 2  Please provide a copy of the table of contents for every policy and procedure manual located on the critical care unit.

No. 3  Please provide a list of references and textbooks in the critical care unit.

No. 4  Please provide a copy of the structural organization of the critical care unit (i.e., those written organizational charts identifying the organizational structure of the unit and functional responsibilities of nursing, medical and ancillary personnel).

No. 5  Please provide a copy of all drawings, plans, etc., of the critical care unit.

No. 6  Please provide a copy of the written philosophy and objectives for the critical care unit.

No. 7  Please provide a copy of all written materials regarding the definition of the scope of practice on the critical care unit.

No. 8  Please provide a copy of all policies and procedures regarding nursing orders, nursing standards of care, standards of practice, practice parameters and guidelines, nursing practice policies, nursing audit criteria and/or patient outcome criteria for the critical care unit.

No. 9  Please provide a copy of all policies and procedures setting out the protocol for standing orders on the critical care unit. In other words, what standing orders can be approved.

No. 10 Please provide a copy of all Joint Commission reports and recommendations regarding the nursing dept./service for the years 0000 to the present.

No. 11 Please provide a copy of the nursing license of Anita Dayov which was in effect on June 6, 0000.

No. 12 Please provide a complete copy of the employee file of Anita Dayov.

No. 13 Please provide a copy of all nursing service job descriptions, standards of performance, roles and responsibilities and specific qualifications for RNs, LVNs, care technicians, nursing assistants, charge nurses, head nurses, clinical specialists, supervisors and nursing administrators for the critical care unit.
Exhibit L
Sample Requests for Admission and Responses

No. 1  Admit or deny that Defendants have been properly named and sued in their proper capacity in this cause.

RESPONSE: The allegations of this paragraph are ADMITTED.

No. 2  Admit or deny that on June 6, 0000, Dr. Kildeer was on duty in the ED of North Shore Hospital.

RESPONSE: The allegations of this paragraph are NEITHER ADMITTED NOR DENIED since the Defendant Hospital did not employee Dr. Kildeer and cannot determine his status in the ED on that date.

No. 3  Admit or deny that on June 6, 0000, Dr. Kildeer treated Plaintiff in the ED of North Shore Hospital.

RESPONSE: The allegations of this paragraph are NEITHER ADMITTED NOR DENIED since a reasonable search of the records to date does not disclose any evidence of attendance by an employee of the Defendant Hospital in the ED on that date. The Defendant Hospital continues to undertake a reasonable search of its records and reserves the right to amend this response in the future if it discovers any relevant evidence.

No. 4  Admit or deny that North Shore Hospital authorized Dr. Kildeer to treat Plaintiff in the ED of North Shore Hospital.

RESPONSE: The allegations of this paragraph are NEITHER ADMITTED NOR DENIED since at present Defendant Hospital has insufficient information to determine if the actions of Dr. Kildeer were properly authorized or if any treatment was undertaken at all.

No. 5  Admit or deny that since the treatment of June 6, 0000, Plaintiff has incurred the medical expenses that are listed in Exhibit 1 attached.

RESPONSE: The allegations of this paragraph are NEITHER ADMITTED NOR DENIED since the Defendant Hospital does not understand the use of the word “incurred” and requests clarification.

No. 6  Admit or deny that the medical expenses listed in Exhibit 1 attached relate to treatment for injuries Plaintiff sustained in the June 6, 0000, treatment or accident.

RESPONSE: The allegations of this paragraph are NEITHER ADMITTED NOR DENIED since the responding party does not understand the question and requests clarification.
Q. Does that mean, among other things, that you are responsible for all the nurses and nursing care that is delivered in the hospital?

A. Yes, that’s correct.

Q. How long have you had that title, ma’am?

A. Since 0000.

Q. And would you be kind enough to explain for the folks on the jury what your responsibilities and duties are, just generally?

A. Generally speaking, my responsibilities are to ensure quality of care to patients, to assist in recruitment and retention of nurses, to ensure cost-effective care and to ensure quality outcomes.

Q. Can you tell me what you have reviewed in preparation for this deposition?

A. I haven’t reviewed anything.

Q. Have you ever reviewed the chart of Sue –

A. Sue Nitsover?

Mr. Cheatum: I’m going to instruct the witness that with regard to any hospital committee proceeding she has participated in, that those matters are privileged and should not be discussed. So, whether or not any documents were reviewed as part of any committee process, I’ll instruct the witness not to answer one way or the other. I will instruct the witness to answer the question with regard to whether or not any documents were reviewed outside of the committee process. And so you can go ahead and answer his question based on that instruction.
Exhibit N
Sample Subpoena Duces Tecum

DISTRICT COURT FOR THE STATE OF NEW MEXICO
COUNTY OF HUEVOS

ANITA DAYOV,  
Petitioner,  

v.  

DOCTORS’ HOSPITAL OF NORTHWEST NEW MEXICO  
Respondent.  

Case No. 54-545454

TO:  Medical Records Custodian  
Doctors’ Hospital of Northwest New Mexico  
2000 Doctors’ Road  
Dry Heaves, NM 87201

RE:  Anita Dayov  
Date of Birth: 05/05/75

YOU ARE COMMANDED to produce at the offices of Bettit, Hertz & Howe, 1200 Seeyain Court, Suite 5000, Houston, TX 77000, on or before June 6, 0000, a complete copy of your medical records pertaining to the above-referenced individual. Attendance is not required if records are forwarded in a timely manner to the indicated address.

DATED this 9th day of May, 0000.

HUEVOS COUNTY DISTRICT COURT

By  
R.U. Listnin  
Senior Magistrate
## Exhibit O
### Litigation Process Timeline

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<td><strong>PLAINTIFF</strong></td>
<td>Incident Occurs to Plaintiff or Family Member</td>
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<td>Plaintiff Realizes There Is a Problem</td>
<td>Plaintiff Meets and Hires Attorney</td>
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<td><strong>DEFENDANT</strong></td>
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<td>Potential Defendant Investigates</td>
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<td>Defendant’s Insurer Investigates</td>
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<td><strong>PLAINTIFF</strong></td>
<td>Plaintiff’s Law Firm Investigates</td>
<td>Notice Letter May Be Sent</td>
<td>Suit Is Filed via Complaint or Petition</td>
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<td><strong>PLAINTIFF</strong></td>
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<td><strong>DEFENDANT</strong></td>
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<td>Court Serves Summons on Defendant(s)</td>
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<td>Defendant(s) Notify Their Insurers</td>
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## Litigation Process Timeline

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<td><strong>PLAINTIFF</strong></td>
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<td>Settlement Negotiations Can Occur from Now Through End of Trial and Appeal Process</td>
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<td>Discovery Begins</td>
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<td><strong>DEFENDANT</strong></td>
<td>Defense Attorney Files the Answer</td>
<td>Defendant(s) File Cross-Suits</td>
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<td>Additional Pretrial Conferences Occur</td>
<td>Discovery Ends</td>
<td>Plaintiff Mock Trial Can Be Held</td>
<td>Parties May Go to ADR</td>
<td>Attorneys Prepare for Trial</td>
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<tr>
<td><strong>DEFENDANT</strong></td>
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<td>Defense Mock Trial Can Be Held</td>
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## Litigation Process Timeline

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<td><strong>PLAINTIFF</strong></td>
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<td><strong>PLAINTIFF</strong></td>
<td><strong>DEFENDANT</strong></td>
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<tr>
<td>Trial Begins</td>
<td>Jury Selected</td>
<td>Court Addresses Jury and Jury Is Sworn In</td>
<td>Plaintiff Opening Statement</td>
<td>Defense Opening Statement</td>
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<tr>
<th>26 ➔</th>
<th>27 ➔</th>
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<td><strong>PLAINTIFF</strong></td>
<td><strong>DEFENDANT</strong></td>
<td><strong>PLAINTIFF</strong></td>
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<tr>
<td>One Party or the Other Invokes the Rule</td>
<td>Plaintiff Presents Case – Direct Exam of Own Witnesses and Experts</td>
<td>Plaintiff May Do Redirect Exam of Own Witnesses and Experts</td>
<td>Defense Cross-Examines Plaintiff Witnesses and Experts</td>
<td>Defense May Do Re-Cross-Examination of Plaintiff Witnesses and Experts</td>
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## Litigation Process Timeline

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<tbody>
<tr>
<td><strong>Plaintiff</strong></td>
<td>Plaintiff Closes or Rests</td>
<td>Plaintiff Cross-Examines Defense Witnesses and Experts</td>
<td>Plaintiff May Do Re-Cross-Examination of Defense Witnesses and Experts</td>
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<tr>
<td><strong>Defendant</strong></td>
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<td>Defense Presents Case – Direct Exam of Own Witnesses and Experts</td>
<td>Defense May Do Redirect Exam of Own Witnesses and Experts</td>
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<tbody>
<tr>
<td><strong>Plaintiff</strong></td>
<td>Plaintiff Rebuts Defense Case and/or Closes Case</td>
<td>Plaintiff Closing Statement</td>
<td>Plaintiff Final Closing Statement</td>
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<tr>
<td><strong>Defendant</strong></td>
<td>Defense Rests or Closes Case</td>
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<td>Defense Closing Statement</td>
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## Litigation Process Timeline

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<tbody>
<tr>
<td><strong>PLAINTIFF</strong></td>
<td>Court Instructs Jury (Jury Instructions)</td>
<td>Jury Deliberates</td>
<td>Jury Delivers Verdict to Court</td>
<td>Trial Ends, Posttrial Period Begins</td>
<td>Court May Order Parties to Mediation – Settlement Discussions May Occur</td>
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<tr>
<td><strong>DEFENDANT</strong></td>
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<tr>
<td><strong>PLAINTIFF</strong></td>
<td>Posttrial Motions Filed by Both Parties</td>
<td>Court Issues Judgment</td>
<td>Parties May Appeal</td>
<td>Appellate Briefs May Be Filed</td>
<td>Oral Arguments May Occur</td>
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<td><strong>DEFENDANT</strong></td>
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**Litigation Process Timeline**

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<tr>
<td>Appellate Court Issues Decision</td>
<td>Judgment of Lower Court May Be Affirmed, Overturned, or Case May Be Remanded for Retrial on Certain Issues</td>
<td>Parties May Appeal to Next Higher Court (State Supreme or Federal Supreme Court)</td>
<td>Appellate Briefs May Be Filed</td>
<td>Oral Arguments May Occur</td>
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<table>
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<tr>
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<td><strong>PLAINTIFF</strong></td>
<td><strong>DEFENDANT</strong></td>
<td><strong>PLAINTIFF</strong></td>
</tr>
<tr>
<td>Appellate Court Issues Decision</td>
<td>Judgment of Lower Court May Be Affirmed, Overturned, or Case May Be Remanded for Retrial on Certain Issues</td>
<td>If in State Supreme Court, Parties May Appeal to Federal Supreme Court</td>
<td>Judgment of Lower Courts May Be Affirmed, Overturned, or Case May Be Remanded for Retrial on Certain Issues</td>
<td>Process Can Begin All Over!</td>
</tr>
</tbody>
</table>
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